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Since 11 January 2001, official judgment numbers have been given to all judgments delivered in the House of Lords, Privy Council, both divisions of the Court of Appeal and the Administrative Court. All such judgments have fixed paragraph numbering, as do judgments delivered on or after 11 January 2001 in those parts of the High Court which did not then adopt the system of official judgment numbers (see Practice Note (judgments: neutral citation) [2001] 1 All ER 193 for the Court of Appeal and the High Court). On 14 January 2002 the system of judgment numbers was extended to all parts of the High Court (see Practice Direction (High Court judgments: neutral citation) [2002] 1 All ER 351). We have adopted the following practice in respect of judgments with official judgment numbers and official paragraph numbering:

- The official judgment number is inserted immediately beneath the case name;
- Official paragraph numbers are in bold in square brackets;
- Holding references in the headnotes, and any other cross-references, are to an official paragraph number, not to a page of the report;
- When such a judgment is subsequently cited in another report,
 - (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;
 - (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;
 - (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2004] 2 All ER

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These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (1996 reissue) para 9 refers to paragraph 9 on page 24 of the 1996 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

Halsbury's Statutory Instruments

The reference 14 *Halsbury's Statutory Instruments* (2001 issue) 201 refers to page 201 of the 2001 issue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

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Phillipps v Associated Newspapers Ltd	Eady J	455							
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R (on the application of Richardson) v North Yorkshire County Council								CA	31
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M v Secretary of State for the Home Dept								CA	863
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—Duty to take care – Parties in non-contractual relationship akin to employment – Whether such relationship precluding existence of duty of care arising from voluntary assumption of responsibility									
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PENSIONS APPEAL TRIBUNAL – Holder of service pension applying for leave to appeal from tribunal's decision – President of Pensions Appeal Tribunals (England and Wales) setting aside tribunal's decision and ordering rehearing – Whether direction within President's power									
R (on the application of the Secretary of State for Defence) v President of the Pensions Appeal Tribunals (England and Wales) (Jones, interested party)								Newman J	159

RESTRICTIVE COVENANT AFFECTING LAND – Construction of covenant – Use as a dwelling house

Crest Nicholson Residential (South) Ltd v McAllister (Note) CA 991

SENTENCE – Confiscation order – Defendant convicted of trade mark offences of possession of items with a view to gain – Whether defendant benefiting from offences

R v Davies (Derrick) CA 706

— Confiscation order – Postponement of determination for period not exceeding six months beginning with date of conviction – Whether substantive hearing started within six-month period being within period not exceeding six months – Whether listing difficulties capable of being exceptional circumstances

R v Young CA 63

SOLICITOR – Access to – Police breaching statutory duty allowing person in custody access to solicitor – Whether actionable breach of duty – Whether damages recoverable

Cullen v Chief Constable of the RUC HL 237

SOLICITORS – Disciplinary proceedings – Office for the Supervision of Solicitors refusing oral hearing of complaint of inadequate professional services and directing reprimand, compensation and refunding of costs – Whether solicitor entitled to oral hearing – Whether determination of solicitor's civil rights and obligations

R (on the application of Thompson) v Law Society CA 113

TOWN AND COUNTRY PLANNING – Permission for development – Statement required in decision to grant planning permission that environmental information taken into consideration – Whether statement of main reasons and considerations on which decision to grant planning permission based containing environmental information statement

R (on the application of Richardson) v North Yorkshire County Council CA 31

UNFAIR DISMISSAL – Compensation – Whether compensation recoverable for non-economic loss brought about by manner of unfair dismissal

Dunnachie v Kingston-upon-Hull City Council CA 501

VALUE ADDED TAX – Zero-rating – Supply of services in the course of alterations to outbuilding within curtilage of protected main building – Protected main building a dwelling – Whether supply of services zero-rated

Customs & Excise Comrs v Zielinski Baker & Partners Ltd HL 141

House of Lords petitions

This list, which covers the period 5 March 2004 to 9 June 2004, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

Lewis v Eliades [2004] 1 All ER 1196. Leave to appeal refused 29 April 2004 (Lord Steyn, Lord Hope of Craighead and Lord Carswell).

Mawdesley v Chief Constable of the Cheshire Constabulary [2004] 1 All ER 58. Leave to appeal refused 1 April 2004 (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Carswell).

R (on the application of Richardson) v North Yorkshire County Council [2004] 2 All ER 31. Leave to appeal refused 10 May 2004 (Lord Steyn, Lord Hoffmann and Lord Walker of Gestingthorpe).

Wardlaw v Farrar (Note) [2003] 4 All ER 1358. Leave to appeal refused 29 March 2004 (Lord Nicholls of Birkenhead, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood).

c **R (on the application of X) v Chief
Constable of the West Midlands Police**
[2004] EWHC 61 (Admin)

d QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

WALL J

29 OCTOBER 2003, 23 JANUARY 2004

e *Police – Disclosure of information – Enhanced criminal record certificate – Provision of non-conviction information – Whether decision to disclose governed by common law and convention principles – Whether duty to act with procedural fairness requiring person affected to make representations – Whether decision to disclose information lawful – Police Act 1997, s 115 – Human Rights Act 1998, Sch 1, Pt I, art 8.*

f The claimant, who was a social worker, was a man of good character. Following a police interview, during which no admissions were made, he was charged in relation two incidents of indecent exposure. At trial the prosecution offered no evidence as the complainant failed to make a positive identification, and the claimant was acquitted. Some time later, he applied to a social work agency which sought an enhanced criminal record certificate (ECRC) from the Criminal Records Bureau (CRB) about the claimant under s 115^a of the Police Act 1997.

g The head of the West Midlands Police central information unit requested the approval of the defendant chief constable to disclose information about the arrest of the claimant. The deputy chief constable considered the matter in accordance with s 115(7) of the Act. That subsection required the chief officer to provide any information which, in his opinion, might be relevant and ought to be included.

h He decided to approve the disclosure on the basis that the information was relatively recent, it involved an allegation of threats to rape, there had been sufficient evidence to charge and the complainant was believed to be reliable and credible. The claimant applied for judicial review seeking various declarations. He argued that the procedural and substantive criteria, which had to be satisfied for the disclosure to be lawful under art 8^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1

a Section 115, so far as material, is set out at [15], below

b Article 8, so far as material, provides: 'Everyone has the right to respect for his private and family life ... (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ... or for the protection of the rights and freedom of others.'

to the Human Rights Act 1998) which provided for the right to respect for private and family life, and under the common law, had not been met. The chief constable submitted that the existence of the duty to provide information for ECRCs displaced the general presumption at common law that information should not be disclosed and that there was no requirement for the subject of the disclosure to be permitted to make representations. He contended that he had not exercised his discretion arbitrarily and had carried out the proper balancing exercise. a
b

Held – (1) Section 115(7) of the 1997 Act gave a very wide and apparently subjective discretion to a chief constable, but there was nothing in the language of the section which demonstrated an intention by Parliament to exclude the rules of natural justice or procedural fairness. The discretion also had to be exercised in compliance with art 8 of the convention. It was arguable that there was no presumption against disclosure, but that did not mean that disclosure of additional, non-conviction information was automatic. The tests laid down in s 115(7) had to be applied stringently and the balancing exercise required by art 8 and the application of the common law principles had to be rigorously carried out. The disclosure of information which had not been the subject of judicial adjudication, which was highly contentious and which, if disclosed, was likely to render the claimant permanently unemployable in his chosen profession plainly required the justification of a pressing social need to make disclosure appropriate. It was true that the need to protect children and vulnerable adults was a pressing social need, however, the extent of the need would depend on the facts of the individual case. The approach to be adopted was for a chief constable to form an opinion that the information was relevant because, viewed objectively, it was, taken as a whole reliable, the threshold being that he believed it to be true, having investigated the matter with an open mind. Thereafter, he had to identify the factors he had weighed and explain why he had given weight to some and not to others. The fact that a number of officers might have believed the person to be guilty was only one factor in a much wider equation, and was not one that weighed heavily in the scales. In the instant case, the deputy chief constable had failed properly to carry out that exercise and accordingly his decision was flawed (see [67]–[68], [75], [84], [89]–[93], and [101], below); dicta of Lord Browne-Wilkinson in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577 at 591 applied; *R v Chief Constable of the North Wales Police, ex p Thorpe* [1998] 3 All ER 310 and *R v A Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736 considered. c
d
e
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g

(2) The duty to act with procedural fairness under s 115 of the 1997 Act meant that the person affected by the decision had to have the opportunity to make representations on his own behalf. Without such representations it would not be possible for a chief constable to fairly balance the risk of disclosure and non-disclosure. It would only be in exceptional circumstances that an individual who had not been convicted of an offence, nor gone through some other judicial process, should have allegations of serious misconduct disclosed without his previously being told of the case against him, and being permitted to make observations. As that had not occurred in the instant case, there had been procedural unfairness. It followed that the application would be allowed and the declarations sought granted (see [120]–[122], [128], [132], below); *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92 applied. h
i

a Per curiam. Although not automatically necessary, there may be cases in which additional inquiries, apart from those made of the subject of the disclosure, may be appropriate once a request for information relating to an ECRC is received. Plainly if a chief constable cannot resolve the question of disclosure without further inquiries being made, those inquiries have to be made.

b **Notes**

For enhanced criminal conviction certificates, see Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1572A.

For the Police Act 1997, s 115, see 12 *Halsbury's Statutes* (4th edn) (2003 reissue) 1545.

c **Cases referred to in judgment**

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165, [1971] AC 610, [1970] 3 WLR 488, HL.

C (A Minor) (Care Proceedings: Disclosure), Re [1997] Fam 76, [1997] 2 WLR 322, CA.

d *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

Glasbrook Bros Ltd v Glamorgan CC [1925] AC 270, [1924] All ER Rep 579, HL.

Hentrich v France (1994) 18 EHRR 440, [1994] ECHR 13616/88, ECt HR.

Herczegfalvy v Austria (1993) 15 EHRR 437, [1992] ECHR 10533/83, ECt HR.

e *L (minors) (sexual abuse: disclosure), Re, Re V (minors) (sexual abuse: disclosure)* [1999] 1 FCR 308, [1999] 1 WLR 299, CA.

M v Secretary of State for Education [2001] EWCA Civ 332, [2001] 2 FCR 11.

Pierson v Secretary of State for the Home Dept [1997] 3 All ER 577, sub nom *R v Secretary of State for the Home Dept, ex p Pierson* [1998] AC 539, [1997] 3 WLR 492, HL.

f *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R v a Local Authority in the Midlands, ex p LM [2000] 1 FCR 736.

R v Chief Constable of the North Wales Police, ex p AB [1997] 4 All ER 691, [1999] QB 396, [1997] 3 WLR 724, DC; *affd* [1998] 3 All ER 310, sub nom *R v Chief Constable of the North Wales Police, ex p Thorpe* [1999] QB 396, [1998] 3 WLR 57, CA.

g *R v Norfolk CC, ex p M* [1989] 2 All ER 359, [1989] QB 619, [1989] 3 WLR 502.

R v North and East Devon Health Authority, ex p Coughlan (Secretary of State for Health intervening) [2000] 3 All ER 850, [2001] QB 213, [2000] 2 WLR 622, CA.

Rice v Connolly [1966] 2 All ER 649, [1966] 2 QB 414, [1966] 3 WLR 17, DC.

Sunday Times v UK (1979) 2 EHRR 245, ECt HR.

h *Woolgar v Chief Constable of the Sussex Police* [1999] 3 All ER 604, [2000] 1 WLR 25, CA.

Cases referred to in skeleton arguments

B v Chief Constable of the Avon and Somerset Constabulary [2001] 1 All ER 562, [2001] 1 WLR 340, DC.

j *C (sexual abuse: disclosure to landlords), Re* [2002] EWHC 234 (Fam), [2002] 2 FCR 385.

Application for judicial review

The claimant, X, applied, with permission granted by Owen J on 3 July 2003, for judicial review of the decision of the defendant, the Chief Constable of the West

Midlands Police, through his deputy, to provide to a potential employer of the claimant, information contained in the 'Other Relevant Information' section of an enhanced criminal record certificate relating to the claimant dated 3 March 2003, and issued pursuant to s 115 of the Police Act 1997. The relief sought was (i) a declaration that the information contained in the certificate in relation to the claimant was unlawfully provided; (ii) an order that the chief constable do not, in the future, provide the information relating to the indecent exposure allegations currently contained in the certificate to the Criminal Records Bureau pursuant to ss 115(7) and 119(2) of the 1997 Act; (iii) a declaration that the certificate was unlawfully issued by the bureau; and (iv) an order that the bureau remove from the certificate the details, currently contained in it, of the indecent exposure allegations made against the claimant. The facts are set out in the judgment.

Dan Squires (instructed by *Public Law Solicitors*) for the claimant.

Fiona Barton (instructed by *John Kilbey*, Birmingham) for the chief constable.

Cur adv vult

23 January 2004. The following judgment was delivered.

WALL J.

INTRODUCTION

[1] In this case, the claimant, whom for reasons which will become immediately apparent I do not propose to name, seeks judicial review of a decision made by the Chief Constable of the West Midlands Police (the chief constable) to provide to a potential employer of the claimant, information contained in the 'Other Relevant Information' section of an enhanced criminal record certificate (ECRC) relating to the claimant dated 3 March 2003, and issued pursuant to s 115 of the Police Act 1997.

[2] The decision was actually taken by the deputy chief constable, and at one stage the claimant took the point that the chief constable did not have the power to delegate the making of decisions under s 115 of the 1997 Act to anybody else, including his deputy. That point, however, is no longer pursued, and it is accepted by the claimant that the deputy chief constable had the authority to make the decision. As the proceedings are brought against the chief constable, I propose to refer throughout to the chief constable as the decision-maker, except where the context plainly requires a decision of the deputy chief constable.

[3] The claimant is a social worker with no criminal convictions. As set out in the ECRC, the 'Other Relevant Information' against the disclosure of which objection is taken, is the following:

'It is alleged that on 11 December 2001 [the claimant] indecently exposed himself to a female petrol station attendant. It is further alleged that this was repeated on 7 May 2002. [The claimant] was arrested and interviewed whereby he stated that he did not think he had committed the offence but that he was suffering from stress and anxiety at the time. [The claimant], who was employed by a child care company at the time of the alleged offences, was charged with two counts of indecent exposure, however the alleged victim failed to identify the suspect during a covert identification parade, and the case was subsequently discontinued.'

a [4] Relief was initially sought by the claimant against both the chief constable and the Secretary of State for the Home Department. However, on 3 July 2003, Owen J, whilst granting permission to apply for judicial review against the chief constable, refused it as against the Secretary of State on the ground that no decision of either the Criminal Records Bureau (CRB) or the Secretary of State had been challenged, and no relief was sought against either. The Secretary of State was, however, given permission to file evidence and to make representations at the hearing, an opportunity of which, in the event, he did not avail himself.

c [5] The challenge to the ECRC is on three grounds, namely that: (1) the substantive criteria which have to be satisfied for the disclosure by the chief constable to be lawful under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and under the common law were not met; (2) the decision to disclose the information by the chief constable was procedurally unfair under both the common law and art 8 of the convention and not 'in accordance with the law' as required by the latter; and (3) the chief constable had unlawfully departed from the Association of Chief Police Officers' (ACPO) Code of Practice for Data Protection (October 2002) (the ACPO code) in relation to information held concerning the claimant.

d [6] The relief sought by the claimant is in the following terms:

e (1) A declaration that the information contained in the ECRC issued on 3 March 2003 in relation to the claimant was unlawfully provided by the chief constable;

(2) An order that the chief constable do not, in the future, provide the information relating to the indecent exposure allegations currently contained in the ECRC to the CRB pursuant to ss 115(7) and 119(2) of the 1997 Act;

(3) A declaration that the certificate was unlawfully issued by the CRB;

f (4) An order that the CRB remove from the certificate the details, currently contained in it, of the indecent exposure allegations made against the claimant;

(5) Costs.

THE CONCEPT OF THE ECRC

g [7] ECRCs were created by Pt V of the 1997 Act, which deals with criminal conviction certificates and criminal record certificates. Although the purpose for which ECRCs are to be provided is clear, the statutory language, which creates them, is not immediately transparent.

h [8] In broad terms, Pt V of the 1997 Act creates a statutory scheme for access by prospective employers to the criminal records of, and (in certain prescribed circumstances) other information held by the police relating to, potential employees. Under s 112(2) and (3), a criminal conviction certificate (which is issued to the prospective employee) is a certificate which gives prescribed details of every unspent conviction recorded against the individual, or states that there is no such conviction.

j [9] A criminal record certificate under s 113 of the 1997 Act includes cautions and spent convictions under the Rehabilitation of Offenders Act 1974. This is provided on application by the prospective employee, although, under s 113(2) the application must be accompanied by a statement from the prospective employer that the certificate is required for the purposes of an 'exempted question'. By s 113(5) an 'exempted question' is defined as—

'a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) ...'

a

[10] Section 115 of the 1997 Act creates ECRCs. As with criminal record certificates, s 115(1) places a mandatory duty on the Secretary of State for the Home Department (a function delegated to the CRB) to issue an ECRC to any prospective employee who makes an application 'in the prescribed form countersigned by a registered person' and pays the appropriate fee. Section 115(2) similarly requires the application to be accompanied by a statement from the prospective employer that the ECRC is required 'for the purposes of an exempted question' asked—

b

'(a) in the course of considering the applicant's suitability for a position (whether paid or unpaid) within subsection (3) or (4), or (b) for a purpose relating to any of the matters listed in subsection (5) ...'

c

[11] A 'position' is within s 115(3) 'if it involves regularly caring for, training, supervising or being in sole charge of persons aged under 18', and within s 115(4) if it is of a kind specified in regulations made by the Secretary of State and involves regularly caring for, training, supervising or being in sole charge of persons aged 18 or over.

d

[12] The term 'exempted question' is defined by s 113(5) of the 1997 Act as—

'a question in relation to which section 4(2)(a) or (b) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) has been excluded by an order of the Secretary of State under section 4(4) ...'

e

[13] The matters listed in s 115(5) are not material for present purposes, but include certain activities under the Gaming Act 1968, the Lotteries and Amusements Act 1976, the National Lottery Act 1993, and under the Children Act 1989, including child minding and day care and the placement of children with foster parents.

f

[14] The ECRC itself is defined in s 115(6) as a certificate which—

(a) gives—(i) the prescribed details of every relevant matter relating to the applicant which is recorded in central records, and (ii) any information provided in accordance with subsection (7), or (b) states that there is no such matter or information.'

g

[15] Section 115(7) is at the heart of the present application. It provides:

'Before issuing an enhanced criminal record certificate the Secretary of State shall request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion—(a) might be relevant for the purpose described in the statement under subsection (2), and (b) ought to be included in the certificate.'

h

[16] Section 115(8), which does not apply in the instant case, goes further than s 115(7). It provides:

j

'The Secretary of State shall also request the chief officer of every relevant police force to provide any information which, in the chief officer's opinion—(a) might be relevant for the purpose described in the statement under subsection (2), (b) ought not to be included in the certificate, in the

a interests of the prevention or detection of crime, and (c) can, without harming those interests, be disclosed to the registered person.'

[17] In other words, where an ECRC is issued under s 115(7), the relevant information will be on the ECRC itself, and will be seen both by the prospective employee and the prospective employer. Under s 115(8) the information will be conveyed separately to the prospective employer, and will not be set out on the face of the ECRC itself. It will thus not be seen by the person who is the subject of the certificate.

b [18] Section 115(9) imposes a mandatory duty on the CRB to send to the registered person who countersigned the application (for present purposes, once again, the claimant's prospective employer) a copy of the ECRC and any information provided in accordance with s 115(8). By s 119(2), where the chief officer of a police force receives a request under s 115, he is required to comply with it as soon as practicable.

c THE GUIDANCE NOTES FOR FORCES ISSUED BY THE CRB

[19] The purpose of ECRCs under the 1997 Act is explained in the *Guidance Notes for Forces* (the guidance notes) issued by the CRB in the following terms:

d '1.4 The [ECRC] will include details of all convictions and cautions, held at National level including convictions "spent" under the Rehabilitation of Offenders Act 1974 and including relevant non-conviction information from local police records. For those working with children or vulnerable adults, the enhanced disclosure will also include information sourced from the Department of Health and the Department for Education and Skills ...

e 2.1 Subject to authentication of an applicant's identity and current address, the CRB will issue an [ECRC] in response to any properly submitted application. An ECRC will contain conviction data where applicable and may also contain any non-conviction information from local police records, which might be relevant. The tests of the relevance of information remains the judgment of individual chief officers. The police may opt to disclose relevant non-conviction information to the registered body only, in the interests of the prevention or detection of crime. This will be done by means of a separate letter to the CRB. The accuracy and relevance of the data released though, rests solely with the police service and the CRB will not undertake any editing function.'

f [20] The guidance notes give only limited assistance as to the manner in which individual chief officers are to exercise the test of relevance identified in para 2.1 above, and contained in s 115(7)(a) and (8)(a) of the 1997 Act. The guidance notes are at pains to emphasise that information supplied by the police to the CRB should be based on fact and capable of proof if presented in evidence. The importance of presenting information in a neutral fashion is also stressed. However, para 3.4.1. appears somewhat to downplay the importance of the exercise. It states:

g 'Forces are merely supplying information via the CRB to prospective employers—it is the employers' responsibility to decide the applicant's suitability for a specific role.'

[21] The guidance notes cross-refer to the ACPO Data Protection and Audit Manual and the ACPO code. Reference is made to the concepts of proportionality and relevance under the Human Rights Act 1998 and data

protection principles. The guidance notes suggest that if the Police National Computer (PNC) record already shows a history of similar convictions, police forces should consider whether the release of non-conviction data would present a fuller picture, and suggests that 'if the intelligence held does not add anything further, then the disclosure of non-conviction data could be deemed unnecessary'.

[22] The guidance notes conclude by emphasising both the sensitivity of the task facing chief officers and the need to treat each case on its particular facts:

'The dilemma of whether or not to release information illustrates that disclosure is an area of fine judgments. In many areas of this guidance it is not possible to be as prescriptive and exact as the Service would want. It is crucial for the effective operation of the disclosure process that the individual and often unique ingredients of each case are taken into consideration. Hard and fast rules in certain areas of the disclosure process could be both restrictive and counterproductive in frustrating the perpetrators of offences against the vulnerable. It is essential that Forces retain the flexibility to articulate a response, which takes account of the unique characteristics of each case. Further, Forces should have a clear and transparent decision making process—capable of withstanding scrutiny.'

[23] Whilst I do not underestimate the difficulty of providing clear guidelines in an area where judgments are manifestly dependent on the facts of the individual case, it seems to me that there are some approaches, which can be universally applied. Although there are references in the guidance notes to the 1998 Act there is no specific reference to art 8, and in particular to art 8(2). The guidance notes make no reference to the duty to act fairly towards the person information about whom is being disclosed, and there is no discussion about the appropriateness of permitting the subjects of the ECRC an opportunity of commenting on the information which it is proposed to include about them.

THE FACTS

[24] These are not in dispute, but need to be set out in a little detail. The claimant is aged 44. He is Afro-Caribbean. He obtained a diploma in social work in about 1990, and thereafter was employed as a social worker until 9 July 2002, when he was dismissed by the agency which employed him. He is a man of good character; as I have already stated, there are no criminal convictions recorded against him.

[25] On 16 May 2002 the claimant was interviewed by the police and then charged in relation to two alleged incidents of indecent exposure, which had occurred in the early hours of the morning on 12 December 2001 and on 7 May 2002 at a local garage. The complainant, Ms R, was the cashier at the garage, and on each occasion Ms R was on duty on her own.

[26] On the first occasion, Ms R says she saw a man whom she identified as a regular customer pass by the newspaper rack, which was directly under the window next to the counter. At that point she could only see his head and shoulders. For obvious security reasons, the door to the garage shop within which Ms R was situated was locked, and customers were served through a hatch. The man appeared to be on foot, and had not driven a car onto the garage forecourt.

[27] Ms R says she recognised the man because he had been in the night before and had purchased a Mars bar and a bottle of water. She says that because he was

a a regular customer, she pressed the button behind the counter, which unlocked the door of the shop in order to let him in. She says that as soon as he entered the shop she saw that he was naked from the waist down. His genitals were plainly visible, although he did not have an erection. She says he purchased a Mars bar with a £10 note and said to Ms R: 'I'll be back later to rape you.' After standing by the door and opening and closing it several times, the man asked Ms R the time. She told him it was 2.50 am. He then walked out of the shop and left the garage on foot. Ms R does not appear herself to have telephoned the police, but says she later mentioned the matter to her manager.

[28] Ms R says the shop was well lit. She was plainly able to have a clear view of the man, whom she identified as a regular customer. She gives a description of him in which, among other details describes him as about 36 years of age, 5 ft 8 in in height, black, but not very dark skinned, more of a mixed race appearance.

c [29] Ms R says that the same man came to the garage in the early hours of 27 February 2002, 27 March 2002, and 10 and 24 April 2002. On each of these occasions he was driving a car, the make and number of which Ms R noted (the car). On the first occasion the man made as if to draw petrol, but did not do so: d on the remaining occasions he did draw petrol; he then paid for his purchases normally and left the garage without incident. On each of the last three occasions he paid through the hatch; on all four occasions the man was normally dressed, and apart from taking out the pump but not drawing petrol on the first occasion, behaved normally.

e [30] Although Ms R noted the number and make of the car on 27 February, she does not appear to have informed the police at that stage.

[31] At about 3.15 am on 7 May 2002, Ms R says she heard somebody tapping on the window of the shop. She says it was the same man, who was naked from the waist up, and said he wanted to buy a Mars bar. He then began to walk backwards, and Ms R saw that he was completely naked. She refused to serve f him: he pointed his finger at her and said: 'I'll fucking sort you out.' He then turned round and walked off. Once again, there was no car on the forecourt, and the man appeared to have arrived on foot.

[32] Ms R made a statement to the police, which is dated 9 May 2002, which she supplemented on 8 June 2002. At the conclusion of the latter statement she said:

g 'I can say 100% that it is the same man that drove [the car]. I would recognise him anywhere and this was confirmed during the second incident. There is no doubt in my mind that it is him.'

h In the light of subsequent events, these three sentences are, in my judgment, significant.

[33] The car, which Ms R had observed on the garage forecourt, was traced by the police to the claimant's employers, who had hired it for his use. There was no suggestion that anybody but the claimant had been driving the car at the relevant time.

j THE CLAIMANT'S POLICE INTERVIEW ON 16 MAY 2002

[34] As will be apparent from the content of the disclosure set out at [3], above reliance was placed by the chief constable on the claimant's police interview. The claimant declined the opportunity to obtain legal advice prior to being interviewed, and did not want a solicitor to be present during the interview itself. He was interviewed by two women police officers. At no time did he make any

admissions, and at other times he specifically denied that he was the man who had exposed himself to Ms R. a

[35] The main point, which appears to have persuaded the interviewing officers that the claimant was the man who had exposed himself to Ms R, was his initial reluctance categorically to deny that he was the man. He said he could not remember the incidents put to him, and that he did not think it was him. One of the officers said in terms during the interview that she thought the claimant needed help, that it was the claimant who exposed himself and that he was not telling the whole truth. b

[36] No criticism is made of the interview, and it is always difficult, when reading a transcript, to get the full flavour of it. It was plainly a robust interview, and the officers' scepticism about the claimant's answers emerges very clearly. However, I feel bound to say that in my judgment, a fair and objective reading of it does not warrant the reliance placed on it. c

[37] Firstly, although it was by his own choice, the claimant did not have a solicitor's advice before and during the interview. Judging by his statements in these proceedings, which contain a forthright denial of any form of involvement, the interview might well have taken a different course had the claimant received such advice or had his solicitor been present. d

[38] Secondly, however, although criticism is made of the claimant's apparent lack of memory, and the improbability of his being unable to remember walking around naked, the interview is largely conducted by the officers by means of asking him whether or not he remembered relevant events and dates. When Ms R's version of the first alleged indecent exposure is put to him, he is asked: 'Do you remember anything about that incident?' and he answers: 'Not really. I cannot remember that.' One of the officers then continues: e

'Q. ... I think I would remember if I went into a petrol station and I had nothing else underneath, I think I would remember that, it would stick out in my mind. f

A. Well, I cannot remember that.

Q. Is it possible that you've done it?

A. I don't think so.

Q. Right, you see it does not make sense to me because I'd know for a fact if I had done something like that.' g

[39] Any question about any incident which begins with the words: 'Do you remember doing x?' contains within it the implication that the person questioned has something to remember, and was, accordingly, the person who committed the act about which he or she is being questioned. In my judgment it is unsafe then to treat the answer 'No' or 'I can't remember' as incredible and to give it the same implication. As Mr Squires points out, there are four occasions in the interview where the claimant categorically denies that he was the man who exposed himself to Ms R. If (a) Ms R's version of the events been put to him; (b) had the claimant been asked: 'Was that you?' and (c) had the claimant then said: 'I can't remember' or 'I don't think so' the passages in the interview might, I think, have had more force. h j

[40] There is much in a similar vein to the exchange I have set out at [38], above. As I have already stated, later in the interview the claimant denies in terms that he swore or was violent, or that he had threatened anybody. At this point he also denies in terms that he had gone into the garage naked at any time. He also makes the perfectly sensible point that since this was a garage, which he

a acknowledged he went to regularly, and since he could be traced by his car, why would he then go back naked and on foot? The questioning officer accepts that she cannot explain why somebody would go in naked and then go back as a normal customer.

b [41] Having now read the interview several times, I have come to the clear view that the summary of it in the 'Other Relevant Information' section of the ECRC is partial, and carries with it an implication that the claimant was guilty, or at the very least the author of the summary believed him to be guilty. For reasons, which I will develop in due course, I agree with Mr Squires that it would be wrong to place weight on the interview as reliable evidence tending towards the guilt of the claimant. In my judgment it is, putting the matter at the highest from the police perspective, neutral.

c EVENTS AFTER THE POLICE INTERVIEW

[42] On 9 July 2002 the claimant was dismissed from his employment. The reasons for his dismissal are currently the subject of proceedings instituted by the claimant in the employment tribunal which have not yet been determined.

d [43] In the interview, the claimant agreed to take part in an identification parade. Parades were arranged for 16 August and 12 September 2002, but each time they could not proceed due to a lack of suitable participants. The claimant also agreed to take part in two other forms of identification testing, but these also could not be conducted due to the witness not being present or a lack of participants.

e [44] No identification parade was ultimately held before the claimant's trial, which was due to commence in the magistrates' court on 25 September 2002. Immediately prior to the hearing, however, it appears that the police conducted a covert identification in court and asked Ms R to identify the perpetrator. She picked out someone who was not the claimant. Thereupon the Crown Prosecution Service offered no evidence against the claimant and the claimant f was acquitted.

[45] The person whom Ms R identified as the perpetrator was pointed out to the claimant by his solicitors. According to the claimant, the man identified was considerably lighter skinned than the claimant. He was perhaps of middle-eastern origin, while the claimant is Afro-Caribbean. He was also g considerably shorter than the claimant (who is 6 feet tall) and did not resemble him in appearance.

[46] When he was charged, the claimant was told he would receive a copy of the CCTV footage from the petrol station taken at the time of the alleged incident. This was not received, and the matter was pursued by the claimant through his solicitors. He was subsequently told that the footage had been h displaced or lost during the course of the case. It thus remains unclear what, if any, information the CCTV footage contained.

THE MAKING OF THE ECRC

j [47] Following his dismissal from his employment as a social worker on 9 July 2002, the claimant applied for another social work position to a different social work agency. That agency sought information from the CRB about the claimant, and on 14 February 2003 the head of the West Midlands Police Central Information Unit, Ms S, received an electronically transmitted request from the CRB to supply any 'approved information' about the claimant. She instructed researchers to carry out standard checks of the local designated force computer systems.

[48] The result, Ms S says, was information relating to an offence of indecent exposure, which included an alleged threat to rape. Ms S took the view that this clearly required further investigation, and sent for the crime file. She recites the facts she obtained from the file, noting that the record of the claimant's interview stated:

'He states that he cannot recall doing what has been alleged. He is asked if it is possible that he had done it and he states that he does not think so. [The claimant] is asked if there is any reason why he would not remember doing it and [the claimant] states that he cannot remember doing it and [he] would not remember doing it because he was suffering from stress and anxiety at this time and he went to see his doctor.'

[49] The claimant complains that this is also a misrepresentation of the interview. In relation to the final sentence of the extract cited at [48], above he cites what he is recorded as actually saying in the interview, which was: 'I cannot remember doing that, I mean I was under a bit of stress at that time, I had been to my doctor around that time you know.'

[50] Ms S refers to 'aborted identification parades following objections from the claimant through his legal representative' and to the fact that it was nearly four months after she last saw the claimant that Ms R was asked to identify him. She also makes reference to a previous incident in June 2001 when the claimant had been arrested following complaints by several teenage girls that a man had been running around naked in public. The claimant had been found in a clothed state by the police: the girls' evidence had been inconsistent, and no further action had been taken.

[51] Ms S then describes the exercise through which she went in preparing her advice for the deputy chief constable about the disclosure of relevant information in the ECRC. She says she balanced the claimant's rights under art 8 of the convention with any potential risks posed to those with whom the claimant may have had contact in the course of his new employment. She points out (as I have already found) that there is no guidance on what 'might be relevant' under s 115(7) of the 1997 Act. However, in order to undertake the balancing exercise, she carried out what she describes as 'a risk assessment and a relevance test'. The mental checklist of factors she applied were as follows:

'(a) the timeliness of any previous event to this disclosure; (b) the seriousness of the event; (c) the source and reliability of the non-conviction information held on the local system; (d) the age and details known about any victims; (e) if proceedings were instigated, why they were not continued; (f) does the information add anything to the PNC information already provided? (g) the actions of the applicant since the event; (h) the retention of Pt V material on local systems and weeding procedures; (i) the likely impact on the applicant if this information was disclosed; (j) the potential impact on any vulnerable group if this information was not disclosed.'

[52] As to relevance, Ms S says she 'restricted information to that which had a direct bearing on the potential risk posed by the claimant to the safety of children and vulnerable adults'. She eliminated information of a more general nature and says she would never disclose any information that was not already known to the claimant.

a [53] Having applied her risk assessment and relevance test to the claimant's case, Ms S then sent a memorandum to the deputy chief constable, in a standard format, requesting his approval to disclose the information stated in the memorandum. She adds that she did not include details of the earlier arrest of the claimant on 24 June 2001 (see [50], above) but that this clearly featured in her decision-making 'when the disclosure relating to the offences between
b 11 December 2001 and 7 May 2002 was made'.

[54] I do not wish to be critical of Ms S. She was plainly doing her best in difficult circumstances and without the benefit of any proper guidelines. The factors, which she identifies, seem to me to be a creditable attempt to identify relevant considerations to be taken into account. It is, however, in my judgment, unfortunate, that Ms S's affidavit does not explain how she balanced the various
c factors she identifies; nor does it give her reasons for reaching her conclusion that the non-conviction material should be disclosed. It is equally significant, in my view; she does not appear to have given the deputy chief constable any reasons for the decision she had reached. All her memorandum to the deputy chief constable does is to present him with the information in the form in which it
d ultimately appeared on the ECRC, and to ask him to approve its disclosure.

[55] The deputy chief constable received the memorandum and the accompanying file of papers, which he read. He records that he was required to balance the claimant's art 8 rights against any potential risks posed to those with whom the claimant may have future contact. He approved the disclosure in the
e identical terms put forward by Ms S. His reasons for making the disclosure are stated as follows:

'This decision was based on the fact that the information was relatively recent, it involved an allegation of threats to rape, there had been sufficient
f evidence to charge and the complainant was believed to be reliable and credible. I noted the duration of time that had elapsed between the last sighting of this suspect by the complainant and the unsuccessful covert identification procedure that led to the discontinuance of the case by the CPS. Before arriving at my final decision I weighed the likely impact on the claimant if this information was disclosed, against the potential impact on
g any vulnerable group if this information was not disclosed.'

THE CLAIMANT'S FIRST GROUND: NAMELY THAT THE SUBSTANTIVE CRITERIA WHICH HAVE TO BE SATISFIED FOR THE DISCLOSURE BY THE CHIEF CONSTABLE TO BE LAWFUL UNDER ART 8 OF THE CONVENTION AND UNDER THE COMMON LAW ARE NOT MET

[56] Consideration of this ground involves an examination of the law on
h disclosure to third parties of confidential and sensitive information. There are no cases on s 115 of the 1997 Act. No doubt that is in part due to the fact that s 115 only came into force in March 2002, and that according to a document issued by the code of practice officer in the CRB policy section only three of every 1,000 enhanced disclosures contain 'approved' information.

j [57] It was common ground between counsel in the instant case that art 8 of the convention is engaged on the facts of this case. Article 8 is very familiar, and I need not set it out. It follows that the disclosure by the chief constable in the instant case, if it is to represent a justified interference with the claimant's right to respect for his private life, must be 'in accordance with the law' and 'necessary in a democratic society' for the fulfilment of one or more of the public interests identified within art 8(2).

[58] In addition, Mr Dan Squires, for the claimant, submitted, and Ms Fiona Barton, for the chief constable, accepted: (1) that the phrase 'necessary in a democratic society' means that any art 8(2) interference requires the justification of a 'pressing social need' (the phrase used by the European Court of Human Rights (ECHR) in *Sunday Times v UK* (1979) 2 EHRR 245 at 275 (para 59)); and (2) that there must be a relationship of 'proportionality' between the need and the means used to pursue it.

[59] Mr Squires further relied on *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26 at [27], [2001] 3 All ER 433 at [27], [2001] 2 AC 532 for the uncontentious propositions: (1) that for interference to be proportionate, the measures designed to meet the need must be rationally connected to it and be no more than necessary to accomplish their objectives; and (2) that in conducting a proportionality review under the convention the court's role is no longer merely supervisory and confined to applying the *Wednesbury* test (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), but requires more intense scrutiny of a public authority's decision.

[60] Further in relation to the phrase in 'accordance with the law' in art 8(2), Mr Squires argued that the decision to disclose must be taken within a legal framework which is sufficiently precise and specifies the conditions under which a disclosure will occur: see *Herczegfalvy v Austria* (1993) 15 EHRR 437 at 485, 486 (paras 89 and 91). He also relied on the fact that the ECHR had held that the operative legal framework must be capable of preventing a power being exercised, 'arbitrarily and selectively and [in a manner that is] scarcely foreseeable, and [is] not attended by the basic procedural safeguards': see *Hentrich v France* (1994) 18 EHRR 440 at 469–470 (para 42). In this regard, he argued that the convention imported similar notions of fairness and protection against arbitrariness into a decision-making process as are required under the common law. None of this was, as I understood it, contentious.

[61] Mr Squires pointed out that the legality of disclosure by public authorities of allegations of sexual misconduct has been considered by the domestic courts both before and after the 1998 Act came into force. The courts had set out various procedural and substantive conditions that must be met for disclosure to be lawful. He relied in particular on two cases: *R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691, [1999] QB 396 and *R v a Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736 to which I will turn in due course.

[62] It was at this point, however, that Mr Squires and Ms Barton parted company on the law. Ms Barton argued that the issue of an ECRC was governed by the provisions of Pt V of the 1997 Act, and not by common law principles. Whilst art 8 was plainly engaged, she submitted that the dicta in both *Ex p AB* and *Ex p LM* on which Mr Squires relied, were distinguishable in the instant case because in neither of those cases was the court considering the exercise of the positive duty to provide information for the purposes of an ECRC under the 1997 Act.

[63] Ms Barton developed her argument by submitting in particular that: (a) the existence of the duty to provide information for ECRCs displaced the general presumption at common law that information should not be disclosed; (b) Pt V of the 1997 Act provides specific public justification for disclosure; (c) there was no requirement for consultation with other relevant agencies; and (d) there was no requirement for the subject of the disclosure to be permitted to make representations.

a [64] Ms Barton accepted, however, that the discretion of the chief constable must not be exercised arbitrarily. She further accepted that the substantive criteria for lawful disclosure were as set out by Dyson J in *Ex p LM* [2000] 1 FCR 736 at 747–748. These were, she argued: (a) the level of certainty on the part of the public authority that the allegations it is disclosing are true. The greater the conviction that the allegation is true the more pressing the need for disclosure;

b (b) the interest of the third party in receiving the information. The more intense the legitimacy of the interest in the third party having the information the more pressing the need to disclose is likely to be; and (c) the degree of risk posed by the person if disclosure is not made.

c [65] Essentially, Ms Barton submitted, the decision to disclose was an exercise in which the chief constable was required to balance the need to protect children against the right of an individual to privacy. Her case, in a nutshell, was that the chief constable in approving disclosure, had applied those criteria. He had thus acted both fairly, and in accordance with the law.

DO THE TERMS OF S 115 EXCLUDE THE OPERATION OF THE COMMON LAW?

d [66] Ms Barton is plainly right in her submission that none of the decided cases on disclosure relate to s 115 of the 1997 Act, where, as provided by s 119, the chief constable is placed under an obligation to comply with a request for disclosure as soon as practicable, and where the only statutory criteria for the provision of the information are the broadly expressed ‘might be relevant’ and ‘ought to be included’ tests in s 115(7) which are both themselves in turn matters left by

e Parliament to be governed by the chief constable’s opinion.

[67] However, it does not follow, in my judgment, that the very broad powers conferred by the 1997 Act exist in a vacuum, or that the approach to disclosure set out in *Ex p AB* and *Ex p LM* does not apply. In this context, it seems to me that the statement of principle contained in the speech of Lord Browne-Wilkinson in

f *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577 at 590–591, [1998] AC 539 at 573–574, cited in the judgment of Dyson LJ in *M v Secretary of State for Education* [2001] EWCA Civ 332 at [38], [2001] 2 FCR 11 at [38] applies:

‘I consider first whether there is any principle of construction which requires the court, in certain cases, to construe general words contained in the statute as being impliedly limited. In my judgment there is such a principle. It is well established that Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions: see *Cross on Statutory Interpretation* (3rd edn, 1995) pp 165–166, *Bennion on Statutory Interpretation* (2nd edn, 1992) p 727 and *Maxwell on Interpretation of Statutes* (12th edn, 1969) p 116. As a result, Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication: *Cross* p 166, *Bennion* p 718 and *Maxwell* p 116. This presumption has been applied in many different fields including the construction of statutory provisions conferring wide powers on the executive. Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice: *Bennion* p 737. However widely the power is expressed in the statute, it does not authorise that power to be exercised otherwise than in accordance with fair procedures.’

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[68] In my judgment, there is nothing in the language of s 115(7) of the 1997 Act or in the duty imposed by s 119(2) on the chief constable to comply with a request from the Secretary of State, which demonstrates an intention by Parliament to disapply the rules of natural justice or procedural fairness.

THE DECIDED CASES ON DISCLOSURE

[69] I therefore propose to look at a number of the authorities on disclosure. There are, of course, many reported cases in the Family Division in which the question which has arisen has usually been the disclosure to the police either of documents rendered confidential to the family proceedings by r 4.23 of the Family Proceedings Rules 1991, SI 1991/1247, or of evidence given in private in wardship and, since 1991 in care proceedings under Pt IV of the Children Act 1989. In this area, the leading case is the decision of the Court of Appeal in *Re C (A Minor) (Care Proceedings: Disclosure)* [1997] Fam 76, [1997] 2 WLR 322.

[70] I respectfully agree, however, with an observation of Kennedy LJ in *Woolgar v Chief Constable of the Sussex Police* [1999] 3 All ER 604 at 614, [2000] 1 WLR 25 at 35 that in the present context little assistance can be derived from the family cases. Whilst they all involve a balancing exercise, many of the factors involved in that exercise (for example the importance of encouraging frankness in children's cases) simply do not apply in cases such as the present. Equally, a case such as *Re L (minors) (sexual abuse: disclosure)*, *Re V (minors) (sexual abuse: disclosure)* [1999] 1 FCR 308, [1999] 1 WLR 299, concerned the duty which ss 17 and 47 of the 1989 Act impose on local authorities to inform other local authorities of those found guilty of sexual abuse in care or other family proceedings. The 1989 Act is not in play in the instant case.

[71] I start, therefore, with *Ex p AB*. In that case, two convicted paedophiles sought declarations that the decision of the police to inform the owner of a caravan site in which they were residing of their convictions was unlawful. They failed both in the Divisional Court and in the Court of Appeal. In the Divisional Court, the Secretary of State submitted that any policy adopted by the police to guide its conduct when problems of this sort arose should observe three important principles. These were ([1997] 4 All ER 691 at 698, [1999] QB 396 at 409):

'(1) There is a general presumption that information should not be disclosed, such a presumption being based on a recognition of (a) the potentially serious effect on the ability of the convicted people to live a normal life; (b) the risk of violence to such people; and (c) the risk that disclosure might drive them underground. (2) There is a strong public interest in ensuring that police are able to disclose information about offenders where that is necessary for the prevention or detection of crime, or for the protection of young or other vulnerable people. (3) Each case should be considered carefully on its particular facts, assessing the risk posed by the individual offender; the vulnerability of those who may be at risk; and the impact of disclosure on the offender. In making such assessment, the police should normally consult other relevant agencies (such as social services and the probation service).'

[72] The Divisional Court agreed with these principles. Lord Bingham CJ accepted the first of these principles as 'an important and necessary principle underlying such a policy'. He added ([1997] 4 All ER 691 at 698, [1999] QB 396 at 409-410):

'When, in the course of performing its public duties, a public body (such as a police force) comes into possession of information relating to a member of the

a public, being information not generally available and potentially damaging to that member of the public if disclosed, the body ought not to disclose such information save for the purpose of and to the extent necessary for performance of its public duty or enabling some other public body to perform its public duty.'

b [73] It was, however, plain that the general rule against disclosure was not absolute. The police had a job to do. After citations from the speech of Viscount Cave LC in *Glasbrook Bros Ltd v Glamorgan CC* [1925] AC 270 at 277, [1924] All ER Rep 579 at 582, and from Lord Parker CJ in *Rice v Connolly* [1966] 2 All ER 649 at 651, [1966] 2 QB 414 at 419, Lord Bingham CJ added ([1997] 4 All ER 691 at 699, [1999] QB 396 at 410):

c 'It seems to me to follow that if the police, having obtained information about an individual which it would be damaging to that individual to disclose, and which should not be disclosed without some public justification, consider in the exercise of a careful and bona fide judgment that it is desirable or necessary in the public interest to make disclosure, whether for the purpose of preventing crime or alerting members of the public to an apprehended danger, it is proper
d for them to make such limited disclosure as is judged necessary to achieve that purpose. I regard the third principle set out above also as being necessary and important. It would plainly be objectionable if a police force were to adopt a blanket policy of disseminating information about previous offenders regardless of the facts of the individual case or the nature of the previous
e offending or the risk of further offending. While it is permissible for a public body to formulate rules governing its general approach to the exercise of a discretion (see *British Oxygen Co Ltd v Minister of Technology* [1970] 3 All ER 165, [1971] AC 610), it is essential that such rules should be sufficiently flexible ...'

f [74] In the Court of Appeal the Secretary of State's submission were likewise successful. Giving the judgment of the court, Lord Woolf MR said ([1998] 3 All ER 310 at 320, [1999] QB 396 at 427–428):

g 'On behalf of the Home Secretary, Mr Eadie advanced careful and well-balanced submissions as to how the duty (which he accepted existed) to act fairly should be exercised. He agreed that there are cases where it would be desirable, so as to ensure as far as possible that the police are acting on accurate information and so as to ensure the necessary degree of fairness, to afford individuals in the position of the applicants some opportunity to comment. However whether such an opportunity should be afforded and the form that it should take depends on the particular circumstances of a particular
h former offender. In determining what should be done the overriding priority must remain to protect the public, particularly children and other vulnerable people. The time-scale involved may make it not possible to afford an opportunity to comment. The information in the police's hands may be of a category which means that it is unlikely that the subject could be expected to add anything of value. The information available to the police may be
j information upon which the subject has already had an opportunity to comment. The information may be of a nature which means it would be undesirable for it to be disclosed because of its confidentiality or sensitivity or on the grounds of public interest immunity. There is no formal procedure with which the police should be required to comply. The police should be allowed to act in a sensible pragmatic way. It should be remembered that they

have to rely upon the advice of experts and they should not be required to test opinions which they have received from experts.

OUR CONCLUSIONS

We had no difficulty in indorsing Mr Eadie's general approach. Each case must be judged on its own facts. However, in doing this, it must be remembered that the decision to which the police have to come as to whether or not to disclose the identity of paedophiles to members of the public, is a highly sensitive one. Disclosure should only be made when there is a pressing need for that disclosure. Before reaching their decision as to whether to disclose the police require as much information as can reasonably practicably be obtained in the circumstances. In the majority of the situations which can be anticipated, it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk.

[75] *Exp AB* was, of course, a case in which the applicants had been convicted of serious criminal offences. Those convictions were a matter of public record. It follows, in my judgment, that the principles relating to disclosure need to be applied all the more stringently (a) when one is dealing with information about a person who has not been either convicted of a criminal offence or found on the balance of probabilities to have committed an act of indecency by a judge in civil proceedings; and (b) where the identity of the person who is alleged to have committed the act details of which it is intended to disclose is in issue.

[76] The second case is *R v a Local Authority in the Midlands, ex p LM* [2000] 1 FCR 736. LM owned a bus company, which had a contract with the local education department to transport school children. The contract was terminated because the police and the social services department of the local authority disclosed to the education department details of two allegations of sexual offences against children (one against his own daughter) neither of which had resulted in a prosecution or any civil finding of guilt. The first in time had occurred some ten years previously and related to a period when LM was employed by social services in a hostel caring for vulnerable children. A boy of about 11 alleged that LM had 'lain on top of me in his underpants'. The allegation had been investigated by LM's line manager, Mrs G in 1996 (no reason is given for the delay). She could not recall LM's explanation; but whatever it was, there was no corroboration of the allegation and no action was taken.

[77] The second allegation was some seven years old and related to LM's daughter, then aged four. It arose in acrimonious divorce proceedings between LM and his wife. LM denied the allegation. Once again, there was no corroboration, although the police searched LM's house where they discovered some soft pornographic photographs. The name of the family had been placed on the Child Protection Register, but no other action had been taken.

[78] LM suffered some persecution as a result of the termination of the contract, almost certainly due to rumours as to why it had occurred. His company then entered into another contract with a different local authority for the provision of school bus services and LM sought assurances from the police and social services that the allegations would not again be disclosed. Those assurances were refused, and LM applied for judicial review.

[79] Finding that such a disclosure would be unlawful, Dyson J stated (at 747):

a 'In my view, the guiding principles for the exercise of the power to disclose
 in the present case are those enunciated in (*R v Chief Constable of the North Wales
 Police, ex p AB* [1998] 3 All ER 310, [1999] QB 396). Each of the respondent
 authorities had to consider the case on its own facts. A blanket approach was
 impermissible. Having regard to the sensitivity of the issues raised by the
 b allegations of sexual impropriety made against LM, disclosure should only be
 made if there is a "pressing need". Disclosure should be the exception, and not
 the rule. That is because the consequences of disclosure of such information
 for the subject of the allegations can be very damaging indeed. The facts of this
 case show how disclosure can lead to loss of employment and social ostracism,
 if not worse. Disclosure should, therefore, only be made if there is a pressing
 c need for it ... What was required of the police and the social services
 department in this case was that they examine the facts, and carry out the
 exercise of balancing the public interest in the need to protect children against
 the need to safeguard the right of an individual to a private life. How should
 the balancing exercise be carried out? All relevant factors must be considered.
 It is not possible or desirable to attempt to provide an exhaustive list. It seems
 d to me, however, that the following factors will usually have to be considered
 by the police and local authority that is contemplating disclosure of allegations
 of child sex abuse to a third party.'

[80] The first factor, which Dyson J then identified, was the authority's own
 belief as to the truth of the allegation. The greater the conviction that the allegation
 e is true, he said, the more pressing the need for disclosure. The second factor was
 the interest of the third party in obtaining the information. The more intense the
 legitimacy of the interest in the third party in having the information, the more
 pressing the need to disclose is likely to be. The third factor was the degree of risk
 posed by the person if disclosure is not made.

f DISCUSSION

[81] I fully accept that in the instant case, I am dealing with disclosure within a
 statutory framework. I have set out the structure of Pt V of the 1997 Act earlier in
 this judgment. It is quite clear from that structure that in the circumstances defined,
 for example, in s 113 of the 1997 Act, the CRB, on the application of a prospective
 g employee, is required to disclose to a prospective employer any cautions and
 criminal convictions recorded against the name of the prospective employee,
 including those which are spent. There is no room here either for the exercise of
 any discretion on the part of the CRB, or the application of any common law
 principles.

h [82] It is equally plain, however, in my judgment that different considerations
 apply to s 115 of the 1997 Act. Here, the respective statutory duties imposed on the
 CRB and the chief constable seem to me to be as follows: (1) on the CRB to issue an
 ECRC to a prospective employee and employer; (2) on the CRB before issuing the
 ECRC to request the chief constable of every relevant police force to provide the
 information identified in s 115(7), (8); and (3) on the chief constable to comply with
 j any request from the CRB as soon as practicable.

[83] The only guidance which the 1997 Act gives the chief constable as to the
 information to be provided under s 115(7) in the ECRC is that, in the chief
 constable's opinion: (1) it 'might be relevant' to a consideration of the employee's
 suitability for a post involving regularly caring for, training, supervising or being in
 sole charge of persons aged under 18; and (2) that it ought to be included in the
 certificate.

[84] On its face, therefore, s 115(7) gives a very wide and apparently subjective discretion to the chief constable. For the reasons already given, however, and as explained in the speech of Lord Browne-Wilkinson in *Pierson v Secretary of State for the Home Dept* [1997] 3 All ER 577 at 590–591, [1998] AC 539 at 573–574 cited at [67], above, s 115 in my judgment, whilst defining the parameters of the chief constable's discretion does not exclude the operation of common law principles as to its exercise.

[85] As all the parties in the current proceedings accept (including the deputy chief constable who authorised the provision of the information—see [55], above) the discretion must also be exercised in compliance with art 8(2) of the convention. Ms Barton further accepts that the substantive criteria identified by Dyson J in *Ex p LM* apply. From there, it seems to me, it is only a very short step to an acceptance that the common law principles set out in *Ex p AB*, adopted as they were by Dyson J in *Ex p LM*, also apply. Accordingly, I propose to apply the common law guidance contained in *Ex p AB* and *Ex p LM* although I accept that its application must, of course, reflect both the statutory provisions contained in s 115(7) of the 1997 Act and the facts of the instant case.

[86] In applying that guidance to the facts of this case, however, I have two reservations. The first relates to Ms Barton's submission that the existence of the duty to provide information for ECRCs displaces the general presumption at common law that information should not be disclosed.

[87] In my judgment, this submission conflates the duty on the CRB to provide ECRCs to prospective employers and employees on request with the responsibility of the chief constable to consider the content of the individual certificate. Clearly, where cautions and criminal convictions are concerned there is no issue. Parliament has laid down the circumstances in which these must be disclosed, and no question of discretion arises. But where the information does not relate to a criminal conviction, it seems to me, for the reasons I have already given, that different considerations apply.

[88] The presumption against disclosure identified in *Ex p AB* was, of course, as Lord Bingham CJ made clear, unrelated to any specific statutory duty on the part of the police, and was based (*inter alia*) on the potentially serious effect on the ability of convicted paedophiles to live a normal life.

[89] The two statutory tests for the provision of non-conviction information under s 115(7) are those set out in [83], above. Both tests, in my judgment, need to be stringently applied. The disclosure of information which (as here) has not been the subject of judicial adjudication, which is highly contentious and which, if disclosed is likely to render the claimant permanently unemployable in his chosen profession plainly requires what the ECHR described as 'a pressing need' to make disclosure appropriate.

[90] I accept, of course, that the need to protect children and vulnerable adults from abuse by those employed to care for them is a pressing social need. However, the nature and extent of the need will depend on the facts of the individual case. It is, moreover, precisely because the stakes are so high that the balancing exercise required by art 8 of the convention and the application of the common law principles must be rigorously carried out.

[91] Having said that, however, I am very conscious of the fact that it is at least highly arguable that Ms Barton is right, and that the effect of s 115 of the 1997 Act is to displace the common law presumption against disclosure. The purpose of the statute is clearly designed to meet the pressing social need identified in the previous paragraph. I therefore propose to approach the question of disclosure on the facts

- a of the instant case on the basis that there is no presumption against disclosure under s 115, and that the circumstances identified in s 115 identify, in general terms, a pressing social need for disclosure. As will become apparent, however, this does not mean that disclosure of additional, non-conviction information under s 115 is automatic, or that it is not surrounded by the stringent conditions of natural justice and procedural fairness.
- b [92] My second reservation relates to Ms Barton's submission (with which Mr Squires agreed) that one of the factors, which the police would usually have to consider when contemplating disclosure, is its own belief in the truth of the allegations. In the context of the exercise of the chief constable's powers under s 115(7) of the 1997 Act, however, it seems to me that the application of this concept carries with it a risk that a presumption of guilt will be imported into the exercise
- c which may, inappropriately, prevent proper and objective consideration being given to the information itself and thus vitiate the exercise. What, in my judgment, is required is that the chief constable should form his opinion that the information is relevant and should be disclosed because, viewed objectively, it is, taken as a whole, reliable.
- d [93] I accept, of course, that a chief constable exercising his discretion under s 115 of the 1997 Act could not properly contemplate disclosing information which he believed (or had reasonable cause to believe) was untrue. I would, however, prefer to regard the need for there to be a belief that the information is true as a form of threshold criterion, which the information has to meet before, further and more detailed consideration is given to it.
- e [94] I reach this conclusion because any person—including a police officer—can have a strong, but none the less mistaken belief that a suspect is guilty. The two women police constables who interviewed the claimant plainly believed that he was guilty. But, if Ms R was wrong in her identification of the claimant as the man who exposed himself to her, the officers' belief that he was guilty—however
- f sincerely and strongly held—was, plainly, itself wrong.
- [95] The risk that a subjective judgment may be wrong is, in my experience, particularly strong where allegations of sexual misbehaviour are concerned. This is a commonplace of family proceedings, where there is frequently no objective medical evidence of abuse, and allegations frequently arise in the context of acrimonious proceedings between former partners. Equally, however, cases have
- g arisen in which the police or a local authority form a mistaken opinion of a party's guilt, which is then transfused throughout the proceedings. It is for this reason that it has become axiomatic in any investigation of abuse that the investigator should investigate with an open mind.
- h [96] On the facts of the instant case, it seems to me that both Ms S and the deputy chief constable relied on the police interview and on two women police officers' belief that what the claimant said in interview was untrue, and that his statements that he could not remember, and that he did not think he had committed the offence, were false. In my judgment, the fact that the two interviewing police officers in the instant case thought the claimant guilty is only
- j one factor in a much wider equation, and is not a factor which weighs heavily in the scales.
- [97] The dangers of relying on a subjective belief are, I think, self-evident. A presumption of guilt arises, and the remaining evidence in the case is either ignored, or slanted, subtly and often quite unconsciously, to accord with the presumption. There are several possible examples of that process in the instant case, to which I now turn.

SHOULD THE INFORMATION IN THE INSTANT CASE HAVE BEEN DISCLOSED?

[98] In my judgment, the statements provided by Ms S and the deputy chief constable fail what I may describe as the modified *Ex p AB* and *Ex p LM* tests. On any analysis, two stark features stand out in this case. They are, firstly, that the critical issue in the criminal proceedings was the identification of the claimant; and secondly that the effect of disclosure in the form proposed in the ECRC would render the claimant unemployable as a social worker. In my judgment, these two factors required careful examination. a
b

[99] The crucial and simple fact in this case is that Ms R picked out a person other than the claimant during the covert identification at court on 25 September 2002. That fact, and the fact that there had been no previous identity parade, needed to be weighed objectively. In my judgment, it does not appear that they were, either in the opinion of Ms S or the deputy chief constable. c

[100] Ms S provides no reasons for her advice in her memorandum to the deputy chief constable. She identifies the factors she thought relevant, but does not explain the weight she gave to them, or how she balanced them. Moreover, in their affidavits neither Ms S nor the deputy chief constable properly explains the factors in the reasoning process, which led them to the conclusion that the material should be disclosed. All the deputy chief constable says in his statement is that he balanced the claimant's art 8 rights against any potential risks posed to those with whom the claimant may have future contact. I have already set out the deputy chief constable's additional reasoning at [55], above. d

[101] In my judgment, this is simply not sufficient. I appreciate that the deputy chief constable was not writing a judgment, but this was the opportunity for him in these proceedings to explain his reasons for his decision that the information in the ECRC was both relevant and ought to be included. It is not enough, in my view, for the decision-maker simply to say that he has carried out a balancing exercise. He has to identify the factors he has weighed and explain why he has given weight to some and not to others. This is not an arcane or complex exercise. e

[102] In her statement, Ms S deals with the matter in the following way: f

'Due to aborted identification parades, following objections from the claimant through his legal representative, a group identification procedure did not occur until 25 September 2002 (nearly four months after the complainant last saw the suspect). The complainant failed to identify the claimant and the CPS decided to discontinue proceedings relating to both offences on 25 September 2002.' (My emphases.) g

[103] The claimant's case is that he was throughout willing to stand on an identification parade. That is what he says in his police interview. His case, supported by his solicitor's CDS time recording notes, is that he was advised to co-operate and did so. On the first occasion, the parade could not proceed, as there were only five suitable witnesses. On the second there were only four, so he was asked if he would take part in a Viper ID parade. He agreed, but there was a lack of suitable 'stooges'. He was then asked to take part in a group ID and agreed, but by then the witnesses had left the ID suite. He thereupon agreed to a group ID taking place on another occasion. However, none was arranged. h
j

[104] I do not imagine the solicitor's notes were available to Ms S when she made her statement. However, nothing in the papers available to me warrants Ms S's insinuation that the claimant frustrated the identification parade process. Moreover, if the claimant's solicitor objected to an inappropriately constituted identification parade, he was right to do so.

a [105] Equally, there is no mention in Ms S's statement of Ms R's categorical assertion that she was '100%' certain she would recognise the man who exposed himself to her anywhere. Instead, her failure to identify is explained and excused by the fact that it was some four months since she had last seen the complainant. These are, in my judgment, subtle indications that, instead of making an objective assessment, and weighing the factors appropriately in the balance, Ms S had formed the view from the file that the complainant was guilty. Any objective reader looking at the ECRC disclosure would, I think, be given the strong impression that the claimant was guilty, and that Ms R's failure to identify him was an unfortunate, but understandable mistake.

c [106] In my judgment, the fundamental point in this case is that the claimant is entitled to say that the information disclosed in the ECRC is irrelevant and should not be disclosed because it does not relate to him, but to somebody else, and that he was wrongly identified and wrongly charged. At the very least, in my judgment, those propositions need to be examined and weighed in the balance. Ms S identified as a factor 'if proceedings were instigated, why they were not continued' and we must infer that she dismissed the failure to identify as excusable because of the time lapse. There is no evidence that the deputy chief constable properly considered the point.

e [107] Nowhere in the deputy chief constable's reasons do I see any proper assessment by the deputy chief constable of the effect on the claimant of disclosure being given. He simply says he 'weighed the likely impact' on the claimant. He does not say how. We must infer that it was less than the potential impact on any vulnerable group if the information was not disclosed. Yet this was a factor of critical importance. It was obvious, as Ms Barton accepts, that the consequence of the disclosure in the form contained on the ECRC would be to render the claimant permanently unemployable in any social work position. The consequences to him could not be more serious. Merely to recite it as a factor without more is, in my judgment, simply insufficient.

f [108] I fully accept that on an application for judicial review, the court is not entitled to substitute its view for that of the decision-maker. If the decision-maker has reached a permissible decision having taken into account all the relevant factors and has given adequate reasons for his decision, it is not this court's function to interfere in that process.

g [109] However, in the instant case, the decision, in my judgment, is flawed for one fundamental reason. It is that neither Ms S nor the deputy chief constable seems to me properly to have addressed their minds to the two critical issues in the case, which I have identified at [106] and [107], above. A proper analysis of those two factors points strongly against disclosure. There is a powerful case for saying that Ms R's failure to identify the claimant was correct: that the claimant was not the man who exposed himself to Ms R. If he was not the man, then it follows inexorably that the information is irrelevant and ought not to be disclosed. The implication in the ECRC that the claimant was guilty is, accordingly, unsafe and unreliable. Because of this, the effects on him of disclosure self-evidently outweigh the risks posed to those with whom the claimant may have future contact when employed as a social worker.

j [110] In these circumstances it cannot, it seems to me, be said that there is a 'pressing social need' for disclosure on the facts of this particular case, notwithstanding the purposes of the 1997 Act, and even on the basis that the terms of s 115 oust the common law presumption against disclosure.

[111] For all these reasons, it seems to me that the claimant's first ground is made out. For the claimant, Mr Squires devoted a substantial part of his skeleton argument to a criticism of the deputy chief constable for reaching his decision to approve disclosure without further investigation of the underlying facts of the case. He suggests, as examples, further inquiries of Ms R, inquiries about other allegations of indecent exposure in the area, and further efforts to obtain the CCTV footage of the garage forecourt.

[112] Subject to what follows in relation to procedural fairness, I am not saying that there may not be cases in which additional inquiries (apart from those made of the subject of the disclosure) may be appropriate once a request for information relating to an ECRC is received. However, my reading of s 115 is that it is designed to deal with information in the possession of the police, and it would, I think, be imposing an undue administrative burden on the police if further inquiries were regarded as automatically necessary before an ECRC is completed. Plainly, if a chief constable cannot resolve the question of disclosure without further inquiries being made, those inquiries must be made. In the instant case, however, I am clear that the correct decision (not to disclose) did not require further investigation.

PROCEDURAL FAIRNESS

[113] Mr Squires argued that the chief constable did not act fairly in that he denied the claimant an opportunity to make representations prior to his decision to disclose information to the CRB.

[114] Mr Squires began his argument on this point by going back to the judgment of Lord Bingham CJ and the Court of Appeal in *Ex p AB*, which I have set out at [71]–[74], above. He also cited Lord Bingham CJ's statement that the consultation of other agencies, assuming time permits, was a valuable safeguard against partial and ill-considered conclusions.

[115] Mr Squires also relied on the earlier case of *R v Norfolk CC, ex p M* [1989] 2 All ER 359, [1989] QB 619. That case involved an allegation against a plumber (M) (which had not led to a conviction) of indecent exposure and inappropriate touching of a child. The allegations were disclosed by one local authority to M's employer, another local authority, and he was included on a list of suspected child abusers. Waite J held that in making the disclosure the local authority had acted unlawfully. He noted the effect of the disclosure to M's employment prospects, and held ([1989] 2 All ER 359 at 366, [1989] QB 619 at 628):

'... the consequences of registration for M were in my judgment sufficiently serious ... to impose on the council a legal duty to act fairly towards him. The council's case conference [which had decided to place M's name on the register and disclose the allegations to his employer] acted unfairly and in manifest breach of that duty when it operated a procedure which denied him all opportunity of advance warning of its intention, or of prior consultation, or of being heard to object, or of knowing the full circumstances surrounding its decision.'

[116] Mr Squires pointed out that Waite J had noted, earlier in his judgment, that allowing M or his professional advisers the opportunity to make representations would have enabled them to suggest further lines of inquiry to the authority. For example, they could have suggested to the authority that it ought to consider whether the child who had made the allegations against M might have fabricated them.

a [117] Mr Squires argued that the importance of consultation and the right to make representations were widely recognised as a basic aspect of procedural fairness in public law generally. He relied on the following passage in the speech of Lord Mustill in *Doodly v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560:

b 'Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification ...'

[118] Mr Squires further argued that, generally speaking, to be considered fair, consultation and an opportunity for representations must occur—

c 'at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken ...' (See the judgment of the Court of Appeal in *R v North and East Devon Health Authority, ex p Coughlan* (*Secretary of State for Health intervening*) [2000] 3 All ER 850 at 887, [2001] QB 213 at 258 (para 108).)

e [119] In developing his argument, Mr Squires accepted that the requirements of fairness were dependent, to some extent, on the circumstances of a particular case. However, in this case, he submitted, it was manifestly unfair not to permit the claimant to make representations prior to disclosure, for a number of reasons.

f [120] Firstly, the decision to disclose the information to the CRB was plainly likely to have adverse consequences for the claimant. The chief constable knew that the information had been requested by a potential employer of the claimant and that the CRB had a statutory duty to disclose it once it was provided. The decision to disclose the information was also, effectively, a finding that the claimant had committed serious criminal offences. Under such circumstances natural justice, pursuant to the common law and the convention, require that the claimant be given an opportunity to make representations prior to the adverse decision being taken.

g [121] Secondly, Mr Squires submitted that the importance of the right to make representations was evident from the fact that the chief constable was required to consider the likelihood the claimant had committed the offence, the risk posed if disclosure was not made and the effect on the claimant if it was. As the Court of Appeal had noted in *Ex p AB* [1998] 3 All ER 310 at 320, [1999] QB 396 at 428) in most situations that can be anticipated:

h '... it will be obvious that the subject of the possible disclosure will often be in the best position to provide information which will be valuable when assessing the risk.'

j The same, Mr Squires argued, could be said of the effect of disclosure on the claimant. Without allowing the claimant to make representations, and in the absence of evidence from the probation service or social workers, the chief constable could not fairly balance the risk of disclosure and non-disclosure.

[122] Furthermore, Mr Squires argued, in order for the chief constable lawfully to disclose the allegations made against the claimant he had to determine that it was likely that the allegations were true. It was unfair, Mr Squires submitted, for such a conclusion to be reached without the claimant being given the opportunity to give

his version of events. The right to make representation is of particular importance where the claimant has had no opportunity to respond to serious allegations made against him. It is only in exceptional circumstances, Mr Squires submitted, that an individual who has not been convicted of an offence, nor gone through some other judicial process, should have allegations of serious misconduct disclosed without previously being told of the case against him and being given the opportunity to make representations. No such exceptional circumstances existed in this case.

[123] Mr Squires also submitted that there would be little administrative burden on the chief constable in allowing representations to be made, given the evidence that only three of every 1,000 enhanced disclosures contain non-conviction information. There was also no particular compelling reason, such as urgency or a need to protect sensitive information, so as to justify denying the claimant the opportunity to make representations. He could, with little practical difficulty, have been told of the information which the chief constable was considering about him and been permitted, on his own or through his representatives, to make submissions on it.

[124] In contrast to *Ex p AB*, Mr Squires submitted that the claimant's case was not one in which it could be concluded that 'no information [he] could have supplied would have altered the outcome of the case' and therefore that relief ought to be denied. The court should be slow to conclude that representations would have had no impact. Such a conclusion was permissible on the extreme facts of *Ex p AB*, in which the individuals in question had been convicted of very serious offences against children and been the subject of numerous reports by therapists and probation officers. As a consequence it was possible in that case safely to conclude that any representations the claimants could have made would not have altered the authority's decision.

[125] In relation to the claimant in the instant case, however, Mr Squires submitted that there were various representations he could have made which might have altered the outcome of the chief constable's decision. For example, he could have explained the reasons why he gave the answers he did during the interview with the police and corrected the somewhat misleading description of the interview given by Ms S. The claimant could also have indicated, in relation to the incident of June 2001 in which he was questioned about another indecent exposure that the person who the police were seeking was in his early 20s while the claimant was in his early 40s. An opportunity to make representations would have allowed the claimant to explain the effects on him of the disclosure as well as unequivocally to deny involvement in the incidents.

[126] Mr Squires accepted that he was not suggesting that such representations would inevitably have altered the decision to disclose. It could not, however, he submitted, be concluded that they, or other representations, could not have done so.

[127] For the chief constable, Ms Barton succinctly advanced three arguments. The first was that there was no requirement in the 1997 Act, and thus no obligation on the chief constable to permit the subject of the disclosure to be permitted to make representations. The second was that the claimant had had a contemporaneous opportunity to make representations as to his version of events during the course of his police interview. The third was that the statutory framework set out in Pt V of the Act was sufficiently precise to enable a decision as to disclosure to be fairly made, particularly when subject to the general common law provision that the discretion must not be exercised arbitrarily.

a [128] On this point, I prefer the submissions made by Mr Squires. Whether or not one includes the need on the part of the chief constable to believe the allegations were true, I am quite satisfied that the duty to act with procedural fairness under s 115 of the 1997 Act is fair and square within Lord Mustill's statement in *Doddy v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560 which I have cited at [117], above and that the weight of authority in the cases cited by Mr Squires is amply sufficient on the facts of this case to negative Ms Barton's argument that the duty to act fairly does not include an obligation to permit the subject of the proposed disclosure to make representations on it.

b [129] I am conscious, of course, of the danger of imposing an unrealistic administrative burden on the police. However, I bear in mind in particular that the procedure adopted by Ms S in this case caused her, quite properly, to send for the crime file and to read it thoroughly. She then reported to the chief constable. I see no administrative difficulty in that context in contact being made with the claimant or his advisers once a provisional decision to disclose information had been made. This conclusion is reinforced by the very small numbers of ECRs and the important consequences, which may flow from disclosure for those who are the subjects of them.

c [130] Furthermore, I am unable to accept Ms Barton's argument that the police interview was the claimant's opportunity to make representations. The claimant is seeking an opportunity to comment on the decision to make disclosure. Commenting on the interview is an integral part of that process.

d [131] Apart from the fact that the police interview and the opportunity to respond to the proposal to disclose information are qualitatively quite different, the opportunity to make representations on the proposed disclosure must involve an opportunity to comment on, and explain, the claimant's answers during his police interview, on which the chief constable is placing reliance. Ms Barton's argument on this point amounts to a denial of the opportunity to make representations. If her argument were accepted, the claimant would be denied the opportunity to comment on any aspect of the case, which post-dated the interview.

e [132] For all these reasons, the claimant succeeds in my judgment on his second ground. The deputy chief constable should have afforded him the opportunity to make representations on the material, which it was proposed to disclose. His failure to do so was procedurally unfair, and the decision to provide the information cannot stand for this reason also.

f THE CLAIMANT'S THIRD ARGUMENT: THE CHIEF CONSTABLE HAD UNLAWFULLY DEPARTED FROM THE ACPO CODE IN RELATION TO INFORMATION HELD CONCERNING THE CLAIMANT

g [133] The ACPO code is designed to establish procedures and safeguards to promote the maintenance of good practice and compliance with the Data Protection Act 1998.

h [134] Section 8 of the ACPO code deals with the retention of personal information. Section 8.4 provides general rules for criminal record weeding on police systems. Section 8.4 (para 12) provides that, with certain exceptions, details of acquittals, or of cases discontinued without caution may not be retained beyond 42 days after the notification of discontinuance. However, under para 13.1 acquittals for an offence of unlawful sexual intercourse by a male with a female under the age of 16 years must be retained.

j [135] Section 8.4 provides:

'14 Details may be retained for a period of five years in cases where a sexual offence is alleged, but the subject is acquitted, or the case is discontinued because of lack of corroboration or allegation of consent by the victim, providing identity is not an issue. An officer not below the rank of Superintendent must give authorisation and be reviewed again at the end of the retention period. Cautions for sexual offences, ordinarily weeded after five years, may also be reviewed and extended where appropriate.

14.1 When considering retention for cases above, the authorising officer must personally consider the full circumstances and only if all of the following criteria have been satisfied will authorisation for retention of the details be given;

(i) The circumstances of the case would give cause for concern if the subject were to apply for employment for a post involving substantial access to vulnerable persons and;

(ii) The decision to retain the information can be defended on the grounds of the prevention and detection of crime.'

[136] Section 8.5 of the ACPO code is headed 'Crime Intelligence', and reads as follows:

'It is not possible to lay down strict criteria for the removal of data from criminal intelligence records. The need to retain or remove such information can only be judged from the nature of the information, and whether it is necessary, lawful, proportional and relevant to its purpose. The decision to retain or remove personal information will be assisted by knowledge of the reliability of the source. All intelligence reports will be reviewed on a regular basis and considered for deletion subject to a maximum period of 12 months. For intelligence to be retained it must be relevant, but in some cases information will have to be retained for long periods if the police are to effectively discharge their duties.'

[137] On this part of the case, Mr Squires makes a very simple submission. Ms S accepts in her statement that the chief constable was not permitted to depart from the ACPO code without valid reason in relation to information held about the claimant. Section 8.4 (para 12) provides clearly that information concerning a discontinued case should not be retained beyond 42 days of notification of discontinuance. None of the exceptions applied. Accordingly, the chief constable acted unlawfully in holding information about the claimant after the end of the 42-day period.

[138] To this, Ms Barton's response was to accept that information concerning a discontinued case should not be retained on the subject's criminal record beyond 42 days of notification. However, she submitted that the information held by the chief constable in respect of the discontinued matters constituted criminal intelligence and therefore fell within para 8.5 of the ACPO code.

[139] Ms Barton argued that it was nonsensical to suggest that criminal intelligence could only cover current investigations. Intelligence was any information, which was likely to be of assistance to the police in the furtherance of their common law duty to prevent and suppress crime. She relied on the speech of Viscount Cave LC in *Glasbrook Bros Ltd v Glamorgan CC* [1925] AC 270 at 277, [1924] All ER Rep 579 at 582 to which reference has already been made in [73], above. There was an absolute and unconditional obligation binding the police authorities to

a take all steps which appear to them to be necessary for keeping the peace, for preventing crime.

[140] Ms Barton argued that the material held by the chief constable concerned three separate allegations of indecency within the space of one year. Two of the offences occurred at one venue in relation to a particular individual. Retention of the information was thus reasonable and necessary in furtherance of the chief constable's common law duties.

[141] Ms Barton argued that if the claimant's submission was correct one would never be able to bring before a court similar fact allegations if those matters occurred more than 42 days apart because such material would not be held. Thus a person could be the subject of ten separate allegations each three months apart, none of which taken alone had led to a conviction, but which, taken together were very compelling evidence. An extremely useful investigatory and evidential tool would thus be lost to the police.

[142] Ms Barton submitted in the alternative that if, which was denied, the chief constable had departed from the ACPO code retention of the material was lawful by reason of it being a step which appeared to the chief constable to be necessary for the discharge of his common law duty to keep the peace and prevent crime. Disclosure of the information was with good reason, the deputy chief constable having properly carried out the balancing exercise required in the exercise of the discretion. The fact of the matter was that the information had been brought to the attention of the deputy chief constable who had a duty under s 115(7) of the 1997 Act. Once the information was in his possession then in view of the risk posed to vulnerable members of the community he could not simply ignore it. The correct approach was to apply the test set out in s 115(7) to the information available.

[143] Mr Squires' response to these submissions was to argue that if the chief constable was suggesting that any information relating to a completed criminal investigation may be maintained as 'intelligence' it would render the detailed provisions of section 8.4 of the ACPO code redundant. In almost every instance, he submitted, information of an acquittal or discontinued proceedings could then be kept as 'criminal intelligence' and the rules set out in section 8.4 would be bypassed.

[144] Mr Squires submitted that 'criminal intelligence' referred to information, which is the basis of an ongoing criminal investigation. The police were not currently investigating the possibility that the claimant was involved in the indecent exposures at the petrol station and the information in question plainly fell within section 8.4 of the ACPO code and not section 8.5.

[145] As to 'good reason' for departing from the ACPO code because the information was relevant to the suitability of the claimant to work with children, Mr Squires submitted that this argument was also misconceived. Again, if correct, it would render otiose the provisions contained in section 8.4 of the ACPO code and especially para 14. The ACPO code specifically dealt with the retention of information pertaining to sexual offences where the individual in question may come to be employed to work with vulnerable individuals. Section 8.4 (paras 5.4 and 6) provided that a conviction for an offence for indecency or a sexual offence should be retained until the subject dies or reaches 100 years of age.

[146] Mr Squires argued that the claimant's case did not fall within the exception contained in section 8.4 (para 14), as identity was an issue. The chief constable's submission that he could nevertheless retain the information was plainly contrary to the ACPO code's provisions. It would mean that in every case information could be retained relating to discontinued proceedings for sexual offences, regardless of whether identity was in dispute. There was nothing exceptional about the particular

circumstances of the claimant's case so as to generate a valid reason for section 8.4 (para 14) of the ACPO code to be disapplied. As such the retention of the information in question beyond 42 days was unlawful.

DISCUSSION

[147] I am very conscious of the fact that each case turns on its particular facts, and as a consequence it would be inappropriate for me to be drawn into a discussion of what does and what does not constitute criminal intelligence, particularly when it is not necessary to my decision. In my judgment, on the facts of this case, the Data Protection Act 1998 and the ACPO code add little to the common law considerations upon which my decision is primarily founded. I certainly would not wish to make any finding about the meaning of criminal intelligence which inhibited the police in the proper execution of the duties identified in the speech of Viscount Cave LC in the *Glasbrook Bros* case.

[148] As I have already recorded at [138], above, Ms Barton accepted that the information could not be—and, she submitted, was not—held under section 8.4 of the ACPO code. As identity was in issue, the exception in para 14 applied. Retention by the police of the claimant's acquittal beyond the 42-day period identified in section 8.4 (para 12) would have constituted a breach of the ACPO code. That seems to me plainly correct.

[149] In these circumstances, given the relief which the claimant seeks, I do not think that it is necessary for me to rule on whether or not the information held by the police constituted 'Crime Intelligence' within section 8.5 of the ACPO code, and I do not intend to do so. Equally, whether or not the fact of a breach of the ACPO code would render unlawful an otherwise proper exercise of the powers given to a chief constable under s 115(7) of the 1997 Act is another question on which I express no view.

CONCLUSION

[150] In my judgment, the deputy chief constable's decision to provide to a potential employer of the claimant, information contained in the 'Other Relevant Information' section of the ECRC relating to the claimant dated 2 March 2003, and issued pursuant to s 115 of the 1997 Act cannot stand and will be quashed. The claimant is entitled, in my judgment, to the other relief he seeks as set out in sub-paras (1)–(4) of [6], above. I invite counsel to agree an appropriate order.

FOOTNOTE

[151] I wish to make it as clear as possible that, although on the facts of this particular case I am quashing the decision of the deputy chief constable to provide information under s 115(7) of the 1997 Act, nothing in this judgment is designed to interfere in any way with the proper flow of relevant information between statutory authorities in the field of child protection. Equally, as I make clear at [147], above, I am making no decision outside the ambit of the facts of this particular case as to what material can or cannot constitute criminal intelligence in the investigation of crimes relating to children and other vulnerable people, or as to what information may or may not be retained by the police in that context. These are all matters for the police.

Application allowed.

a R (on the application of Richardson and another) v North Yorkshire County Council and others

[2003] EWCA Civ 1860

b

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, KEENE AND SCOTT BAKER LJ

8, 9, 19 DECEMBER 2003

c *Town and country planning – Permission for development – Environmental impact assessment development – Statement required in decision to grant planning permission that environmental information taken into consideration – Whether statement of main reasons and considerations on which decision to grant planning permission based containing statement that environmental information taken into consideration – Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, regs 3(2), 21(1).*

d

Local government – Meeting – Committee meeting – Council member having personal interest in matter under consideration excluded from meeting – Whether provisions for exclusion of council member having personal interest applying only to members of council committee – Whether council member having personal interest able to remain in meeting in personal but not representative capacity – Local Authorities (Model Code of Conduct) (England) Order 2001, Sch 1.

e

The first claimant was a member of the first respondent council. The interested party applied to the planning authority of the council to extend the planning permission relating to quarrying gravel at a site approximately 250 metres from the claimant's property. The first claimant, and a number of other local residents, including the second claimant, objected to the proposed development. In June 2002, at a meeting of the council's planning and regulatory functions committee, it was resolved that planning permission would be granted subject to conditions. The council's code of conduct, made pursuant to Pt III of the Local Government Act 2000, provided in para 11^a, that a member of the council must, if he was involved in the consideration of a matter at a meeting of an overview and scrutiny committee of the council regard himself as having a prejudicial interest if that consideration related to a decision made or action taken by another of the council's committees. Paragraph 12(1)^b provided that a member with a prejudicial interest in any matter must withdraw from the room where a meeting was being held whenever it became apparent that the matter was being considered. The first claimant, who was not a member of the planning committee was excluded from the June meeting on the basis that he had a prejudicial interest within the meaning of para 12(1) of the code of conduct. The minute of the resolution contained no statement that environmental information had been taken into consideration as required by reg 3(2)^c of the Town and Country Planning (Environmental Impact Assessment) (England and Wales)

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a Paragraph 11, so far as material, is set out at [53], below

b Paragraph 12, so far as material, is set out at [53], below

c Regulation 3, so far as material, is set out at [13], below

Regulations 1999. The 1999 regulations implemented Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment). In August, a notice of decision was issued by the council which included a note that the council had taken into consideration accompanying environmental information. Under reg 21(1)(c)(ii) of the 1999 regulations the council had a duty to make available for public inspection a statement containing the main reasons and considerations on which the decision was based. The claimants sought judicial review contending that there had been a failure to comply with regs 3(2) and 21(1) of the 1999 regulations. They contended that the resolution passed at the June meeting was the relevant decision for the purposes of reg 3(2); and that no statement of reasons had been made available as required by reg 21(1)(c)(ii). The first claimant further contended that he should not have been excluded from the June planning committee meeting. In the course of proceedings the council stated that it intended to place on the register a further document in substitution for the August notice to include a statement of the main reasons for the decision. The judge rejected the argument on reg 3(2). He concluded that there was a clear failure by the council to comply with the requirement under reg 21(1), however, he held that the regulation looked to the position after the grant of planning permission rather than laying down requirements for the decision making process itself. He determined that the placing on the register of the substitute notice of decision would remedy the breach and that, therefore, the planning permission should not be quashed. He further held that the committee had been correct to exclude the first claimant. The claimants appealed, contending, *inter alia*, that in relation to the breach of reg 21(1) of the 1999 regulations, implementing as they did an EC Directive, the court was not permitted to do anything other than quash the permission granted; and in relation to the code of conduct, that para 12 imposed a requirement to withdraw only on members of the committee holding the relevant meeting; and that in any event the first claimant had been entitled to attend the June meeting in his personal capacity as opposed to his representative capacity.

Held – (1) The correct interpretation of reg 3(2) was that it was concerned with the issue of the written notice of the decision. That constituted the grant of planning permission which could not be made unless the council had first taken the environmental information into consideration, and that was the decision in which the relevant statement had to be made. In the instant case, the notice of decision issued in August had complied with the requirement to state that the council had taken the environmental information into consideration (see [25], [28], below); *R (on the application of Barker) v Bromley London BC* [2001] All ER (D) 361 (Nov) and *R (on the application of Burkett) v Hammersmith and Fulham London BC* [2002] 3 All ER 97 applied.

(2) The court had the power to regard a breach of the 1999 regulations as curable other than by quashing the development permission granted. Regulation 21(1) looked to the position after the grant of planning permission. It was concerned with making information available to the public as to what had been decided and why, rather than laying down requirements for the decision-making process itself (see [38]–[43], below); *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897 considered.

(3) Paragraph 12(1) of the code of conduct referred to members of the council generally not only to the members of the relevant committee. In every other

- a paragraph of the code, except para 11 where the word was expressly qualified, wherever the word 'member' was used it was clear that the reference was to a member or co-opted member of the council as a whole. A very strong presumption accordingly arose that that was also what the word meant in para 12 and there was nothing in the language of the code or its underlying rationale to displace that presumption (see [60], [66], [70], below).
- b (4) A member of the council attending a council meeting could not, simply by declaring that he was attending in his private capacity, thereby divest himself of his official capacity as a councillor. He was still to be regarded as conducting the business of his office. Only by resigning could he shed that role. Accordingly, the appeal would be dismissed (see [75], [82]–[84], below).
- c **Notes**
For environmental statements and for the duty to adopt a code of conduct and the duty of a member to comply, see 2003 Supp to 46 *Halsbury's Laws* (4th edn reissue) para 436, and 29(1) *Halsbury's Laws* (4th edn reissue) paras 137, 138, respectively.
- d For the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, regs 3(2), 21(1), see 20 *Halsbury's Statutory Instruments* (2002 issue) 236, 246.
For the Local Authorities (Model Code of Conduct) (England) Order 2001, Sch 1, see 11 *Halsbury's Statutory Instruments* (2003 issue) 476.
- e **Cases referred to in judgments**
Berkeley v Secretary of State for the Environment [2000] 3 All ER 897, [2001] 2 AC 603, [2000] 3 WLR 420, HL.
Brayhead (Ascot) Ltd v Berkshire CC [1964] 1 All ER 149, [1964] 2 QB 303, [1964] 2 WLR 507, DC.
- f *English v Emery Reimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (t/a Freightmaster Commercials) v Comr of Police of the Metropolis* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.
Flannery v Halifax Estate Agencies Ltd [2000] 1 All ER 373, [2000] 1 WLR 377, CA.
R (on the application of Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389.
- g *R (on the application of Barker) v Bromley London BC* [2001] EWCA Civ 1766, [2001] All ER (D) 361 (Nov).
R (on the application of Burkett) v Hammersmith and Fulham London BC [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593.
- h *R (on the application of Carlton-Conway) v Harrow London BC* [2002] EWCA Civ 927, [2002] All ER (D) 79 (Jun).
R (on the application of Goodman) v Lewisham London BC [2003] EWCA Civ 140, (2003) 2 P & CR 262.
- j *R (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408, [2003] All ER (D) 277 (Oct).
R v Flintshire CC, ex p Armstrong-Braun [2001] LGR 344, CA.
R v Mendip DC, ex p Fabre (2000) 80 P & CR 500.
R v Westminster CC, ex p Ermakov [1996] 2 All ER 302, CA.
R v Yeovil BC, ex p Trustees of Elim Pentecostal Church, Yeovil (1971) 23 P & CR 39, DC.

South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 AC 558. a

Appeal

The claimants, Paul Richardson and Wendy Orme appealed with permission of Richards J from his order on 15 April 2003 ([2003] EWHC 764 (Admin), [2003] All ER (D) 268 (Apr)) dismissing their application for judicial review of the grant of planning permission to the interested party, Brown & Potter Ltd, by the first respondent, North Yorkshire County Council on the bases of (i) non compliance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 and (ii) the first respondent's breach of the model code of conduct contained in Sch 1 to the Local Authorities (Model Code of Conduct) (England) Order 2001 made by the second respondent, the Secretary of State for Transport, Local Government and the Regions in exercise of powers under the Local Government Act 2000. The facts are set out in the judgment of Simon Brown LJ. b c

Robert McCracken QC and Gregory Jones (instructed by *Richard Buxton*, Cambridge) for Mr Richardson and Ms Orme. d

Timothy Straker QC and Paul Greatorex (instructed by *Katriona Gatrell*, Northallerton) for the council.

Phillip Sales and James Maurici (instructed by the *Treasury Solicitor*) for the Secretary of State.

Thomas Hill (instructed by *Mills & Reeve*, Cambridge) for the interested party. e

Cur adv vult

19 December 2003. The following judgments were delivered.

SIMON BROWN LJ. f

INTRODUCTION

[1] This is the appellants' appeal against Richards J's order dated 15 April 2003 substantially dismissing their judicial review challenge to the North Yorkshire County Council's (the council) grant of planning permission for a quarry extension at Ripon ([2003] EWHC 764 (Admin), [2003] All ER (D) 268 (Apr)). At a meeting on 11 June 2002 (the June meeting), the council's planning and regulatory functions committee (the planning committee) resolved by a majority of five to four that, subject to conditions and s 106 agreement, the permission be granted. The notice of decision of the grant of planning permission was issued on 6 August 2002 (the August permission). The council is the first respondent. g h

[2] It is not disputed that the planning permission relates to 'EIA development' within the meaning of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, SI 1999/293 (the EIA regulations), nor is it disputed that, as the EIA regulations require, the council, before granting the planning permission, first took into consideration the relevant environmental information. What is in dispute, however, is whether two other requirements of the regulations were complied with—one, indeed, it is acknowledged was not—and the first part of the appellants' challenge centres, therefore, on these. j

[3] A second and quite distinct basis of challenge rests upon the first appellant's contention that he was unlawfully excluded from the June meeting in breach of the

a Secretary of State's model code of conduct. The Secretary of State is the second respondent and concerned solely with this second part of the case.

[4] The appeal comes before us by permission of the judge below, a permission granted in these terms:

b 'The case raises issues of some importance concerning the EIA regime and the working of local democracy that in my view provide a compelling reason why an appeal should be heard.'

c Richards J appears there to have had in mind CPR 52.3(6)(b), rather than to have thought that an appeal would have 'a real prospect of success'. Be that as it may, the issues arising, in particular perhaps the true construction and application of the model code, are certainly of sufficient importance to have justified an appeal hearing.

d [5] Richards J's judgment, let me say at once, is masterly, both thorough and concise, a model of clarity, impeccably laid out. It provides the soundest possible foundation for our consideration of the issues now arising and it would be an absurd waste of effort, both on his part and ours, were we not to incorporate much of it into our own judgments. A good deal of the exposition and analysis that follows is therefore gratefully taken from the judgment below. Yet more detail can be found by direct reference to it.

GENERAL BACKGROUND

e [6] The planning permission under challenge was granted to Brown & Potter Ltd, the interested party, for the extension of quarrying of sand and gravel at Ripon City Quarry, a site falling within the boundary of three parishes, including the parish of Littlethorpe. The first appellant, Paul Richardson, is a member of the council, living in Littlethorpe and representing the electoral division which includes it. His house is approximately 250m from the nearest point of the proposed extraction. He objected to the new development both in his capacity as the elected representative of the inhabitants of Littlethorpe and in his personal capacity. Although a member of the council, he is not and was not a member of the planning committee.

f [7] The second appellant, Wendy Orme, likewise lives in Littlethorpe. She objected to the proposed development as a member of Littlethorpe parish council.

g [8] As stated, the planning committee, by a majority of five to four, resolved at the June meeting that, subject to the completion of a satisfactory s 106 agreement, planning permission be granted subject to conditions. The s 106 agreement was signed on 6 August 2002 and the notice of decision in respect of the grant of planning permission was issued that day.

h THE EIA ISSUES: LEGAL FRAMEWORK

j [9] The EIA regulations implement Council Directive (EEC) 85/337 (on the assessment of the effects of certain public and private projects on the environment) (OJ 1985 L175 p 40) (the directive), as amended by Council Directive (EC) 97/11 (OJ 1997 C95 p 31). The general principle of the directive, as set out in the recital quoted in *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897 at 901, [2001] 2 AC 603 at 609, is:

'Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on

the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question ...'

[10] The primary obligation imposed on member states, by art 2(1) of the directive, is to—

'adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects.'

[11] Article 2(2) provides that the environmental impact assessment may be integrated into the existing planning procedures in the member states.

[12] Article 9(1) provides:

'When a decision [to grant or refuse development consent] has been taken, the competent authority or authorities shall inform the public concerned of:

- the content of the decision and any conditions attached thereto,
- the reasons and considerations on which the decision is based ...'

[13] As regards the implementing EIA regulations, reference should be made first to reg 3(2), which provides:

'The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, *and they shall state in their decision that they have done so.*' (My emphasis.)

[14] The 'environmental information' is defined in reg 2(1) as—

'the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development ...'

The 'environmental statement' is defined as a statement that includes the information specified in Pts I and II of Sch 4.

[15] Regulation 21(1) provides:

'Where an EIA application is determined by a local planning authority, the authority shall ... (c) *make available for public inspection* at the place where the appropriate register (or relevant section of that register) is kept *a statement containing—*(i) the content of the decision and any conditions attached thereto; (ii) *the main reasons and considerations on which the decision is based*; and (iii) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects of the development.' (My emphases.)

[16] It is common ground that the application for the proposed development in this case was an 'EIA application' and that regs 3(2) and 21(1) both applied to it. An environmental statement was submitted with the application. It is to be noted that the appellants were refused permission to challenge the planning permission on the ground that the environmental information was inadequate. Permission was likewise refused for a challenge on the ground that the council failed to take the environmental information into consideration or reached an irrational conclusion on the information before it.

a [17] The areas of dispute concern the application of those parts of regs 3(2) and 21(1) italicised above, namely, first, the duty on the council to state in its decision that it had taken the environmental information into consideration and, secondly, its duty to make available for public inspection a statement containing the main reasons and considerations on which the decision was based.

b THE FACTS RELEVANT TO THE EIA ISSUES

[18] Previously to the June meeting the members of the planning committee had received an officers' preliminary report and had made a site visit, at which they also received briefing material. At the June meeting they had before them a full report by the council's director of environmental services in which he summarised the proposal, the background to it and the results of consultation, identified c relevant policies and discussed the main planning considerations. He reached a conclusion favourable to the proposal and recommended the grant of planning permission subject to conditions and to the completion of a s 106 agreement.

[19] Having considered the director's report and a number of oral presentations the majority of the members then adopted a resolution which was minuted as d follows:

'That, subject to the completion of a Section 106 Agreement requiring an extended aftercare period, a Management Plan, the establishment of a Management/Steering Group to oversee restoration and aftercare and a scheme of survey, monitoring and migration of [sic—ie mitigation for] species e protected under the Conservation (Natural Habitats etc) Regulations 1994, planning permission be granted subject to the conditions as recommended and to the addition of a further condition requiring the phased working and restoration of the site.'

f [20] On 6 August 2002, after completion of the s 106 agreement, the council issued a 'notice of decision' under the signature of the director of environmental services addressed to the developer, stating:

'The above-named Council being the Planning Authority for the purposes of your application dated 11 February 2002, in respect of proposed development g for the purposes of the extraction of sand and gravel at Ripon City Quarry have considered your said application and have granted permission for the proposed development subject to the following conditions:—

(See attached sheets)

NOTE:

h In accordance with Article 22(2) of the Town and Country Planning (General Development Procedure) Order 1995 notice is hereby given that the County Council in determining the above application has taken into consideration the accompanying environmental information. Furthermore the County Council in determining the application has taken into consideration the policies of the North Yorkshire Mineral Local Plan adopted j 1997 and all other material considerations as set out in the report to the Planning and Regulatory Functions Committee on 11 June 2002.'

[21] The 'attached sheets' included the conditions, the signed s 106 agreement and various documents annexed to the s 106 agreement (including a restoration management plan and documents relating to survey, monitoring and mitigation measures in respect of protected species).

[22] The notice of decision and the attached documents were entered on the register maintained by the council pursuant to art 25 of the Town and Country Planning (General Development Procedure) Order 1995, SI 1995/419 (the GDPO 1995). a

[23] In evidence filed in the course of the proceedings the council's head of minerals and waste planning stated that the council intended, subject to the proceedings, to place on the register a further document in substitution for the notice dated 6 August 2002, intended in particular to include a statement of the main reasons for the decision. What was proposed reads as follows: b

'The above named Council, being the Planning Authority for the purposes of your application dated 11 February 2002, in respect of proposed development for the purposes of the extraction of sand and gravel at Ripon City Quarry have considered your said application and, for the reasons set out in the attached sheets, have granted permission for the proposed development subject to the following conditions:— c

(See attached sheets)

NOTE:

In accordance with Article 22(2) of the Town and Country Planning (General Development Procedure) Order 1995 and Article 3(2) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ("EIA Regulations") notice is hereby given that the County Council in determining the above application has taken into consideration the environmental statement and environmental information (as defined by the EIA Regulations). The main considerations on which the decision was based were the policies of the North Yorkshire Mineral Local Plan adopted in 1997 and all other material considerations as set out in the report to the Planning and Regulatory Functions Committee on 11 June 2002 (attached hereto). The main reasons for the decision were as follows: (1) agreement with the report to the Planning and Regulatory Functions Committee on 11 June 2002 (attached hereto) and the conclusion at paragraph 7.9 thereof; (2) the development constituted an acceptable extension to existing working which would satisfy a local market for aggregates; (3) the development would allow for the continuation of working at a well-run and well-maintained site where a good standard of restoration has been achieved; (4) there would be no permanent scar to the landscape, a good standard of restoration has been proposed is proposed [sic] and the development would bring significant benefits in terms of site restoration for nature conservation purposes; (5) the development site is at an acceptable distance from the nearest residential properties and would not cause undue disturbance to the amenity of local residents; (6) minerals can only be worked where they exist in the ground; (7) existing jobs in this local business would be protected; (8) the requisite monitoring of conditions could be carried out; (9) there is a need for sand and gravel in the locality which would not be met by the local market if this permission were not granted.' d
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[24] The 'main reasons' set out in that notice are a composite based on information provided by the individual members who voted in favour of the resolution. According to the evidence, they were all 'motivated by factors referred to in the [director's] report or in public session' and each of them has also given his 'particular reasons' for voting for the resolution. The particular reasons given are consistent with those in the proposed substitute notice, but no individual member j

a refers to all the reasons set out in the notice. For example, the particular reasons given by one member correspond to (2), part of (4) and part of (5); those given by another correspond to part of (3) and to (5) and (6); whilst those given by a third correspond to part of (4), part of (5) and to (7), (8) and (9). None of the particular reasons given by members refers in terms to (1), ie agreement with the director's report.

b THE REG 3(2) ISSUE

[25] The appellants contend that the council breached the second of reg 3(2)'s two stipulations, namely that 'they shall state in their decision that they have done so' (ie have 'first taken the environmental information into consideration' before granting planning permission). Mr McCracken QC on their behalf advances two alternative arguments to this effect. First, he submits that the council's 'decision' c for this purpose was the resolution at the June meeting rather than the August permission—in which event, of course, the argument succeeds since the minute of the resolution (see [19], above) plainly contained no statement that the environmental information had been considered. Secondly, he submits, even if the 'decision' was the August permission, the notice of that decision (see [20], above) d itself failed to satisfy the requirement. Richards J below rejected each of these arguments ([2003] All ER (D) 268 (Apr)):

[31] In my judgment the relevant "decision" for the purposes of reg 3(2) was not the resolution dated 11 June 2002 but the notice of decision dated 11 August 2002, which constituted the actual grant of planning permission. (i) As e a matter of domestic law, a resolution to grant planning permission has no immediate legal effect. A local planning authority is required to give an applicant written notice of its decision within the time laid down by art 20 of the GDPO 1995 and containing the details specified in art 22 of the same order. The grant of planning permission is made only when the written notice is f issued by a duly authorised officer of the authority. There is no effective planning permission unless and until the written notice is issued to the applicant: see *R v Yeovil BC, ex p Trustees of Elim Pentecostal Church, Yeovil* (1971) 23 P & CR 39 at 44–45. (ii) The same point lies at the heart of the decision of the House of Lords in *R (on the application of Burkett) v Hammersmith and Fulham London BC* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593, in which it g was held that time for bringing an application for judicial review runs from the grant of planning permission, not from the date of the resolution to grant it. An important part of the reasoning was that until the actual grant of planning permission the resolution has no legal effect and the authority has a discretion to revoke it (see e.g. [2002] 3 All ER 97 at [39] per Lord Steyn). (iii) The general h principle of the directive is that "development consent" should be granted only after prior assessment of the likely environmental effects. One would expect the "development consent" for present purposes to be the actual grant of planning permission which authorises the relevant development, rather than a resolution which in itself has no legal effect. (iv) The EIA regulations tie the assessment requirements into existing planning procedures, as permitted by j art 2(2) of the directive. The GDPO 1995 forms part of those planning procedures. Regulation 3(1), which provides that the regulation applies to EIA applications received on or after a certain date, refers expressly to the GDPO 1995, stating that the date of receipt of an application is to be determined in accordance with art 20(3) of the order. (v) Against that background the natural and in my view correct interpretation of reg 3(2) is that

it is concerned with the issue of the written notice of decision referred to in arts 20 and 22 of the GDPO 1995. That constitutes the "grant" of planning permission which must not be made unless the authority has first taken the environmental information into consideration; and that is the "decision" in which the relevant statement must be made. a

[32] The next question is whether the notice of decision issued on 6 August 2002 complied with the requirement to state that the council had taken the environmental information into consideration. In my judgment it did, for these reasons. (i) The notice included a "Note", which formed part of the notice, stating that "in accordance with Article 22(2) of [the GDPO 1995] notice is hereby given" that the council had taken into consideration "the accompanying environmental information". (ii) Article 22(2) of the GDPO 1995 provides: b

"Where—(a) the applicant for planning permission has submitted an environmental statement; and (b) the local planning authority have decided (having taken environmental information into consideration) to grant permission (whether unconditionally or subject to conditions), the notice given to the applicant in accordance with article 20(1) shall include a statement that environmental information has been taken into consideration by the authority." c

(iii) Article 1(2) of the same order defines "environmental information" as having the same meaning as in reg 2 of the 1988 predecessor to the EIA regulations, which is materially identical to the definition in reg 2(1) of the EIA regulations themselves. (iv) It seems to me that art 22(2) of the GDPO 1995 is aimed at achieving the same result as is required by the relevant part of reg 3(2) of the EIA regulations, ie a statement in the notice of decision that the environmental information has been taken into account. Counsel did not provide me with any details of the legislative history, but it appears that the requirement to include such a statement in the decision was introduced into the EIA regime in 1994, by para 3 of the Schedule to the Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994, SI 1994/677. Given the integration of EIA procedures into the general planning regime, art 22(2) of the GDPO 1995 should in my view be read as consonant with that requirement. There is no material difference between the reference to "environmental information" in art 22(2) of the GDPO 1995 and the reference to "*the* environmental information" in reg 3(2) of the EIA regulations. (v) The relevant part of the Note in the notice of decision was evidently directed towards compliance with the requirement to state in the decision that the environmental information had been taken into account. It refers to the "accompanying" environmental information rather than simply to environmental information. That was plainly apt to include the environmental statement submitted with the planning application, but if narrowly construed might not cover representations made by other persons about the environmental effects of the proposed development. In my view, however, a narrow construction is inappropriate. Taking into account the statutory and factual context, I would construe the Note as referring to the environmental information as defined in the GDPO 1995 and (by cross-reference) in the EIA regulations. (vi) On that basis I conclude that the council did comply with the requirement in reg 3(2) to state in the decision that it had taken the environmental information into consideration. It would certainly have been better to express it along the lines of the proposed d
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- a substitute notice of decision (“the County Council in determining the application has taken into consideration the environmental statement and environmental information (as defined by the EIA regulations)”), but the actual wording was good enough for the purpose.’

Mr McCracken takes issue with the judge’s conclusions in both those paragraphs.

b THE DECISION

- [26] As to [31], Mr McCracken criticises in particular the judge’s reliance on *R (on the application of Burkett) v Hammersmith and Fulham London BC* [2002] UKHL 23, [2002] 3 All ER 97, [2002] 1 WLR 1593 which, he suggests, the judge clearly misunderstood. It was wrong, he submits, to conclude from *Burkett*’s case that ‘the resolution has no legal effect’; on the contrary, he says, it confers immediate authority on the council’s officers under their delegated powers to issue the decision notice (subject only to whatever conditions are imposed and, as here, the completion of a satisfactory s 106 agreement). Moreover, as Lord Steyn himself noted ([2002] 3 All ER 97 at [42]): ‘The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption.’

- d [27] So far as it goes I am inclined to accept Mr McCracken’s criticism of the judge’s statement (at [31]) that ‘the resolution has no legal effect’. But I do not think it goes very far. The real point, and this surely is the point the judge was intent on making, is that domestic law for all purposes provides for but a single decision on the question of development permission, that being the actual grant of planning permission itself. That has been the consistent view taken by the courts throughout the jurisprudence. Most recently it was this court’s conclusion in *R (on the application of Barker) v Bromley London BC* [2001] EWCA Civ 1766, [2001] All ER (D) 361 (Nov) where the question arose in the context of an outline planning permission granted subject to the approval of reserved matters. True it is that the House of Lords in June 2003 gave leave to appeal in that case so as to refer a number of questions to the Court of Justice of the European Communities. Meantime, however, we are bound by the Court of Appeal’s decision, and in any event the present case is a fortiori to it.

- f [28] I am, in short, in full agreement with the conclusions reached on this point by the judge below.

g THE AUGUST PERMISSION

- [29] The note at the foot of the August notice stated that the council ‘has taken into consideration the accompanying environmental information’ (see [20], above). Mr McCracken contrasts this with the proposed substitute note stating that the council ‘has taken into consideration the environmental statement and environmental information (as defined by the EIA Regulations)’, and which in addition refers, as the original note did not, to reg 3(2) itself (see [23], above). The former note, submits Mr McCracken, is deficient in failing to define what was meant by ‘environmental information’. There was, he submits, nothing to suggest that the term was being used in its technical sense and no basis, therefore, for reading it as if it complied with the regulation. Again I find myself in full agreement with the judge’s reasoning ([2003] All ER (D) 268 (Apr) at [32]) and venture to add only one observation. Given, as already stated, that no dispute now arises as to the council in fact having properly taken into consideration all the relevant environmental information, it seems to me impossible to impugn the performance of the remaining secondary limb of reg 3(2), namely that the council *state* that they

have taken the environmental information into consideration, when, as here, they adopted for the purpose of such statement the very language which the regulation calls for. a

[30] I should notice at this point the judge's further conclusion (expressed in his judgment (at [33]), which I have not thought it necessary to set out) that, even had he formed the view that the council had failed to comply with the second limb of reg 3(2), he would not in any event have regarded that as a sufficient reason to b quash the grant of planning permission in the exercise of his discretion. Despite the appellants' submissions to the contrary, I believe the judge was perfectly entitled to reach this conclusion also. I find his reasoning on the point compelling and think it unnecessary to add to it. I would accordingly have rejected the reg 3(2) ground of appeal for this reason even if I had not already rejected it for others. c

THE REG 21(1) ISSUE

[31] The judge below concluded—and before us the respondents have not disputed—that there was a clear failure by the council to comply with the requirement under reg 21(1) to make available for public inspection, at the place where the appropriate register is kept, a statement containing the main reasons on d which the decision was based. As stated in [2003] All ER (D) 268 (Apr) at [46]:

'(v) The notice of decision dated 6 August 2002 did not contain a statement of the main reasons on which the decision was based. It set out the terms of the decision and attached the conditions to which the permission was subject, together with the s 106 agreement and its annexes relating to mitigation measures and the like. By the oblique reference, in the note, to the report of the Director of Environmental Services which the members of the planning committee had before them, it referred to the considerations taken into account. But it did not contain a sufficiently specific statement of the main reasons for the decision to achieve compliance with reg 21(1)(c)(ii). Nor was there any separate statement of reasons.' e
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[32] The critical question then arising was what the consequences of that failure should be. The appellants were contending that the council's attempt at retrospective validation was too late and should in any event be rejected. There was, they submitted, no support in the minutes of the June meeting for the process of reasoning set out in the proposed substitute notice of decision and they suggested g that the whole process was rendered unreliable by the ongoing process of litigation. They argued that the failure rendered the decision to grant planning permission *ultra vires* and/or that having regard to *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897, [2001] 2 AC 603 the court had no alternative but to quash it and no discretion to withhold relief. Mr Straker QC's submission for the council was h that common sense required reasons now to be given rather than that the grant of planning permission be set aside for a failure to state them earlier. This particularly was so given that it was not until the hearing of the appellants' renewed application for permission to move for judicial review before Collins J on 20 January 2003 that j the appellants for the first time sought to advance a reasoned challenge under reg 21(1), at which point the council for its part speedily sought to repair the omission.

[33] The judgment below contains the most detailed and illuminating review of the many cases down the years which have considered what consequences should attend failures on the part of decision-making bodies to comply with the requirement to give reasons imposed upon them in varying contexts. I shall not

a repeat that review but rather proceed to the judge's cogently expressed conclusions reached in the light of it ([2003] All ER (D) 268 (Apr)):

b [47] The consequences of a failure to comply with a requirement to give reasons depend very much on statutory context and the particular circumstances of the case. The authorities cited by counsel cover a range of different situations. In evaluating them it is also important to bear in mind that there has been, as it seems to me, a tendency in recent years to adopt a stricter approach to the requirement to give reasons and to be readier to quash a decision for failure to give reasons and less ready to allow a deficiency of reasons to be cured by the provision of reasons or supplemental reasons at a later stage.

c [48] The closest decision in point of subject matter, though furthest away in point of time (and divorced from the context of an EC directive), is *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 1 All ER 149, [1964] 2 QB 303, where it was held that a failure to comply with the duty to give reasons for the imposition of a planning condition did not invalidate the condition (let alone the planning permission) and the duty could be enforced by mandamus. At the other end of the spectrum, *R v Westminster CC, ex p Ermakov* [1996] 2 All ER 302 provides an example of a case, more recent and in a different statutory context, in which a decision was quashed for a failure to comply with the duty to give adequate reasons at the same time as the decision, and the court adopted a restrictive approach to the admissibility of later reasons. *Flannery v Halifax Estate Agencies Ltd* [2000] 1 All ER 373, [2000] 1 WLR 377 was concerned with a different context again, namely the duty of a trial judge to give reasons for his decision. In that area a more up-to-date and detailed analysis is to be found in *English v Emery Reimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (t/a Freightmaster Commercials) v Comr of Police of the Metropolis* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409, which was not cited by counsel but which makes it clear (at [22]–[25]) that it may be appropriate in certain circumstances to remit the case to the trial judge for the provision of additional reasons. Although these and the other cases to which I have been referred provide general guidance, they do not lay down a principle that is determinative of the present case. There is no substitute for a careful examination of the particular statutory context and the precise nature of the requirement to state reasons in each case.

g [49] As to that, the first and most important point in the present case is that reg 21(1) looks to the position *after* the grant of planning permission. It is concerned with making information available to the public as to what has been decided and why it has been decided, rather than laying down requirements for the decision-making process itself. It implements the obligation in art 9(1) of the directive to make information available to the public “when a decision ... has been taken” (my emphasis). That is to be contrasted with art 2(1) of the directive, which lays down requirements as to what must be done before the grant of planning permission (which may be granted only after a prior assessment of significant environmental effects).

j [50] The fact that the requirement focuses on the availability of information for public inspection after the decision has been made, rather than on the decision-making process, leads me to the view that a breach of reg 21(1) ought not to lead necessarily to the quashing of the decision itself. A breach should be capable in principle of being remedied, and the legislative purpose achieved,

by a mandatory order requiring the authority to make available a statement at the place, and containing the information, specified in the regulation. a

[51] Thus, to take a straightforward example, if the members of the committee had agreed in terms at their meeting on a specific statement of the main reasons for the grant of planning permission but the officers had failed to include that statement on the register, a mandatory order requiring the statement to be placed on the register (or, perhaps more accurately, requiring it to be made available for public inspection at the place where the register is kept) would plainly be the appropriate remedy. b

[52] The difficulties in this case arise out of the fact that there was no such agreement. The need to make a statement of main reasons available for public inspection appears to have been overlooked by the officers, so that members were not advised about it. That was a most unfortunate oversight. It meant that members did not have imposed upon them the same disciplined and structured approach as might have been thought appropriate had they been aware of the duty to make a statement of main reasons available. It also meant that they missed the opportunity to agree in terms on a specific set of reasons. The most obvious way in which that might have been done was by expressing agreement with the reasoning in the director's report, subject to any agreed departures from or additions to that reasoning. c
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[53] The resulting situation is very unsatisfactory. I have reached the conclusion, however, that it is still capable of being remedied by a mandatory order and that what has happened does not justify the quashing of the grant of planning permission. My reasons are as follows: (i) Although it is necessary to view with caution any subsequent statement of reasons for a decision, especially where the reasons have not been articulated until many months after the decision, I do not think that the exercise of obtaining reasons *ex post* from the individual members who voted for the resolution is inherently flawed or of such doubtful reliability that the evidence should be rejected. All that the individual members have been asked to do is to cast their minds back to the reasons that actually motivated them to vote for the grant of planning permission. There is no suggestion that they have had any difficulties of recollection. In my view there is nothing in the nature of the exercise or in the evidence obtained to cause concern that the answers might have been distorted by the existence of these proceedings or other extraneous considerations. The process does not involve changing a decision or reconsidering it or anything of that kind. This is a very different exercise from that found unacceptable in *R (on the application of Carlton-Conway) v Harrow London BC* [2002] EWCA Civ 927, [2002] All ER (D) 79 (Jun) or in *R (on the application of Goodman) v Lewisham London BC* [2003] EWCA Civ 140, (2003) 2 P & CR 262. In both those cases the councils had engaged in a later decision-making process and there was an understandable concern that that might be vitiated by a wish to sustain a former invalid decision. In this case it is simply a matter of being satisfied that the reasons now put forward were the actual reasons that motivated the decision-makers at the time. (ii) On the face of it, a greater difficulty is created by the fact that, although all the members were "motivated by factors referred to in the report or in public session", each of them has given a different set of "particular reasons" for voting for the resolution and those "particular reasons" do not of themselves provide a sufficiently reasoned basis for a departure from the development plan and the grant of planning permission. (iii) It requires only a limited degree of e
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a beneficence, however, to read the evidence as meaning that all the members
 accepted the reasoning and conclusion in the director's report but each
 attached particular significance to the "particular reasons" that they have
 identified. If the evidence is read in that way, everything seems to me to fall
 into place and a reasoned basis for the decision is immediately provided. That
 is evidently how the author of the proposed substitute notice understood the
 information being provided by the individual members, since the first reason
 expressed in that notice, though not mentioned as a "particular reason" by any
 of the members, is "agreement with the [director's] report ... and the
 conclusion at paragraph 7.9 thereof". All of the "particular reasons" are
 consistent with the reasoning in the director's report. All but one (namely (9),
 the need for sand and gravel in the locality) are clearly reflected in that
 reasoning. The tenor of the resolution and original notice of decision also
 support the view that the director's report was accepted, though I recognise
 that they do not say so in terms. Taking all those matters into account, I have
 reached the view that the evidence should be read in the way I have indicated.
 (iv) On that basis the substitute notice of decision and its attached documents
 (including the director's report) would contain an entirely satisfactory
 statement of the main reasons for the decision, and the placing of that material
 on the register would remedy the breach of reg 21(1). There would be no
 problem with the decision to grant planning permission: I have already
 covered the point that the members took the environmental information into
 consideration and reached a rational conclusion on the information before
 them, and the statement of reasons would give rise to no separate cause for
 concern about the lawfulness of the decision reached. (v) It might be possible
 to refrain from making any order at all, on the basis that the council has
 informed the court of its intention to place the substitute notice of decision on
 the register. In my view, however, the right course is to grant a mandatory
 order requiring the council to follow that course. That will ensure compliance
 with reg 21(1) and will thereby also ensure compliance with the obligation
 imposed by art 9(1) of the directive. No question of the discretionary
 withholding of relief arises.'

g [34] Mr McCracken criticises not only the judge's central conclusion that the
 placing on the register of the substitute notice of decision will remedy the breach of
 reg 21(1), but also his view (at [53](iv)) that the proposed substitute notice contains
 'an entirely satisfactory statement of the main reasons for the decision'.

h [35] Let me dispose first of this second point which I can deal with quite shortly.
 It focuses, of course, principally on para [53](iii) of the judgment below which
 Mr McCracken submits involves impermissibly ascribing to the majority of the
 planning committee the detailed reasoning contained in the director's report.
 Paragraph [24], above describes the factual background to the judge's conclusion
 that the evidence can be read as meaning that all five members who voted for the
 resolution accepted the report's reasoning. Mr McCracken, however, disputes the
 judge's entitlement to draw that inference: being 'motivated by factors' in the
 report, he submits, is not the same as and falls short of the adoption of those factors,
 still less of all of them or of the officer's reasoning. For my part I find this
 submission unpersuasive. As Sullivan J remarked in *R v Mendip DC, ex p Fabre* (2000)
 80 P & CR 500 at 511, a case where, as here, the committee accepted the officer's
 recommendation:

‘... one is concerned with the members’ reasons not the planning officer’s, but where a planning officer makes a recommendation which is followed by the members’, the reasonable inference is that the members did so for the reasons advanced by the officer, unless of course there is some indication to the contrary.’

[36] Mr McCracken submits that there was indeed here an ‘indication to the contrary’ namely the ‘particular reasons’ given by each of the five who voted for the resolution. I cannot, however, accept this: the ‘particular reasons’ which each gave seem to me self-evidently to have been those particular considerations upon which they as individuals chose to place the greatest weight. In some cases they went to matters about which the individual members had been especially concerned and required specific reassurance, in others they went to what the individual members thought represented the most telling of the reasons for permitting this departure from the development plan.

[37] All that said, it would plainly have been easier and in the event better had each of the five members voting for this resolution—given, as I believe to be the case, that each of them did indeed endorse the reasoning in the director’s report which recommended it—simply resolved to do so, something which Mr McCracken concedes could have been lawfully done. In this connection it is worth noting what is said at para 127 of Circular No 2/99 *Environmental Impact Assessment*:

‘The requirement to make available the main reasons and considerations on which the decision is based now applies equally to cases where planning permission is granted and where it is refused. In practice, authorities may find that this requirement is met by the relevant planning officer’s report to the planning committee.’

[38] I turn, therefore, to the appellants’ main criticism of this part of the judgment, Mr McCracken’s argument that, in a case falling as this one does within the scope of the directive, the court is simply not permitted to regard a breach of the implementing regulations as curable other than by the outright quashing of the development permission granted. Mr McCracken not surprisingly emphasises certain features of the judgment below: the judge’s recognition that the need to make a statement of reasons appears to have been overlooked by the council’s officers so that the members of the planning committee were not advised of it; that this ‘most unfortunate oversight ... meant that members did not have imposed upon them the same disciplined and structured approach as might have been thought appropriate had they been aware of the duty to make a statement of main reasons available’, the resulting situation being ‘very unsatisfactory’ (see [2003] All ER (D) 268 (Apr) at [52], [53]). These, of course, are powerful considerations. But are they such as to compel the court to quash the permission itself? In common with the judge below I conclude not. The critical part of the judge’s reasoning I conceive to be that expressed at [49], namely that—

‘reg 21(1) looks to the position *after* the grant of planning permission. It is concerned with making information available to the public as to what has been decided and why it has been decided, rather than laying down requirements for the decision-making process itself.’

[39] Mr McCracken submits that an irresistible inference arises from the requirement to give reasons following an EIA decision that at the time the decision

is taken those reasons must be openly discussed and formulated in public. Whenever there is a legislative requirement for reasons, he argues, there are necessarily twin objects to be served. One is to enable those aggrieved by the decision to challenge it if its reasoning can be seen to be deficient. The other is to improve the quality of decision-making. Often, of course, that will be so. But to contend that it is invariably so seems to me extravagant: the requirement for 'the main reasons and considerations on which the decision is based' to be made available to the public—after, it should be noted, the decision 'has been taken'—was first introduced by the amending Council Directive (EC) 97/11. To suggest that there then suddenly arose a duty upon planning committees to discuss their detailed reasoning in public I find absurd. As Mr Straker points out, an EIA planning application can on occasion be decided by a council officer under his delegated powers when, of course, there would be no public hearing at all. In any event it seems to me plain that the particular requirement for reasons imposed upon planning authorities here was to inform the public retrospectively of the basis for the decision rather than to dictate the course or even quality of the decision-making process itself. Be it noted that the recital quoted in *Berkeley v Secretary of State for the Environment* [2000] 3 All ER 897, [2001] 2 AC 603 (set out in [9], above) was from the *unamended* directive (Council Directive (EEC) 85/337), when therefore, there was no requirement for reasons to be stated. Yet the directive already contemplated its central purpose being achieved irrespective of whether reasons were or were not to be given. Nor, of course, is this the only context in which the law regards it as acceptable to formulate and state the reasons for a decision subsequent to the decision itself. Courts on occasion follow this practice (for example announcing a decision for reasons to be given later, or, following *English v Emery Reimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd, Verrechia (t/a Freightmaster Commercials) v Comr of Police of the Metropolis* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409, requiring additional reasons to be stated by the judge below). So too do certain tribunals—employment tribunals, for example, under the provisions of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171. So too, in my experience, do various other public bodies.

[40] Mr McCracken's argument places great weight upon the decision in *Berkeley's* case. He draws particular attention to what Lord Hoffmann said there in relation to the requirement for an EIA ([2000] 3 All ER 897 at 907, 909, [2001] 2 AC 603 at 616, 617):

'Although s 288(5)(b) [of the Town and Country Planning Act 1990], in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the directive. To do so would seem to conflict with the duty of the court under art 5 of the EC Treaty (now art 10 EC) to ensure fulfilment of the United Kingdom's obligations under the Treaty. In classifying a failure to conduct a requisite EIA for the purposes of s 288 as not merely non-compliance with a relevant requirement but as rendering the grant of permission ultra vires, the legislature was intending to confine any discretion within the narrowest possible bounds ... In the present case the directive had been transposed into domestic legislation and there was a failure to comply with the terms of that legislation. In my view, a court should not ordinarily be willing

to validate such an act on the ground that a different form of transposing legislation ... might possibly have also satisfied the terms of the directive. I would accept that if there was a failure to observe some procedural step which was clearly superfluous to the requirements of the directive, it would be possible to exercise the discretion not to quash the permission without any infringement of our obligations under European law. But that is not the case here.'

[41] Mr McCracken submits that the breach of reg 21(1) cannot possibly be characterised merely as 'a failure to observe some procedural step which was clearly superfluous to the requirements of the directive', such as alone Lord Hoffmann appears to have contemplated could properly escape the extreme sanction of the permission being quashed. The flagrant breach of reg 21(1) here, he points out, was something quite different from the scenario postulated in Richards J's judgment (at [51]) (as set out at [33], above). A venial error of that nature, he accepts, could well be excused as falling within Lord Hoffmann's exception to the basic principle (akin, suggests Mr McCracken, to the operation of the slip rule). Not so a failure to recognise until long after the decision was taken that reasons needed to be given for it.

[42] This whole argument to my mind reads altogether too much into *Berkeley's* case. It is not necessary to go as far as Carnwath LJ recently went in *R (on the application of Jones) v Mansfield DC* [2003] EWCA Civ 1408, [2003] All ER (D) 277 (Oct) in suggesting the true reach of *Berkeley's* principle was narrow—a view which Mr McCracken suggests was both obiter and arrived at without argument—to conclude, as I do, that Richards J's reasoning and decision in the instant case sit perfectly comfortably alongside that authority.

[43] In short, I fully concur with the judgment below in respect of the entirety of the EIA-based part of this challenge and rather regret that, instead of simply saying so in the baldest terms, I have somewhat slavishly followed the convention of addressing at least the bulk of the arguments afresh.

[44] I turn then to the wholly distinct second basis of challenge, that resting upon the first appellant's contention that he was unlawfully excluded from the June meeting. Once again, my exposition of the relevant material will draw heavily upon the judgment below.

CODE OF CONDUCT: LEGISLATIVE FRAMEWORK

[45] The background to the model code can be found in a 1986 report, *Report of the Committee of Inquiry into the Conduct of Local Authority Business* (Cmnd 9797), by a committee chaired by Mr David Widdicombe QC (the Widdicombe report) and in a 1997 report, *Standards of Conduct in Local Government in England, Scotland and Wales* (Cmnd 3702-1), by the Committee on Standards in Public Life chaired by Lord Nolan (the Nolan report). I shall refer to certain passages in them when considering the specific issues.

[46] Part III of the Local Government Act 2000 provided a new statutory framework for governing the conduct of members and employees of local authorities. Section 49(1) provides that the Secretary of State 'may by order specify the principles which are to govern the conduct of members ... of relevant authorities in England ...' Section 50(1) empowers him by order to 'issue a model code as regards the conduct which is expected of members ... of relevant authorities in England ...' By s 50(4), a model code must be consistent with the principles specified in an order under s 49(1) and may include provisions which are mandatory and provisions which are optional.

a [47] In July 2000 the Secretary of State invited the Local Government Association to draw up proposals for a model code. Following an extensive consultation exercise, the association submitted a proposal in October 2000.

b [48] On 8 February 2001 the Department of the Environment, Transport, and the Regions issued a consultation paper, *A Model Code of Conduct for Members*, seeking views on the government's proposals on members' conduct that might be reflected in the model code. Copies of the consultation paper were sent to a wide range of local government bodies and others.

c [49] Having considered the consultation responses, the Secretary of State, in the exercise of powers under the 2000 Act, made the Local Authorities (Model Code of Conduct) (England) Order 2001, SI 2001/3575, which came into force on 27 November. The order contained two versions of the model code for local authorities. The relevant one for present purposes is the model code for authorities operating executive arrangements, which is contained in Sch 1 to the order (the model code). Article 2(2) of the order provided that all the provisions of the model code were mandatory.

d [50] In those circumstances the effect of s 51 of the 2000 Act was to impose a duty on the council to adopt a code of conduct incorporating the provisions of the model code. The council incorporated the model code into Pt 5 of its constitution as its code of conduct.

e [51] Article 2.04 of the council's constitution provides that 'Councillors will at all times observe the Members' Code of Conduct ... set out in Pt 5'. Pursuant to s 52(1) of the 2000 Act, councillors also had to give a written undertaking to comply with it.

f [52] Section 53(1) of the 2000 Act required relevant authorities to establish a standards committee. The functions of such committees are set out in s 54(1) and are: (i) to promote and maintain high standards of conduct by members of the authority, and (ii) to assist members of the authority to observe the code.

g Article 13.09 of the council's constitution set up a standards committee in those terms. The Relevant Authorities (Standards Committee) (Dispensations) Regulations 2002, SI 2002/339 (the dispensations regulations), also made by the Secretary of State in the exercise of powers under the 2000 Act, prescribe the circumstances in which a standards committee may grant dispensations to members of relevant authorities. By s 81(4) of the 2000 Act, the effect of a dispensation is to allow the participation by a member of the relevant authority in any business where it would otherwise amount to a breach of the code. Although the existence of the dispensation procedure is relevant by way of background (especially since the possibility of dispensation is referred to in para 12(1) of the model code), it is not suggested that any power of dispensation could have been

h exercised in the circumstances that arose in this case.

[53] The relevant provisions of the model code, and therefore, as explained above, of the council's own code of conduct, are as follows:

'PART 1

GENERAL PROVISIONS

Scope

1.—(1) A member must observe the authority's code of conduct whenever he—(a) conducts the business of the authority; (b) conducts the business of the

office to which he has been elected or appointed; or (c) acts as a representative of the authority, and references to a member's official capacity shall be construed accordingly. a

(2) An authority's code of conduct shall not, apart from paragraphs 4 and 5(a) below, have effect in relation to the activities of a member undertaken other than in an official capacity ...

General Obligations b

...

4. A member must not in his official capacity, or any other circumstance, conduct himself in a manner which could reasonably be regarded as bringing his office or authority into disrepute. c

5. A member—(a) must not in his official capacity, or any other circumstance, use his position as a member improperly to confer on or secure for himself or any other person, an advantage or disadvantage ...

PART 2 d

INTERESTS

Personal Interests

8.—(1) A member must regard himself as having a personal interest in any matter if the matter relates to an interest in respect of which notification must be given under paragraphs 14 and 15 below, or if a decision upon it might reasonably be regarded as affecting to a greater extent than other council tax payers, ratepayers, or inhabitants of the authority's area, the well-being or financial position of himself, a relative or a friend ... e

Disclosure of Personal Interests f

9.—(1) A member with a personal interest in a matter who attends a meeting of the authority at which the matter is considered must disclose to that meeting the existence and nature of that interest at the commencement of that consideration, or when the interest becomes apparent ... g

Prejudicial Interests

10.—(1) Subject to sub-paragraph (2) below, a member with a personal interest in a matter also has a prejudicial interest in that matter if the interest is one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest ... h

Overview and Scrutiny Committees

11.—(1) For the purposes of this Part, a member must if he is involved in the consideration of a matter at a meeting of an overview and scrutiny committee of the authority or a sub-committee of such a committee, regard himself as having a personal and a prejudicial interest if that consideration relates to a decision made, or action taken, by another of the authority's—(a) committees or sub-committees; or (b) joint committees or joint sub-committees, of which he may also be a member. j

(2) But sub-paragraph (1) above shall not apply if that member attends that meeting for the purpose of answering questions or otherwise giving evidence relating to that decision or action.

Participation in Relation to Disclosed Interests

12.—(1) Subject to sub-paragraph (2) below, a member with a prejudicial interest in any matter must—(a) withdraw from the room or chamber where a meeting is being held whenever it becomes apparent that the matter is being considered at that meeting, unless he has obtained a dispensation from the authority's standards committee; (b) not exercise executive functions in relation to that matter; and (c) not seek improperly to influence a decision about that matter.

(2) A member with a prejudicial interest may, unless that interest is of a financial nature, and unless it is an interest of the type described in paragraph 11 above, participate in a meeting of the authority's—(a) overview and scrutiny committees; and (b) joint or area committees, to the extent that such committees are not exercising functions of the authority or its executive.

13. For the purposes of this Part, "meeting" means any meeting of—(a) the authority; (b) the executive of the authority; or (c) any of the authority's or its executive's committees, sub-committees, joint committees, joint sub-committees, or area committees.

PART 3

THE REGISTER OF MEMBERS' INTERESTS

Registration of Financial and Other Interests

14. Within 28 days of the provisions of an authority's code of conduct being adopted or applied to that authority or within 28 days of his election or appointment to office (if that is later), a member must register his financial interests in the authority's register maintained under section 81(1) of the Local Government Act 2000 by providing written notification to the authority's monitoring officer of ... (f) the address or other description (sufficient to identify the location) of any land in which he has a beneficial interest and which is in the area of the authority ...

[54] In what follows I shall refer generally to 'the code'. Strictly speaking, however, in relation to what happened in practice it is the council's own code of conduct which is material; in relation to questions of construction, the identical issues arise both under the council's own code of conduct and under the model code; and in relation to questions of lawfulness, the focus of attention is the model code, since the council was required by statute to adopt the model code and the real question is whether the Secretary of State acted lawfully in promulgating the model code as part of the order made by him under his statutory powers.

FACTS RELEVANT TO THE CODE ISSUES

[55] These facts I propose to deal with substantially more shortly than appear in the judgment below. It is, I think, sufficient for present purposes to note three matters. First, Mr Richardson's typed statement which he read out at the commencement of the June meeting and which the judge accepted provided 'the

best evidence of the precise words he used before withdrawing from the meeting' ([2003] All ER (D) 268 (Apr) at [43]):

'The application before you, concerning Ripon City Quarry, lies partly within my division. I also live within and represent Littlethorpe community, and as such will be affected by the quarry, should the application be approved. I have been advised by the officers of the county council that, as such, I can neither speak nor be present in my capacity as councillor or as a citizen, despite the fact that I have no decision-making role on the planning committee. The rights of representation, by their chosen elected member, has been denied to the Littlethorpe community by government legislation, and my basic human right of freedom of speech, as a citizen has also been denied. I will leave the room as instructed, but give formal notice that I will further fight for the rights of the individual and unrepresented communities.'

[56] Secondly, I should note that following Mr Richardson's withdrawal, the director's report was presented by Mr Shaw, the council's head of minerals and waste planning. The members were then addressed by district councillor Galloway, Mr Roly Curtis (the chairman of Littlethorpe parish council), Mrs Orme and a representative of the developer. Those making representations were allowed three minutes each.

[57] Thirdly, it should be noted that, according to the council's minute of the meeting, a specific resolution was passed to extend a right of audience to Mr Galloway to address the meeting 'to represent the views of those affected by the development' in view of the fact that Mr Richardson was unable to represent the views of his constituents.

[58] Four questions arise on this part of the case. (i) Which 'member[s]', assuming that they have a prejudicial interest in a matter, are required by para 12(1) of the code to 'withdraw from the room or chamber where a meeting is being held [when] ... the matter is being considered at that meeting'? Is this requirement imposed on all members of the authority or only on those who are members of the committee holding the relevant meeting? (ii) Whatever be the answer to question (i), is a member, para 12 notwithstanding, entitled to attend such a meeting in his personal capacity as opposed to his representative capacity? (iii) Was Mr Richardson properly to be regarded as having a 'prejudicial interest' in the matter of this planning application? (iv) Did Mr Richardson indicate that, even were he not permitted to attend the June meeting in his representative capacity, he wished to attend in his personal capacity?

[59] I have formulated these questions in order of their importance rather than in the order followed below. Plainly the first two are of general importance and application; the third touches upon the correct approach to determining what amounts to a 'prejudicial interest'; the fourth is a narrow question turning on the individual facts of this case.

Issue (i)—what is the meaning of 'member' in para 12(1)?

[60] It is Mr McCracken's submission that para 12(1) refers only to members of the relevant committee and not to members of the authority generally. In rejecting this submission below, the judge concluded ([2003] All ER (D) 268 (Apr) at [102]), first, that 'the effect of the code on its ordinary and natural meaning' was that para 12 applies to *all* councillors and, secondly, that there is nothing in the background material to the code which could possibly justify departing from that natural and ordinary meaning. Once again it is convenient to set out the bulk of the

a judgment below on both points. As to the natural and ordinary meaning of the code, the judge said:

b '(i) I reject Mr McCracken's submission that attendance by a councillor at a meeting of a committee of which he is not a member falls outside the scope of the code. It seems to me that such attendance falls clearly within para 1(1). If a councillor attends a meeting of a committee of which he is a member, he is "conduct[ing] the business of the authority" within para 1(1)(a). If he attends a meeting of a committee of which he is *not* a member, he is "conduct[ing] the business of the office to which he has been elected" within para 1(1)(b). He is there as an elected councillor performing the functions of that office. That is well illustrated by the facts of this case. Mr Richardson's wish to attend the meeting as a councillor representing his electorate and giving the community a representative "voice" at the meeting was at the heart of his objection to withdrawing from the meeting (I deal later with the question of his attendance in a personal capacity as well). An additional consideration is that attendance by a councillor at *any* meeting of a committee of a council, whether or not he is a member of that committee, counts towards fulfilment of the minimum attendance requirement imposed on members by s85 of the Local Government Act 1972. (ii) The ordinary and natural reading of para 12 is that it applies to a member of the council, not just to a member of the relevant committee. Throughout the code, starting most obviously with para 1(1), the expression "a member" denotes a member of the council. Where a provision is limited to participation as a member of a particular committee, it is done so expressly, as in para 11(1) (which opens by a general reference to "a member", ie a member of the council, but then refers to decisions made or action taken by committees "of which he may also be a member"). There is no such limitation in para 12. On its face it lays down a rule applicable to any member of the council in relation to any meeting of the council or of any of its committees (see the wide definition of "meeting" in para 13).'

[61] As to the background material, the judge said:

g '[103] The background material provides some support for the view that the mischief at which the provision is aimed is the presence of a councillor in the room, whether or not he is a member of the relevant committee, though it is fair to say that the point does not seem to have been addressed in terms. Paragraphs 6.51–6.52 of the Widdicombe report deal as follows with the question of withdrawal from meetings, referring first to pecuniary interests and then to non-pecuniary interests:

h "6.51 At present there is no statutory requirement for someone who has declared an interest at a meeting to withdraw from the room ... We believe that this is wrong. By staying in the room, even though he or she may not speak or vote, a councillor might still influence the decision or might gather information which would help in the furtherance of his or her interest ... We propose that there should be a statutory requirement for councillors in all such instances to withdraw. Withdrawal should be from the room, not just to the space set aside for the public. There should be no option to invite councillors to stay, which could place their colleagues in an invidious position.

j 6.52 The 1975 Code ... currently requires councillors to treat non-pecuniary interests precisely as if they were pecuniary ones: that is to

say that the councillor should not only declare such interests but also abstain from voting and speaking (and, under our recommendation, withdraw from the room). We do not think this is right. Non-pecuniary interests will sometimes be substantial and clearly justify such disabilities. In other cases they will be much more distant ... The councillor should ... only be required to abstain from voting and speaking and, under our recommendation, to withdraw from the room, if the interest is a clear and substantial one.”

[104] It is true that, as Mr McCracken says, that recommendation does not deal in terms with the issue of a single member constituency and the problem of representation to which withdrawal in such circumstances may give rise. But other passages of the report show that the authors were well aware of, and attached value to, single member constituencies (see eg para 7.16); and in my view it is clear that they put forward their recommendation as one of general application.

[105] The Nolan report deals extensively with general principles of conduct for local councillors, including a lengthy discussion of conflicts of interest. Paragraph 82 refers to the complexity of the issues and the balancing exercise required:

“The issues are particularly complex in local government. Local authorities are multi-purpose bodies, involved in many different activities within a restricted geographical area. They are run by councillors, elected on a ward basis, whose task is to represent the interests of local people. Councillors are themselves local people, who are likely to have been actively involved in the local community before election, both in commercial and non-commercial activities, and who may be even more involved after election. Potential conflicts of interest are likely to occur frequently, and the public interest requires that a sensible balance should be struck between avoiding impropriety, and enabling councillors to fulfil the role for which they were elected.”

[106] Paragraphs 112ff deal specifically with public and private interests and bias, drawing the distinction between a situation in which a councillor or his family is no more affected than the generality of the community and a situation in which he or his family is particularly affected. For example, I have referred already [this is a reference to [84](iv) of Richards J’s judgment, now set out at [76], below], in the context of “prejudicial interests”, to the illustrative contrast drawn in para 118 between a case where a councillor’s home is one of a hundred households affected and a case where it is one of ten households affected. On the specific issue that I am now considering, however, I do not think that the Nolan report takes matters further.

[107] The Department of the Environment, Transport and the Regions’ consultation paper *A Model Code of Conduct for Members* (February 2001) contained the following passage under the general heading “Dealing with conflicts of interest”:

“4.17 Under the proposals put forward by the LGA, members would be required to withdraw from consideration of any matter in which they had a financial interest. The Government agrees that this is the right approach to such interests. In relation to non-financial interests, the LGA proposed that members should be required to declare such interests but (unless that interest related to a planning, licensing or grant application) should then be able to speak and vote. Where a member had a non-financial interest in

a relation to a planning, licensing or grant application, members should be able to speak, but not vote.

b 4.18 Ministers believe that, in relation to non-financial interests, these proposals tilt the balance too far in favour of member participation, at the expense of public confidence. The range of potential non-financial interests is very large, and some of these may be of greater significance than some financial interests. Nor are significant non-financial interests restricted solely to planning, licensing and grant-related matters. They may arise in any area of council activity. So the Government believes that a more restrictive approach is needed in relation to such interests. The approach proposed below reflects that view".

c [108] The draft of para 12 required a member with a prejudicial interest in any matter to "withdraw from a meeting wherever it becomes apparent that the matter is being considered". The evidence before the court is that responses to the consultation paper and subsequent discussions suggested that "withdraw from the meeting" was too vague, since it would allow a member to withdraw to the public gallery and use his or her presence there to put pressure on those taking part in the debate; and that there was considerable anecdotal evidence that this could cause problems. The paragraph was therefore amended so that the final version required a member to "withdraw from the room or chamber where the meeting is being held".

e [109] The consultation paper, together with the evidence concerning the amendment to the draft of para 12, shows the general mischief at which the provision is addressed and that a restrictive approach was intended. It does not show in terms that para 12 was intended to apply to withdrawal by any member of the council with a prejudicial interest, and not just by a member of the relevant committee. The general thrust of the material seems to me, however, to provide greater support for that view than for the contrary view.

f Again I take the point made by Mr McCracken that there was no express consideration of the effect on a single councillor constituency, but again it seems to me that the intention was to formulate a rule of general application.

g [110] Overall, I do not regard the background material as decisive, but there is nothing in it that could possibly justify my departing from what I have found to be the ordinary and natural meaning of the relevant provisions.'

[62] A little later in his judgment, dealing with Mr McCracken's submission that, thus construed, para 12(1) imposed an unnecessary and disproportionate restriction on members' ability to represent their constituents such as to make it unlawful to have promulgated a mandatory code in these terms, the judge said (at [111]):

h '(i) In my judgment the question at this stage is one of rationality, not proportionality. Despite the observations of Lord Slynn in *R (on the application of Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389, and of Sedley LJ in *R v Flintshire CC, ex p Armstrong-Braun* [2001] LGR 344 (who, in the context of that case, may in any event have had the convention in mind), proportionality has not yet displaced rationality as the relevant test in domestic law, though in practice the result will very often be the same. (ii) It was plainly rational for the Secretary of State to adopt a code that has the effect of requiring a councillor with a prejudicial interest to withdraw from a meeting of a committee even if he is not a member of that committee. In my view the principle of proportionality, if applicable, would also be satisfied. (iii) The

j

code reflects the outcome of a complex balancing exercise after extensive consultation and deliberation. There has been a sufficiently structured and articulated approach (to the use the language from *South Bucks DC v Porter*, *Chichester DC v Searle*, *Wrexham County BC v Berry* [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 AC 558 on which Mr McCracken relied). The Secretary of State has placed particular weight, as he was entitled to do, on the need to retain public trust and confidence in the operation of the system. This is expressed extremely clearly in the consultation paper: a

“4.3 The retention of public confidence is not so much a desirable goal, as a fundamental necessity. Without the public’s trust, an authority would quickly become discredited. So Ministers see the requirements of public probity as paramount. The system we design must, first and foremost, meet those requirements.” b

(iv) Although the presence of a councillor with a prejudicial interest may give rise to lesser public concern when he is a non-member of the relevant committee than when he is a member of the committee, a non-member is still able to exert influence by reason of his position as a councillor, and the risk that public confidence in the decision-making will be impaired is a real one. (v) To require the highest standards of behaviour in public life is properly viewed as promoting rather than offending the principles of local representative democracy. Moreover, as Mr Sales submitted, the principles of democracy do not require that any particular councillor sit on a council committee or attend or speak at a committee meeting. It is in the nature of council committees that they conduct business on behalf of the council without full participation by every member of the council. Nor is attendance by a councillor at a meeting the only way in which the interests of his constituency can be taken into account. In the present case, for example, the committee heard from a district councillor, the chairman of the parish council and a member of the parish council (the second claimant), as well as receiving written representations.’ c

[63] Mr McCracken challenges all those conclusions. First, he submits that in reaching them the judge took insufficient account of Sedley LJ’s judgment in *R v Flintshire CC, ex p Armstrong-Braun* [2001] LGR 344, both for its observation on proportionality and as having a wider relevance. In that case the council had made a standing order preventing a councillor from putting a matter on the agenda for discussion at a council meeting without being seconded by another council member. The Court of Appeal quashed the standing order. Schiemann LJ (at [37]–[38]) pointed out that councillors represent particular areas and that one of the ways in which they are intended to exercise their function is by raising matters in council. The standing order prevented them from doing that. Before such a standing order was made the matter should be given the most anxious consideration. The council had failed to consider ‘the full democratic implications’ of the course it had adopted. Sedley LJ likewise held (at [53]) that the standing order had been made without proper consideration and laid stress on the fact that ‘a councillor is elected as the representative of a territorial unit’ (see also [57]–[58]). d

[64] For my part I see no inconsistency between that decision and Richards J’s decision here. It is one thing to conclude, as the Court of Appeal did there, that the introduction of a measure designed merely to prevent time-wasting was too high a price to pay for the damage it might cause to local democracy; quite another to suggest that the Secretary of State has struck the wrong balance in the model code between, as para 4.2 of the consultation paper put it, the goals respectively of e

a '[r]etention of public trust in the member and the working of the authority' and '[m]aximising opportunities for members to contribute to the work of their authority'. As Richards J said ([2003] All ER (D) 268 (Apr) at [111](iii)): 'The Secretary of State has placed particular weight, as he was entitled to do, on the need to retain public trust and confidence in the operation of the system.'

b [65] Secondly, Mr McCracken submits that the judge erred in his approach to the natural and ordinary meaning of the word 'member' where it appears in para 12 of the code. The judge's analysis (at [102]) (see [60], above), submits Mr McCracken, misunderstands the point arising on para 11 of the code and in any event overlooks the significance of the dispensations regulations.

c [66] As to para 11, Mr McCracken points out that the word 'member' where last it appears in para 11(1), is clearly being used in the more limited sense for which he contends, namely as a member of a committee. So it is, of course, but, as Richards J pointed out (at [102](ii)), that is achieved expressly by the language used. Paragraph 11, albeit a somewhat opaque provision, can, I think be paraphrased essentially as follows: if an overview and scrutiny committee (committee A) is considering a decision made, or action taken, by another of the authority's
d committees (committee B), then, if one of committee A's members was also a member of committee B, he must regard himself as having a prejudicial interest and must necessarily therefore withdraw from committee A's meeting unless (and this is the effect of para 11(2)) he is attending committee A to answer questions or give evidence in relation to the decision or action under consideration. Properly
e understood, para 11 of the code to my mind tends rather to support than to undermine the judge's approach to para 12. To achieve the narrower construction of para 12(1) for which Mr McCracken contends it would be necessary to write in words: the word 'member' would have to read 'member of the committee holding a meeting'.

f [67] As for the dispensations regulations, Mr McCracken draws our attention to reg 3(1)(a)(i) which provides that the authority's standards committee may grant a dispensation under para 12(1)(a) of the code if 'the number of members of the authority that are prohibited from participating in the business of the authority exceeds 50% of those members that are entitled or required to so participate'. This provision applies, correctly submits Mr McCracken, not merely when at least half
g the members of the council have a prejudicial interest but also when half a committee has. The word on which he focuses in reg 3(1)(a)(i) is 'participating'. These regulations, he points out, were designed to work with the model code as part of a single legislative scheme. His submission is that the word participation in all this legislation should be treated as referring to participation solely as a member
h of a committee or other decision-making body. It would thus exclude representations made by a member of the authority who is not himself a member of the committee in question.

j [68] This submission too I would reject. True it is that para 12 of the code is headed 'Participation in Relation to Disclosed Interests'. That word does not, however, appear anywhere in para 12(1) but only in para 12(2) and its presence there is explained by reference to para 4.28 of the consultation paper:

'... the Government believes that the requirement [to withdraw from a meeting] should be modified by making a distinction between decision-making activities and the other types of member activity provided for under such constitutions. Where decisions are not being taken, the code could take a less restrictive approach to handling conflicts of interest. The functions

of overview and scrutiny committees are constrained by statute to prevent them exercising any traditional decision-making function. Area committees and joint committees may carry out decision-making functions formally delegated to them by the authority, or the executive, but they may well also conduct discussions in order to review or inform policy decisions, rather than actually to make those decisions.' a

[69] If anything, the dispensations regulations to my mind tend rather to support Richards J's construction of para 12(1) of the code. Regulation 2 of the dispensations regulations defines 'member' to mean 'a member or co-opted member of an authority'. Although the code itself does not in terms define 'member', by para 1(4) it provides that within the code "member" includes a co-opted member of an authority'. b

[70] Certainly, in every other paragraph of the code except para 12 (and para 11 where the word is expressly qualified) wherever the word member is used it is crystal clear that the reference is to a member or co-opted member of the authority as a whole. A very strong presumption accordingly arises that that is also what the word means in para 12. Nothing that Mr McCracken submits begins to persuade me that this presumption is displaced either by the language of the code or by its underlying rationale. On the contrary, whilst I readily acknowledge that nothing in the background material directly addresses the question whether all councillors with a prejudicial interest ought to withdraw from a meeting or only those sitting on the decision-making committee itself, it seems to me that there are at least as good reasons for treating all councillors alike as for distinguishing between them. c

[71] No doubt, as Mr McCracken urges, a councillor who is not on the same committee as those taking the decision will generally be less well able to exert untoward influence on the decision than fellow committee members. But that will not invariably be so and in many cases the public would be unlikely to accept it was so. d

[72] It is Mr McCracken's core submission that the narrower construction of para 12 for which he contends would allow more scope for democratic representation within local government. So, of course, it would. But it would be at the expense of public trust and confidence in the local democratic process. The government in the model code decided upon has chosen not to pay that price. At the end of the day it is as simple as that. e

Issue (ii)—Is a member entitled, notwithstanding para 12, to remain at a meeting in his personal capacity? f

[73] The judge below, whilst holding that that question 'simply does not arise on the facts', indicated how he would have dealt with it had it been necessary to decide the point ([2003] All ER (D) 268 (Apr) at [116]): g

'(i) On its face, para 12 would seem to apply to such a situation, since a councillor is still "a member" of the council even if acting only in his private capacity. It must, however, be read in the light of the limitations expressed in para 1 on the scope of the code. (ii) Paragraph 1(2) provides that the code "shall not, apart from paragraphs 4 and 5(a) below, have effect in relation to the activities of a member undertaken other than in an official capacity". In my view a councillor would not be undertaking activities in an official capacity if he attended a meeting solely in his private capacity. In particular, he would not be "conduct[ing] the business of the office to which he has been elected", within the meaning of para 1(1)(b). (iii) I would reject Mr Sales's submission j

a that para 12 is to be seen as an illustration of para 4 and/or para 5(a) of the code. It is not so expressed; and if it had been intended to apply to activities undertaken otherwise than in an official capacity, I would have expected an express reference to it in para 1(2) as a further exception to the general rule there laid down. There may of course be circumstances in which attendance at a meeting in a private capacity would be caught directly by para 4 and/or para 5(a), but that is a different matter and is not a reason for adopting a strained interpretation of para 12 so as to apply it in all cases to attendance in a private capacity. Nor was any advice given, or suggestion made, by the council's officers that attendance by Mr Richardson would be a breach of para 4 or 5(a). (iv) The policy objections to attendance by a councillor at a meeting might reasonably be considered to apply even where attendance is on the express basis that the councillor is attending in a private capacity to defend his own personal interest, rather than in a representative capacity. They might, however, be thought to have less weight in that situation, on the basis that the risk of damage to public confidence would not be so great. In any event I do not regard the policy objections as so compelling that they ought to lead to a construction of the code that would not be justified on its ordinary and natural meaning. (v) Accordingly, I would have held that the code did not in principle preclude attendance by Mr Richardson solely in his private capacity to defend his own personal interest, though steps would have had to be taken to ensure that the limited basis of his attendance was abundantly clear to all. (vi) On that basis the arguments about the lawfulness of the code in its application to a councillor wishing to attend a meeting in his capacity as a private citizen would fall away.'

[74] Given the obvious importance of this issue and since for my part I am disposed to disagree with Richards J on issue (iv) (the factual issue), I must confront this question, arising as it does on the Secretary of State's respondent's notice. Bear in mind that, on the judge's conclusion, even a member of the decision-making committee, notwithstanding his prejudicial interest, will be entitled to remain (and indeed speak) in his (so-called) private capacity.

[75] As appears from [116](ii) of the judgment below, the judge reached his conclusion on this point essentially by reference to paras 1(1)(b) and 1(2) of the code. These provisions, he concluded, operate to displace the apparent effect of para 12. On this point, it seems to me, Richards J erred in his approach. A member of the authority attending a council meeting cannot in my judgment, simply by declaring that he attends in his private capacity, thereby divest himself of his official capacity as a councillor. He is still to be regarded as conducting the business of his office. Only by resigning can he shed that role. To conclude otherwise would drive a coach and horses through para 12. Realistically it would be rendered wholly ineffective. The mischief which para 12 is designed to avoid is manifestly the same whether the councillor is attending the meeting in his public or purportedly private capacity. Is it seriously to be suggested that the very quality which elevates a councillor's private interest under the code into a prejudicial interest (ie a private interest so strong that on its face it requires him to withdraw from the meeting under para 12), nevertheless itself entitles him to remain in a supposedly private capacity? Surely one has only to state the proposition to reject it. It is on this basis, rather than by reference to paras 4 and 5(a) of the code (the basis for Mr Sales's alternative arguments), that I am driven to a different conclusion on this issue from that reached by the judge below.

Issue (iii)—Was Mr Richardson properly to be regarded as having a prejudicial interest?

[76] The first point to make is that the initial and principal judgment on the question is for the individual councillor himself. This is plain both from the consultation paper and also from several of the provisions in the code itself, for example paras 8(1) and 11(1). But there comes a point at which it would clearly be irrational and therefore unlawful for the councillor to conclude that he does not have a personal interest under para 8(1) or, as the case may be, a prejudicial interest under para 10(1). That point, Richards J concluded, was reached here ([2003] All ER (D) 268 (Apr)):

[84] In any event I think it plain that he did have a prejudicial interest and that neither he nor the council could reasonably have taken a different view. (i) I do not understand it to be in dispute, and I would certainly hold, that he had a "personal interest" within para 8(1), in that the decision on the planning application (i) related to an interest of which he had to give notice under para 14(f), namely his home in Littlethorpe, and/or (ii) might reasonably be regarded as affecting his well-being and/or financial position to a greater extent than other relevant persons. (ii) His personal interest was also a "prejudicial interest" within para 10(2) if it was "one which a member of the public with knowledge of the relevant facts would reasonably regard as so significant that it is likely to prejudice the member's judgement of the public interest". (iii) Mr Richardson's home, Ox Close House, was very close to the proposed extension of the quarry and was one of a handful of properties liable to be most affected by the development. As it was put in para 6.7.1 of the director's report:

"The properties potentially most affected by the development proposal are Ox Close House, The Bungalow, Ox Close Farm and Great Givendale. The closest properties are Ox Close House, The Bungalow and Ox Close Farm. These lie approximately 250 metres to the south west and west of the application area. Residents in these properties have expressed concern with regard to noise arising from the proposed workings ... Residents are also concerned about the impact on their views of the valley ..."

(iv) Mr McCracken relies on the statement in para 118 of the Nolan report that "[i]f one hundred households are affected by a council decision, then most people would agree that a councillor similarly affected has no special interest which might debar him or her from speaking or voting, providing the interest is declared". He submits that that was the case here and points to the fact there were some 400 signatories to a local petition opposing the development; Mr Richardson had the same interest as his constituents, albeit to a greater degree than many (and less than some). In my judgment, however, the next sentence of para 118 of the Nolan report is more pertinent: "[i]f in a different decision ten households are affected, then in most circumstances a councillor might feel that taking part in a decision was inappropriate." The present case is stronger still, since Mr Richardson's home was one of three or four properties closest to the site and potentially most affected. The owners of those properties were not merely "similarly affected" as other residents of the parish, but had a greater and special interest in the outcome of the planning application. (v) Anyway, the test is not what was said in the Nolan report but what is laid down in para 10(2) of the code; and in my judgment a member of the public with knowledge of the relevant facts would reasonably have

regarded Mr Richardson's personal interest as so significant that it was likely to prejudice his judgment of the public interest. I reject Mr McCracken's submission that a knowledgeable member of the public would reasonably have regarded him as simply putting forward the views of the people he represented, or making a contribution to the debate based on his perception of the public interest, rather than being influenced by the potential impact of the development on his own home. However conscientious a councillor might be in his representative role and his concern to protect the public interest, the personal interest was a highly material additional consideration. (vi) As a further way of examining the point, though this is not necessary for my decision, I have asked myself whether, if Mr Richardson had been a member of the committee and had participated in a decision to refuse planning permission, it would have been open to the developer to object to the decision on the ground that his participation gave rise to the appearance of bias. In my view it would have been, for the very reason that a fair-minded and informed observer would have concluded that, by reason of the personal interest, there was a real possibility that the committee was biased. The test in para 10(2) of the code is not in identical terms but similar considerations underlie it.'

[77] Quarrel with that as Mr McCracken does, it seems to me that the judge's conclusion on this point is self-evidently correct. Assume, as the judge posited in [84](vi), that Mr Richardson had in fact been a member of the planning committee which had then refused planning permission by a five to four majority. How could it possibly have been suggested that 'a member of the public with knowledge of the relevant facts [essentially those set out in [2003] All ER (D) 268 (Apr) at [84](iii)] would [not] reasonably regard [Mr Richardson's interest] as so significant that it [was] likely to prejudice [his] judgement of the public interest' (the language of para 10(1) of the code)? Plainly it could not.

Issue (iv)—Did Mr Richardson in fact indicate that he wished to attend the June meeting in a private capacity?

[78] Having regard to my conclusion on issue (ii), a conclusion I understand to be shared by my Lords, issue (iv) itself does not now arise for consideration. As already indicated (see [74], above), however, I for my part would have been inclined to resolve it, had it mattered, in favour of Mr Richardson. True it is, as Mr Sales argues and as the judge below found, that Mr Richardson's main concern was to attend the June meeting in his representative capacity to advance the interests of his constituents in the parish and settlement of Littlethorpe. To my mind, however, his statement at the outset of the meeting (see [55], above) indicated that, failing that, he wished at the very least to attend 'as a citizen' and yet regarded himself as barred from the meeting even in a personal role. The judge below, I should note, dealt at considerable length with this issue too. Since, however, nothing now turns on it, I shall hope to be forgiven for the comparatively brisk way in which I have expressed my respectful disagreement with him.

[79] Before leaving issue (iv), however, I would add one thing. The very points which Mr Richardson indicated in later correspondence that he wished to make at the meeting illustrate the difficulty—realistically, I would suggest, the impossibility—of distinguishing his supposedly 'private capacity from his public one. On 19 June 2002 he wrote to the council's chief executive:

'As you are now well aware I was forbidden to speak at the North Yorkshire Council's Planning Committee on Tuesday, 11 June. Had I been allowed my

freedom of speech I had intended to give emphasis on two points. One was the impact on the environment and the lack of a cohesive overall plan of restoration for the whole valley. The second was the impact of the probable increase in flooding; on the flood plain; the villages and towns along the River Ure Corridor and the safety of the workforce ...'

These plainly were just the sort of points which Mr Richardson was wishing to make on behalf of his constituents but which, because of his personal interest in the matters, he could not properly be allowed to do. (The fact that they may well have been entirely lacking in merit—a point urged in particular by Mr Hill for the interested party—is not for this purpose material).

[80] It follows from all this that on each of the determinative issues raised on the appeal I find against the appellants. I am conscious that despite the unusual length of this judgment it nevertheless leaves unaddressed a number of Mr McCracken's disparate arguments. For that I shall hope to be forgiven. Where, as here, a challenge or appeal is pursued in something of a scattergun fashion, it is simply not practicable to examine every pellet in detail.

[81] By way of footnote I add just this. On the first part of the case Mr McCracken put before us the following proposed questions for a possible reference to the Court of Justice:

'Whether it is compatible with the requirements of Council Directive (EEC) 85/337, as amended by Council Directive (EC) 97/11: (1) for the decision-maker not to be aware while making its decision of its obligation for formulate and state publicly the reasons for its decision, (2) for the reasons for the decision to be formulated otherwise than contemporaneously with the decision and in advance of the public registration of the decision, (3) for the reasons for the decision to be formulated and stated publicly after the period of time for legal challenge has expired?'

[82] In my judgment, however, it is not necessary to refer any questions to the Court of Justice for the purposes of disposing of this appeal. Even, moreover, if it were, the questions as presently formulated would not seem to me the appropriate ones. That, however, is by the way. For the reasons earlier given I would dismiss this appeal.

KEENE LJ.

[83] I agree.

SCOTT BAKER LJ.

[84] I also agree.

Appeal dismissed.

Dilys Tausz Barrister.

R v Young
[2003] EWCA Crim 3481

COURT OF APPEAL, CRIMINAL DIVISION

MAY LJ, RODERICK EVANS J AND JUDGE JEREMY ROBERTS QC

28 OCTOBER, 4 DECEMBER 2003

Sentence – Confiscation order – Postponement of determination for period not exceeding six months beginning with date of conviction – Exceptional circumstances allowing court to specify longer period – Whether substantive hearing started within six month period being within period not exceeding six months – Whether listing difficulties capable of being exceptional circumstances – Criminal Justice Act 1988, s 72A(3).

(1) Listing difficulties are capable of being exceptional circumstances within s 72A(3)^a of the Criminal Justice Act 1988 which provides that where it is the duty of the court to determine whether an offender has benefited from any relevant criminal conduct and if so to determine the amount to be recovered, but the court considers that it requires further information before so determining, the court may postpone making those determinations for such period as it may specify, which shall not exceed a period of six months beginning with the date of conviction unless the court is satisfied that there are exceptional circumstances.

The provisions of the statute mean that a timetable to achieve determinations within the six-month period must be set and adhered to in the large majority of cases, but there may be a small minority of cases in which in all the circumstances difficulties with dates cannot justly be accommodated without a modest overrun. These rare cases will be capable of constituting exceptional circumstances and, if no injustice results, a technical objection would not be sustained. However, the likelihood of injustice increases with the length of any overrun (see [42], [63], below); dicta of Rose LJ in *R v Tuegel* [2000] 2 All ER 872 at 894 applied.

(2) A substantive start to a confiscation hearing within the six-month period prescribed by s 72A of the 1988 Act which is adjourned beyond that period does not achieve a determination within the six-month period. Section 72A requires the determination to be concluded within the six-month period unless there are exceptional circumstances. A judicial decision and order made under the inherent jurisdiction of the court that a hearing should start shortly before the end of the six-month period and resume shortly after the end of the six-month period is a postponement or adjournment of the determination until the conclusion of the resumed hearing and also requires that there have to be exceptional circumstance (see [54], [56], [59], below).

Per curiam. (1) The say-so of a listing officer does not amount to the proper and sufficient judicial inquiry necessary to justify a finding that exceptional circumstances have been established (see [63], below).

(2) In applying the principle that listing difficulties are capable of being exceptional circumstances judges should not assume that an overrun of a few days will normally be acceptable. In particular, they should not assume that an overrun to enable them to compose a written judgment will normally be acceptable (see [63], below).

^a Section 72A, so far as material, is set out at [41], below

Notes

For making a confiscation order, see Supp 2003 to 11(2) *Halsbury's Laws* (4th edn reissue) para 1285.

Section 72A of the Criminal Justice Act was repealed on 24 March 2003 by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, para 17(1), (2)(a), Sch 12

Cases referred to in judgment

R v Chuni [2002] EWCA Crim 453, [2002] 2 Cr App R (S) 371.

R v Cole (22 April 1998, unreported), CA.

R v Fawcett (1983) 5 Cr App R (S) 158, CA.

R v October [2003] EWCA Crim 452, [2003] All ER (D) 389 (Feb).

R v Palmer (No 1) [2002] EWCA Crim 2202, [2003] 1 Cr App R (S) 572.

R v Porter [1990] 3 All ER 784, [1990] 1 WLR 1260, CA.

R v Ruddick (David) [2003] EWCA Crim 1061, [2003] Crim LR 734.

R v Sekhon, *R v McFaul*, *R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655.

R v Soneji, *R v Bullen* [2003] EWCA Crim 1765, [2003] Crim LR 738.

R v Steele, *R v Shevki* [2001] 2 Cr App R (S) 178, CA.

R v Tuegel [2000] 2 All ER 872, CA.

Appeal

Trevor Alan Young appealed, with leave of the single judge, from the confiscation order made against him by Judge Harrington on 15 November 2002 in the sum of £111,105, following his conviction on 9 May 2002 in the Crown Court at Bournemouth, after a trial before Judge Harrington and a jury, on three separate counts of conspiracy to defraud, of being knowingly concerned in the fraudulent evasion of Value Added Tax, and of furnishing a false document. The facts are set out in the judgment of the court.

Nicholas Haggan QC (assigned by the Registrar of Criminal Appeals) for the appellant.

David Bartlett and *Judy Earle* (instructed by the Crown Prosecution Service, Bournemouth) for the Crown.

Cur adv vult

4 December 2003. The following judgment of the court was delivered.

MAY LJ.

[1] On 9 May 2002 at the Crown Court at Bournemouth, following a trial which lasted approximately nine weeks, this appellant was convicted by the jury on count 1 of conspiracy to defraud, on count 2 of being knowingly concerned in the fraudulent evasion of value added tax (VAT) and on count 3 of furnishing a false document, namely a VAT return. The following day he was sentenced on those counts by the trial judge, Judge Harrington, to terms of seven years', four years' and 18 months' imprisonment respectively. Those terms were ordered to run concurrently making a total sentence of seven years' imprisonment.

[2] On 15 November 2002 a confiscation order was made by Judge Harrington against this appellant in the sum of £111,105. That sum was ordered to be paid within 18 months of the making of the order and in default of payment a term of two years' imprisonment consecutive to the seven years was imposed.

a [3] The appellant was given leave to appeal against the confiscation order by the single judge who refused leave to appeal against the sentences of imprisonment. The appellant renews that application before us and we shall deal with that matter first.

b [4] Although the appellant was jointly indicted with three others it was ordered that he be tried separately. The first co-accused was Neil Robert Smith who on rearraignment at the end of September 2002 pleaded guilty to count 1 (conspiracy to defraud), count 2 (fraudulent evasion of VAT) and counts 6 and 9, both counts of furnishing a false document, namely a VAT return. On 18 November 2002 he was sentenced to concurrent terms of 14 months', 12 months' and eight months' imprisonment on counts 1, 2 and 9 respectively. No separate penalty was imposed on count 6.

c [5] Danielle Louise Connell was indicted on counts 1 and 2 and on counts 7 and 8 with furnishing false VAT returns. All of these counts were initially ordered to lie on the file subject to the usual conditions as it was unclear whether she would ever be well enough to stand trial. The third co-accused, Polly Humble, was indicted on count 1 but the case against her was at first adjourned as she was pregnant and then on 28 February 2003 the prosecution offered no evidence against both women.

d [6] The charges all arose out of the activities of a company called Flagship Quality Flower Ltd (Flagship) which was in the business of selling roses and was linked to a local charity called 'Help'. Flagship had a large band of self-employed e drivers and sellers who sold roses and collected money for charity in public houses, clubs and restaurants across southern England. Initially Flagship was linked to a charity called 'Dial a Dream' but in September 1998 Help was granted charitable status and on 1 March 1999 Help superseded Dial a Dream. Help was not an independent charity. It was conceived by the appellant who arranged for Miss Humble and two others to become trustees. Some charity events were f organised and donations made to supply small items of equipment for use either in hospitals or patients' homes.

g [7] A written agreement was made in March 1999 between Flagship and Help that Help was to receive 90% of the money raised on its behalf by Flagship. Flagship was required to keep proper records of all receipts and outgoings relating to the project. That agreement was varied in July 1999 entitling Flagship to retain 30% of the proceeds. The wages of the collectors were calculated as a percentage of the total take of rose sales and charitable donations.

h [8] In fact the whole scheme was a fraud which finally ended in March 2000 when police raided the premises of Flagship and the home of the appellant which he shared with Miss Connell. The fraud was simple. Instead of receiving 90% or 70% of the donations, Help received only about 10% being the proceeds of the sale of flowers and donations on a Sunday whilst the money collected on Wednesdays, Thursdays, Fridays and Saturdays was taken each night to the appellant's home along with the accompanying documentation. As part of the fraud that documentation was destroyed. The only records recovered related to j two nights and a Sunday. Those records indicated that after the appropriate deductions, Help should have been receiving about £12,000 a week but considerably less was paid over.

[9] Flagship was also registered for VAT but the figures provided for the company's accountants failed to reflect the true position on sales of flowers and VAT in the sum of about £73,000 was evaded.

[10] The appellant is 46 years of age and has been before the courts on numerous occasions for offences of dishonesty, mainly in the 1970s and 1980s. His previous offences include conspiracy to commit burglary, three convictions of conspiracy to steal and two convictions of conspiracy to obtain property by deception. His last conviction was in 1994 for obtaining services by deception for which he was made the subject of a community service order.

[11] When sentencing the appellant the judge, who had of course heard the evidence during the trial, declared himself 'entirely satisfied' that the loss to Help occasioned by the fraud was in excess of £500,000. He had no doubt that the appellant was the controlling mind behind the fraud and that the appellant had profited from it substantially, certainly far more than anybody else involved. The judge regarded the fraud which the appellant carried out as highly professional and he bore in mind the meanness of a fraud perpetrated on a charitable organisation and the damaging effect such a fraud would have on the public's confidence in those who undertake fundraising for charitable causes.

[12] Mr Haggan, on behalf of the appellant, has frankly told us that when he was asked to consider the merits of an appeal against these sentences in May 2002, his view was that the sentences on counts 2 and 3 (four years and 18 months concurrent) were manifestly excessive but that although he considered the seven-year term imposed on count 1 to be at the upper end of the acceptable bracket of sentencing, it could not be said to be manifestly excessive. Accordingly, as all sentences had been ordered to run concurrently, he advised that there was no merit in an appeal against sentence.

[13] Mr Haggan's opinion changed, however, in late September 2002 when he heard of the sentence imposed on Smith and he submits that there is an improper disparity between the sentences imposed on the two men.

[14] Smith is 30 years of age. He too has previous convictions for offences of dishonesty but for offences much less serious than those of the appellant. His last such conviction was in October 1991 for theft from a vehicle. His antecedents put him in a wholly different category from that of the appellant.

[15] Smith entered his guilty pleas on a written basis, a copy of which we have seen. In summary, Smith was the office manager of Flagship. For a period of five months from February 1999 he actively participated in the fraud in that he compiled and signed, or merely signed, books which contained figures which he knew to be false. Thereafter, he refused to keep the books but continued his participation in the fraud, though in a less active role by sending out rose collectors and their tins. He was aware during the period of the fraud that figures submitted to the accountants for the purpose of calculating the quarterly VAT returns were inaccurate and two VAT return forms that he signed contained, to his knowledge, false information. However, he did not know the true figures and therefore did not know the extent of the fraud. He derived no benefit from the fraud other than his salary.

[16] Smith was sentenced on the basis upon which he entered his pleas and the judge accepted that Smith had been recruited by the appellant as the manager of Flagship and that he had played no part in setting up Help and when he joined the company he believed the operation to be legitimate. He also accepted that Smith had tried to resign from the company in September 1999. The judge came to the conclusion that the appellant was a far more sophisticated man than Smith and that Smith had come under the appellant's influence.

[17] There were therefore a number of features in the case of Smith which formed a proper basis for a distinction to be drawn between him and the

a appellant. Put shortly they are: Smith pleaded guilty albeit not at the first opportunity; the difference in their antecedents; the difference in the roles each played during the fraud and the difference in the benefits each derived from the fraud.

b [18] Nevertheless, Mr Bartlett who appears for the Crown in relation to the appeal against the confiscation order, has told us that after sentence had been passed on Smith he advised that the sentence was unduly lenient within the terms of s 36 of the Criminal Justice Act 1988. However the Attorney General declined to refer the matter to the Court of Appeal.

c [19] It may well be that Smith was fortunate to be sentenced as he was, that the sentence was lenient and that a longer sentence could not have been the subject of proper complaint. However, the test which we have to apply is that set out by Lawton LJ in *R v Fawcett* (1983) 5 Cr App R (S) 158 namely, 'would right-thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of this sentence consider that something had gone wrong with the administration of justice?'

d [20] In the light of the distinctions between Smith and this appellant we are unpersuaded, applying that test, that there is any improper disparity which would justify a reduction in the sentence of seven years' imprisonment passed on this appellant. If anything went wrong with the administration of justice here, which we doubt, it was that Smith's sentence was lenient not that the appellant's sentence of seven years was manifestly excessive. Right-thinking members of the public, properly informed, would so consider. The renewed application in
e respect of the seven year term is therefore refused.

[21] There remains the question of the concurrent terms imposed on counts 2 and 3 which do not, of course, affect the overall term imposed upon the appellant. Mr Haggan's submissions in respect of the sentences are set out in his skeleton argument. Mr Bartlett in his skeleton argument conceded that the terms
f imposed on these counts were manifestly excessive. We granted leave to appeal on these counts, together with the necessary extension of time, at an early stage of the hearing.

[22] We have concluded that in the light of the amount of VAT involved in this case and the nature of the offence, that the term of four years' imprisonment
g imposed on count 2 is manifestly excessive and we intend to quash that term and in its place impose a term of three years' imprisonment. We are however unpersuaded that the term of 18 months' imprisonment imposed on count 3, though a severe sentence, is manifestly excessive and the appeal against that term is dismissed.

h [23] The sentences on counts 1, 2 and 3 will therefore be seven years', three years' and 18 months' imprisonment respectively, those terms to run concurrently.

APPEAL AGAINST THE CONFISCATION ORDER

j [24] This is another case in which the making of a confiscation order is challenged on appeal because, it is submitted, the court failed to comply with statutory procedural requirements. The judge made his determination and made the confiscation order on 15 November 2002. This was a few days more than six months after the date of the appellant's conviction on 9 May 2002. Mr Haggan submits that there were no 'exceptional circumstances' enabling the court to exceed that six-month period such as are required to give the court jurisdiction

under s 72A(3) of the 1988 Act as amended. The confiscation order was therefore made without jurisdiction and should be quashed. a

[25] The appellant had been charged with the offences of which he was eventually convicted on 19 June 2000. He and the three co-defendants were committed for trial on 20 November 2000. Both the Crown and Customs and Excise served notices of their intention to apply for a confiscation order on the appellant in November and December 2000 respectively. b

[26] On 28 January 2002, the appellant and two of his co-defendants, Neil Smith and Polly Humble, appeared at the Crown Court at Bournemouth for their trial. Danielle Connell was unfit to be tried but was represented by counsel in her absence. There was an application to stay the proceedings on the grounds of abuse of process. This application failed but, on 21 February 2002, the court ordered that the appellant should be tried separately from the three co-accused. c Their trials were adjourned to a date to be fixed. The appellant's trial started on 26 February 2002 and concluded with his conviction on all three counts on 9 May 2002. The appellant's leading and junior counsel and counsel for the Crown had all appeared in these proceedings.

[27] The trials of the co-accused were outstanding. It was not known whether Danielle Connell would ever be fit to stand trial, but the trials of Neil Smith and Polly Humble at least were expected to take place. The appellant was reluctant to remain on remand for an indefinite period. He asked to be sentenced immediately and he was sentenced on the day following his conviction. d

[28] On 9 May 2000, the appellant applied for postponement of the prosecution application for a confiscation order. It was submitted on behalf of the appellant that the court could not sensibly deal with the application until the trial of the co-accused had been concluded. This was understandable in the light of *R v Porter* [1990] 3 All ER 784, [1990] 1 WLR 1260, where this court held that, in assessing benefit in accordance with the provisions of s 1 of the Drug Trafficking Offences Act 1986, the court must, as between co-defendants, determine their respective shares of any joint benefit that they may have received as a result of drug trafficking. In the present case, counsel for the Crown contended that the appellant's position was clear and that a determination should be made within the prescribed six-month period. e

[29] The court ordered that the hearing of the prosecution's application for confiscation against the appellant should take place on 20 September 2002. Directions were given for the service of the prosecutor's statement by 6 June 2002 and the defence response by 11 July 2002. A further directions hearing was fixed for 2 August 2002. This date was later changed to 7 August 2002. A provisional defence response was served on 5 July 2002. This document did not concede that it was either possible or sensible for the court to attempt to determine the issue of confiscation until the trial of the co-accused had taken place. It was so submitted on behalf of the appellant at the directions hearing on 7 August 2002. f It was submitted that there were exceptional circumstances that entitled the court to postpone the confiscation hearing beyond the statutory six-month period. Mr Haggan suggested that it would perhaps not be the best deployment of public resources to obtain valuations of relevant property until such time as it was reasonably foreseeable that the confiscation hearing would take place. He said that if the trial of Mr Smith and Miss Humble lasted anything like the length of the trial of the appellant, the court would not be in a position to deal with confiscation for about a year. Mr Bartlett on behalf of the prosecution indicated that the Crown did not accept the submission based upon *R v Porter* nor the g h j

a proposition that the application for confiscation could not be dealt with until after the trial of the co-accused. He invited the court to order the appellant to complete his response by the end of August, since the time remaining within the six-month period was very limited. He suggested that the matter of exceptional circumstances, then contended for on behalf of the appellant, should be fully argued in late September. If the Crown were right about that, a final confiscation
b hearing should be arranged before the early part of November. The court ordered the appellant's full response to be provided by 30 August 2002 and fixed a hearing for directions on 26 September 2002 to determine the then anticipated defence submission that there should be a postponement of the confiscation proceedings.

c [30] The revised defence response was served on 29 August 2002. This reiterated the case for postponement and exceptional circumstances.

[31] In the afternoon of 25 September 2002, a supplemental prosecutor's statement was delivered to the appellant's solicitors. This was a substantial document including 66 pages of appendices. Earlier that day, Neil Smith had pleaded guilty to three counts on the indictment. The pleas were not acceptable
d to the Crown, but attempts were being made to agree an acceptable basis of plea. The defence were informed of this late that afternoon. They were also told that Mr Smith was bankrupt; that the Crown did not propose to pursue applications for either compensation or confiscation against Smith or Miss Humble; that Miss Humble was now pregnant, her child being expected in about January 2003; and that for this reason her trial would have to be adjourned until sometime later
e in 2003.

[32] On 26 September 2002, Smith agreed to plead guilty to another count on the indictment. This was acceptable to the Crown and the need for his trial was avoided. The basis for the appellant's submission that his confiscation proceedings should be postponed had gone.

f [33] At the directions hearing on 26 September 2002, Mr Haggan explained the defence view that, now that the guilt of Neil Smith had been established, the court had sufficient information to be able to arrive at a proper and sensible assessment of the respective benefits received by the appellant and Smith. He withdrew the application that the confiscation proceedings should be postponed
g until after the co-defendants had been tried. Mr Bartlett said that, if the defence were not applying for a postponement, there was nothing between the parties and they ought to get on with it. What the parties needed was sufficient time to do so at a mutually convenient time. If this could not be done before 8 November, it would be necessary for the prosecution to apply to the court for a postponement because of exceptional circumstances. The time estimate for the
h hearing was three days. The judge assumed that, once the hearing had begun, it could be adjourned part heard under the inherent jurisdiction of the court. Mr Bartlett agreed that it could. The judge asked if there was any possibility of at least making a start on the hearing in the first week of November. Mr Bartlett said that counsels' diaries suggested that that would be very difficult. He
j suggested that it would be prudent to ask for an extension then for exceptional circumstances:

‘... and I would itemise those as being the understanding of the Crown, until today, that there might be a trial of Mr Smith that might, in any event, postpone this hearing; the fact that my learned friend, until today, sought a postponement of the hearing if that had happened; and the recognition, only

today, that neither of those things has happened, leaving all too little time for the statutory period to run and the conclusion of these proceedings.’ a

The other suggestion was that the court could formally start the hearing then and then adjourn it.

[34] At this stage in the hearing, Mr Haggan said that the defence would be bound to accept that this was an exceptional circumstances case. They had made it plain that that was so in their skeleton argument. It would be quite wrong to depart from that position. b

[35] Inquiries were then made of the list office to try to find a mutually convenient date. Mr Haggan has submitted in this court that the arrangements which were subsequently made, and which resulted in the conclusion of the confiscation proceedings against the appellant a few days after the end of the six-month period, were to accommodate Mr Bartlett’s professional difficulties. We do not accept that this is factually correct. In fact Mr Bartlett and Mr Haggan each had other professional engagements which it would have been difficult to break. Each was available in one of the weeks, but neither was available in the week in which the other was available. The problem was not confined to the Crown. It was mutual. In addition the court and the judge had difficulty in finding a date. The details are: (a) Mr Bartlett was only available in the first week of November; (b) Mr Haggan had another professional engagement in Rochdale during that week—information provided during the hearing—and there was one week in October when he had a course that he had to attend. The week of 28 October was ‘one of the few weeks that I can do’; (c) the judge was not sitting for one week in October; (d) the judge was listed to sit to hear civil cases in the week of 28 October—but ‘whilst it is not immediately convenient to the court, doubtless arrangements could be made for your Honour’s civil to be transferred to another judge; (e) we are told that the first week of November was not convenient to the court’. c
d
e

[36] Confronted with these difficulties, Mr Bartlett applied for the confiscation hearing to start then and there. Mr Haggan submitted that this sounded rather like a device such as has been deprecated in cases concerning custody time limits. He was also not professionally in a position to start the hearing because he had prepared for circumstances which had since changed. The defence had also been served with a substantial supplementary prosecution statement the day before. There were questions of discovery and disclosure. The judge agreed that starting the hearing then would obviously be a device. f
g

[37] Mr Haggan also upon consideration withdrew the concession he had made earlier in the hearing when he had accepted that exceptional circumstances existed. Mr Bartlett submitted that there were exceptional circumstances. He complained that the Crown and the court were being manipulated. Having come to court to face the submission that the confiscation proceedings should be postponed until the end of Smith’s proceedings: h

‘... all of a sudden, we are told that we must get it done within the six-month period, knowing full well that there is only about six weeks or less in which to do it. Yet, in the same breath, the submissions are made that my learned friends have not had time to deal with the supplemental statement.’ j

Mr Bartlett referred to this as cloud cuckoo land. He suggested that there should be a postponement to 12 November (four days beyond the six-month period), which was convenient to all counsel. What the judge in fact did was to direct that

a the hearing should start at 10.30 am on 28 October for half a day, and that it should then be adjourned to 12 November when the proceedings would be heard to conclusion. He said that he could revisit the question of exceptional circumstances on 28 October, if that were necessary.

b [38] Mr Haggan and his junior arrived at court in Bournemouth at 8.30 am on 28 October hoping to have a consultation with the appellant. The appellant, who was then detained inconveniently in Dartmoor prison, was not delivered to court until about 1 pm. The hearing did not start until the afternoon, but a substantive start was made and there was a short half-day hearing. Mr Bartlett opened the application on behalf of the Crown. The hearing was shorter than it might otherwise have been because the appellant had to leave court at 4 pm otherwise, as Mr Haggan put it, 'he will be locked out of Dartmoor ... and quite where he would be housed overnight is a matter for conjecture'. Mr Bartlett applied for the proceedings to be adjourned under the court's common law power, notwithstanding that the adjournment would take the proceedings beyond the six-month period. The judge said that he would exercise that jurisdiction and adjourned the proceedings to 12 November.

d [39] On 6 November 2002, Mr Bartlett, out of caution, applied to the judge to postpone the hearing, which had been started on 28 October, to 12 November on the basis of exceptional circumstances under s 72A of the 1988 Act. The application was opposed by Mr Harrison, who appeared that day on behalf of the appellant. He submitted that it was the prosecution's decision to have the matter determined near the end of the six-month period; and that the confiscation hearing could have taken place on 28 October and been completed that week, if Mr Bartlett had been available. The judge made his determination in these terms:

f 'I am satisfied, having heard the argument and having been referred to the authorities, that there are exceptional circumstances that justify my postponing the rest of the hearing to 12 November, which as I have already said is just outside the six-month period. I am also satisfied that the prosecution still have to obtain information which is relevant and important information relating to the Abbey National cheques. It seems to me that had Neil Smith not pleaded guilty on 26 September the defence application to postpone outside the six-month period would have succeeded and, as I have already said, the current difficulty would not have arisen. As a result of that change of circumstances it effectively became impossible for the hearing to be completed by 9 November, in other words, within the six months, and that, it seems to me, is something that could not possibly have been foreseen back in May.'

h The Abbey National cheques, which the judge referred to, were further information relevant to the beneficial ownership of a house. The judge considered that the need for this information by itself was not an exceptional circumstance, but it added to the other factors. He said that, if he had not found exceptional circumstances, he would in any event have affirmed his decision to adjourn the hearing part heard under the court's common law powers.

j [40] The confiscation proceedings against the appellant duly resumed on 12 November and a determination was made on 15 November.

[41] Section 1 of the 1988 Act as amended provides for the making of confiscation orders in the circumstances there set out. Section 72A provides:

'(1) Where a court is acting under section 71 above but considers that it requires further information before—(a) determining whether the defendant has benefited as mentioned in section 71(2)(b)(i); or (c) determining the amount to be recovered in his case by virtue of section 72 above, it may, for the purpose of enabling that information to be obtained, postpone making that determination for such period as it may specify. a

(2) More than one postponement may be made under subsection (1) above in relation to the same case. b

(3) Unless it is satisfied that there are exceptional circumstances, the court shall not specify a period under subsection (1) above which—(a) by itself; or (b) where there have been one or more previous postponements under subsection (1) above or (4) below, when taken together with the earlier specified period or periods, exceeds six months beginning with the date of conviction.' c

Subsection (4) gives the court power to postpone determinations where the defendant appeals against his conviction. Subsection (6) provides that any postponement under sub-s (4) shall not exceed the period ending three months after the date on which the appeal is determined or otherwise disposed of 'unless the court is satisfied that there are exceptional circumstances'. d

[42] The plain statutory purpose of these provisions relating to postponement is to ensure that confiscation determinations under this draconian legislation are made within a strictly limited period only to be exceeded exceptionally if it is really necessary that this should happen. e

[43] The provisions for postponement under this and related drug trafficking legislation have caused much trouble and generated numerous decisions. The leading case on the legislation generally is *R v Sekhon*, *R v McFaul*, *R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655, in which the judgment of the court was given by Lord Woolf CJ. The judgment contains a comprehensive review of the legislation designed to enable the courts to confiscate the proceeds of crime. A series of cases had resulted in orders for confiscation of substantial sums being set aside for the failure to adhere to procedural requirements that are often of a technical nature. Lord Woolf CJ reviewed successive amendments to the relevant sections of the 1988 Act, including what is now s 72A. There was a number of appeals before the court. They raised issues whether: (i) the confiscation proceedings took place in accordance with the procedures set out in the 1988 Act, and, in particular, whether the sentencing judge properly postponed the confiscation hearing; and (ii) if the confiscation proceedings did not take place in accordance with the procedures set out in the 1988 Act, whether the confiscation orders in each case were nevertheless lawfully made. f
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[44] Lord Woolf CJ noted that the purpose of rules of procedure is not usually to give or take away a court's jurisdiction. It was submitted by Mr Perry on behalf of the prosecution that breaches of apparently absolute statutory requirements did not necessarily deprive the court of jurisdiction. He submitted that, if even the most trivial breach of an apparently absolute requirement had the effect of vitiating the relevant proceedings, the consequences would be out of all proportion. There is a distinction between mandatory and directory duties. Lord Woolf CJ suggested that it would not have been the intention of Parliament to exclude the jurisdiction of the court in relation to the making of confiscation orders because of procedural defects of a technical nature that caused no injustice j

a to the defendant. The court would only expect a procedural failure to result in a
lack of jurisdiction if this was necessary to ensure that the criminal justice system
served the interests of justice and thus the public, or where there was at least a
real possibility of the defendant suffering prejudice as a consequence of the
procedural failure. The court would not regard it as likely that Parliament would,
for example, be concerned to deprive the court of jurisdiction because of defects
b in the contents of the written notice which is required by s 72(1) of the 1988 Act.

[45] The court considered the case law. The cases included *R v Steele*, *R v Shevki* [2001] 2 Cr App R (S) 178, a case decided under the Drug Trafficking Act 1994. Judge LJ (at 194) set out what should be the general approach relevant to the similar statutory provision which the court was considering. He said:

c 'Confiscation orders should normally form part of the ordinary sentencing
process. For lack of appropriate information, this will often be impractical.
If the conditions set out in section 3(1) or section 3(4) are satisfied, and within
six months of conviction, the court may decide that the determination
should be postponed. Unless the circumstances are exceptional this should
d not extend beyond six months after conviction. These decisions involve the
court's discretion, judicially exercised when the statutory conditions are
present, taking full account of the preferred statutory sequence as well as the
express direction in the statute that save in exceptional circumstances
confiscation determinations should not be postponed for more than six
e months after conviction. So far as practicable, adjournments which would
have the effect of postponing the determination beyond that period, or in
exceptional cases, beyond the period envisaged when the decision to
postpone was made, should be avoided. Nevertheless when the
circumstances in an individual case compel an adjournment which would
have this effect, then whether or not the information gathering process has
f been completed, it may be ordered, for example, to take account of illness on
one side or the other, or the unavailability of the judge, without depriving a
subsequent order for confiscation of its validity.'

Lord Woolf CJ said that this (and another judgment of Judge LJ in *R v Cole* (22 April 1998, unreported) made it clear that the consideration whether there should
g be a postponement of the confiscation proceedings and whether there are
exceptional circumstances involve just the type of issue that courts regularly are
required to determine when engaged in case management. The strict
compliance with procedural requirements relating to issues of this nature would
not normally be expected to go to jurisdiction. The provisions tell the judge the
order in which he must deal with matters and the considerations he must have in
h mind. Any default by the judge can be satisfactorily dealt with on appeal when it
is to be expected that the court would examine the circumstances and not focus
on technicalities. The issue would be what did justice require having regard to
the Parliamentary code.

[46] The court then considered a number of other authorities. Having done
j so, Lord Woolf CJ said ([2003] 3 All ER 508 at [48]):

'... in our opinion all that is strictly required in order to give the court
jurisdiction where a postponement is necessary is that there should be a
decision to postpone. This requires no particular form of words. We are not
persuaded that the statement of a period of postponement is critical for
establishing jurisdiction. It is not a condition precedent for there to be

jurisdiction. If there is a failure to specify then this could be a matter of complaint by appeal to the Court of Appeal after a confiscation order has been made. Then the Court of Appeal could, if justice so required, quash the confiscation order. If, however, no injustice was involved, the confiscation order would stand.' a

[47] When the court came to consider individual appeals of four of the appellants, Lord Woolf CJ said (at [64]) that, whereas other procedural requirements may not be critical, that there should be a postponement of the making of a confiscation order when there is power to do so is fundamental to the exercise of the jurisdiction to make a confiscation order. In the cases under consideration, the court accepted that the effect of non-compliance was intended by Parliament to go to jurisdiction subject to any possible argument as to waiver. There was no postponement or even purported decision to postpone until after the confiscation orders were made without jurisdiction. The orders had to be quashed. b

[48] We pause to remember that in the present appeal there was an explicit decision to postpone and that there has been no suggestion of any injustice to the appellant. c

[49] A later decision of this court is *R v Soneji*, *R v Bullen* [2003] EWCA Crim 1765, [2003] Crim LR 738. In that case, the trial judge, before sentencing the defendants, had formally postponed the confiscation hearing to a date which was outside the six-month period mentioned in s 72A. On the day of the hearing, the prosecution requested a further postponement in the order of three months or more. The defendants objected to the confiscation proceedings on the basis that no proper application had been made within six months. The judge held that the original postponement order was a valid one. He referred to *R v Steele*, *R v Shevki*. He said that the purpose of the order was not to facilitate the obtaining of further information but to cope with a listing problem and 'listing problems are not sadly exceptional circumstances'. It seemed to him to be fair to invoke the inherent powers of the court. The judge was satisfied that the common law power to adjourn was 'still alive and well in such circumstances'. d

[50] On appeal to this court, Pill LJ gave the judgment of the court. He considered *R v Sekhon* and a number of other decisions. These included *R v Ruddick (David)* [2003] EWCA Crim 1061, [2003] Crim LR 734, in which Rose LJ, Vice-President, said: e

'What are exceptional circumstances may well include administrative matters such as court availability, and judge and defendant availability. But what is "exceptional" is not a matter that can be, or should be further defined.' f

Another case was *R v Chuni* [2002] EWCA Crim 453, [2002] 2 Cr App R (S) 371, in which the judge who had tried and sentenced the defendant was not available due to illness and another judge adjourned the confiscation hearing to a date more than six months after the conviction. The case was complicated and the defendant consented to the adjournment. This court said that this represented an exception to the statutory assumption. The court was satisfied, that the judge, in postponing the matter for a period which took it beyond the six-month period, was acting lawfully. g

[51] In *R v October* [2003] EWCA Crim 452, [2003] All ER (D) 389 (Feb), Scott Baker LJ, giving the judgment of the court, referred to cases cited with approval h

a as *R v Sekhon* in supporting the proposition that the Crown Court retains a general power to postpone or adjourn confiscation proceedings. He identified a common law power to adjourn, parallel with the statutory power of postponement. He concluded that the court in the case before him had exercised its common law powers, but applied the test prescribed by the statute.

b [52] The court in *R v Soneji*, *R v Bullen* [2003] Crim LR 738 said that the requirement for exceptional circumstances had thus been imported into the exercise of the common law power. The judgment continued (at [24]):

c ‘Thus whether a power to postpone beyond six months from conviction is purported to be exercised under statutory powers or common law powers, there must be a finding of exceptional circumstances. A broad approach may be taken to the question of what may amount to exceptional circumstances (*R v Steele*, *R v Shevki*) and the expression “exceptional circumstances” need not be used (*R v Chuni*) but consideration of the reasons for postponement and a conclusion following that consideration which amount to a finding of exceptional circumstances are required.’

d [53] In *R v Soneji* [2003] Crim LR 738 there was no inquiry relating to listing difficulties such as could justify a finding that exceptional circumstances had been established. The judge had acknowledged more than once that there were not exceptional circumstances. Even if the judge’s finding might be construed as making a general point that listing difficulties are not an exceptional event, so that it might be said that the use of the expression was not itself fatal, the absence of any judicial inquiry and finding upon the circumstances meant that the requirement was not satisfied. The court then said (at [27]):

e ‘Failure to address the question whether the circumstances could properly be described as exceptional and to make a finding to that effect is in our judgment fatal to the upholding of these confiscation orders. We would respectfully seek to sustain the principle that confiscation orders should not be quashed for mere defects in procedure. To give effect to the requirement that there must be exceptional circumstances, and if the expression is not to be a mere incantation, however, inquiry into the circumstances and the possibility and feasibility of a timely hearing, is required. The failure to address the question whether the general time limit of six months could be met, and the accompanying failure to find exceptional circumstances, was not in the same category as the defect in *R v Palmer* (No 1) [2002] EWCA Crim 2202, [2003] 1 Cr App R (S) 572. To overlook these failures would be to nullify the statutory intention upheld in the cases. It is unfortunate when a confiscation order has to be quashed for defects such as these but it does not serve “the interests of justice and thus the public”, to adopt the expression used by Lord Woolf CJ in *R v Sekhon*, if the requirement for the existence of exceptional circumstances to justify a postponement beyond six months, is just ignored.’

j The court concluded that ‘a threshold of difficultness’ must be crossed.

[54] In the present case, the hearing of the confiscation proceedings started within the six-month period. The hearing on 28 October 2002 was not a mere token. It had been fixed for half a day starting in the morning. It in fact started in the afternoon because the appellant was delivered to the court from prison late and the hearing had to be abbreviated somewhat because he needed to return to a distant prison by a particular hour. We do not need to decide whether a token

start only within the six-month period could contribute to compliance with the statutory requirement. Our strong inclination is that it would not. We do need to decide whether a substantive start to the confiscation hearing within the six-month period by itself complies with the statutory requirement. If it does, this appeal fails at the first hurdle. a

[55] The question turns on the meaning of 'determining' and 'determination' in s 72A of the 1988 Act. We suspect that judges and parties habitually suppose that they are concerned to fix a date for hearing within the six-month period. It may be thought that, if that is done, there will be compliance with the section even if the hearing lasts more than one day and is not concluded until after the six-month period has ended. It is to be supposed that Parliament contemplated the possibility of confiscation hearings taking more than one day, possibly many days, although we have seen no positive indication that this is so. During the hearing of this appeal, members of this court were strongly inclined to think that the section on its proper construction required no more than that the six-month period should be judged by reference to the start of the hearing of the confiscation proceedings. We are, however, with some reluctance persuaded that 'determining' and 'determination' cannot be so construed. b
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[56] In *R v Tuegel* [2000] 2 All ER 872, Rose LJ, giving the judgment of the court, said (at 894): d

'However, although we express no concluded view, we doubt the correctness of Mr Garlick QC's submission that "determining" in s 72A is a continuing process and, provided it is embarked upon within six months of conviction, this is sufficient to satisfy the six-month requirement of s 72A(3).' e

We consider on reflection that the words 'determining' and 'determination' connote the end of the process, that which the court eventually decides. A substantive start to a hearing within the six-month period which is adjourned beyond that period does not achieve a determination within the six-month period. f

[57] This means that Parliament has imposed on the court and the parties a time constraint which, if it were absolute, might in particular cases be distinctly inconvenient and even positively unjust. Unless there is some degree of flexibility, absurd circumstances might arise which we cannot believe Parliament intended. A hearing estimated to take two days might occasionally take two weeks. Are the court and the parties obliged to set aside all other court commitments, however important they may be, to cram a confiscation hearing into an excessively confined period? The answer, of course, in literal terms could be Yes, so that the court and the parties have got so to arrange things that problems of this kind do not arise. There is a clear Parliamentary intention that confiscation determinations should take place within the six-month period unless there are exceptional circumstances. But we doubt whether it was the Parliamentary intention that all other court commitments, for example murder or rape trials, should if necessary be subordinated to confiscation determinations. Other problems would be if the judge or the defendant's counsel were ill; if, as happened in the present case, the defendant was not delivered on time from the prison; if evidence to be called on behalf of the defendant was going to overrun the six-month period; or if the judge reasonably required time to consider and compose a written judgment. Mr Haggan accepted that some at least of these, depending on all the circumstances, would be likely to qualify as exceptional circumstances justifying a postponement or an adjournment. g
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a [58] Another question is whether, if there is a substantial start to a confiscation hearing within the six-month period but the hearing has to be adjourned, the considerations relating to such an adjournment are the same as those which relate to the common law power of adjournment considered by the authorities. The authorities have concerned cases where the entire substantive hearing has been adjourned before it has started. The judge in the present case reckoned that, once there had been a substantive start, he had power to adjourn the hearing unconstrained by s 72A. Mr Haggan submits that he did not have this power. He further submits that, in fixing a short first hearing and at the same time announcing an intention to adjourn it to a date after the end of the six-month period, the judge was adopting an illegitimate device to circumvent the statute.

c [59] This question is linked to the question whether the section requires the determination to be concluded within the six-month period, unless there are exceptional circumstances. We have decided earlier in this judgment that it does. We consider that it follows that the same considerations apply to the adjournment of a hearing which has started, as to the postponement or adjournment of the entire substantive proceedings. The parliamentary intention is that, unless there are exceptional circumstances, the hearing is to be concluded and the determination made within the six-month period. We do not consider that starting the hearing on 28 October for a substantial, but limited, period was simply a device. But we do consider that the judge's order on 26 September 2002 that the hearing should start on 28 October and then resume on 12 November should be seen as a postponement or adjournment of the determination until the conclusion of the hearing to be resumed on 12 November. Authority requires that there had to be exceptional circumstances for this. Authority also indicates that a broad approach may be taken to the question of what may amount to exceptional circumstances.

f [60] *R v Sekhon* decides that there has to be a judicial decision embodied in an order to adjourn or postpone if the court is to have jurisdiction to make a confiscation determination outside the six-month period. There was such a decision and order in the present case. *R v Soneji* decides there has to be a considered judicial finding of exceptional circumstances. There was such a finding in the present case. *R v Sekhon* indicates that procedural technicalities, apart from the two we have indicated, do not go to jurisdiction. The case also indicates that procedural technicalities which cause no injustice do not exclude the court's jurisdiction. There was no injustice in the present case. If, as in the present case, the judge both makes a decision to adjourn or postpone and concludes that there are exceptional circumstances, that is a composite discretionary decision. It is open to a defendant to challenge such a decision in this court, but this court will not interfere with such a decision, especially where there is no injustice, unless the judge made an error of law or was otherwise plainly wrong.

j [61] The essential grounds of appeal advanced on behalf of the appellant by Mr Haggan are: (a) the Crown's case that there were exceptional circumstances was fundamentally flawed. It was based on an illogical reversal of the Crown's previous position. Until 26 September 2002, the Crown had contended that there were no exceptional circumstances, such as until then were being advanced on behalf of the appellant, and that the confiscation proceedings should be heard and determined forthwith within the six-month period. The change of circumstances which occurred when Smith pleaded guilty did not alter that; (b) listing difficulties are not exceptional circumstances. It was listing difficulties alone

which led to the postponement or adjournment until after the end of the six-month period; (c) the listing difficulties were, or were mainly, those of Mr Bartlett appearing for the Crown. It was the Crown's obligation to overcome these difficulties. The proceedings could and should have been heard and determined in the week of 28 October 2003. a

[62] The third of these contentions was much emphasised in Mr Haggan's written submissions. We have already indicated that we reject it. It was not in our judgment factually correct that the listing difficulties were mainly Mr Bartlett's. The court, Mr Haggan and Mr Bartlett all had difficulties. So far as Mr Bartlett was concerned, the hearing could have taken place in the first week of November, but Mr Haggan was otherwise engaged during that week. The court also had difficulties in that week. It was not realistically just that either party should be represented by alternative counsel, when Mr Haggan and Mr Bartlett had been engaged in the proceedings throughout, including the nine-week trial during the spring of 2002. Nor in our judgment was the court obliged to put aside or disrupt literally any other commitment, however important, to promote these confiscation proceedings. b
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[63] In our judgment, a bald proposition that, whatever the circumstances, listing difficulties are incapable of being exceptional circumstances would be wrong. The mere convenience of counsel, witnesses or the court would certainly not justify a postponement or adjournment of any significance on the ground that the circumstances were exceptional. The plain policy of the legislation must be faithfully adhered to and every effort must be made to conclude the confiscation proceedings and make the appropriate determinations within the six-month period. Courts and the parties must be alert to the danger of time slipping away and timetables should not generally be set which risk overrunning the period. It may well be necessary for counsels' other commitments to be interfered with, for witnesses to be inconvenienced, and for the court to promote confiscation hearings at the expense of other business. The provisions of the statute mean that a timetable to achieve the determinations within the six-month period must be set and adhered to in the large majority of cases. But there may be a small minority of cases in which in all the circumstances difficulties with dates cannot justly be accommodated without a modest overrun. These rare cases will be capable of constituting exceptional circumstances and, if no injustice results, a technical objection would not be sustained. As was indicated in the judgment of this court in *R v Soneji* [2003] Crim LR 738 at [25], there has to be a proper and sufficient judicial inquiry to justify a finding that exceptional circumstances have been established. The say-so of the listing officer is insufficient. Judges who apply this principle should not fall into the habit of assuming that an overrun of a few days will normally be acceptable. It will not. In particular, they should not assume that an overrun to enable them to compose a written judgment will normally be acceptable. On the other hand, a need to overrun by a few days where, upon proper investigation, no other solution is reasonably and justly possible, is rather more likely to be justified as exceptional circumstances than a much longer overrun. This may be so, not least because the likelihood of injustice increases with the length of any overrun. d
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[64] In our judgment, the judge in the present case was entitled to conclude, for the reasons which he gave, that the very short adjournment or postponement which his order provided for was justified by the existence of exceptional circumstances within the statute. By 26 September 2002, the combination of listing problems was severe and proper efforts appear to have been made to j

- a overcome them. The timetable up to 26 September could certainly have been set more tightly. But it would, in our judgment, defeat, rather than promote, the parliamentary intention, that proceeds of crime should be confiscated, to hold that the subsequent proceedings were incompetent because a shorter antecedent programme could have been devised. The court had to treat matters as they were on 26 September. One factor then was that Smith had just pleaded guilty.
- b The anticipated complexion of the appellant's confiscation proceedings had substantially changed. We may suppose that the reality was that, although the Crown was forensically obliged to oppose the appellant's application to postpone, the expectation was that it would succeed and that the appellant's confiscation proceedings would be postponed until after the conclusion of Smith's trial. The listing difficulties, which were severe, were fully and properly
- c explored and the court arrived at a just solution which in substance achieved the parliamentary intention. The appeal to this court is based on mere technicality and otherwise has no merit.

[65] For these reasons, we dismiss the appeal against the confiscation order.

Appeal dismissed.

Stephen Leake Barrister.

M25 Group Ltd v Tudor and others

[2003] EWCA Civ 1760

COURT OF APPEAL, CIVIL DIVISION

POTTER AND CARNWATH LJ

18 NOVEMBER, 4 DECEMBER 2003

Landlord and tenant – Flats – Tenants' right to acquire landlord's reversion – Disposal by landlord – Tenants' rights of first refusal – Landlord disposing of reversion without giving tenants prior notice of disposal – Tenants serving notice requiring particulars of disposal – Notice omitting tenants' addresses – Whether notice valid – Landlord and Tenant Act 1987, ss 11A, 54.

The defendant landlord acquired the freehold reversion of a block of flats in which the claimants were qualifying tenants under the Landlord and Tenant Act 1987. Section 11A^a of the 1987 Act provided that the requisite majority of qualifying tenants could serve notice on a purchaser of the freehold requiring particulars of the purchase; it was part of the process which could lead to the exercise of the right to acquire the freehold under the 1987 Act. Section 54^b of the 1987 Act provided that any notice purporting to be served under, inter alia, s 11A, should specify the names of all of the persons by whom it was served and the addresses of the flats of which they were qualifying tenants. The claimants served notice on the landlord, purportedly under s 11A, but the notice did not include the addresses of the flats of which they were qualifying tenants. The landlord therefore did not consider the claimants' notice to be valid. The claimants applied to enforce compliance with their notice and the landlord applied to strike out their claim. It was common ground that if the s 11A notice had not been valid, the time limit for exercising the claimants' rights to purchase the freehold had expired. The judge held that the notice was valid, and the landlord appealed.

Held – The purpose of a notice under s 11A of the 1987 Act was, as regards the recipient landlord, to tell him who sought the information and whether the seeker of the information equalled a majority of the qualifying tenants and was therefore entitled to it at all. The irreducible minimum of matters that were to be regarded as mandatory were those which, but for the notice, a landlord could never know. The requirement to state addresses in the notice was merely supportive. Applying an analytical approach brought about the same result: the substantive provisions of the legislation were those conferring the right to acquire the freehold; the secondary, or machinery, provisions included the notice requirements of s 11A and the formal requirements of s 54, including the requirement for the addresses. The requirement for a notice, and to indicate who was giving notice, was essential machinery. The requirement to state addresses was not, and a failure in that respect did not invalidate the notice. The appeal would accordingly be dismissed (see [19], [26], [34]–[36], below).

Dicta of Hobhouse LJ in *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312 at 335 and of Aldous and Staughton LJ in *Kay Green v Twinsectra Ltd* [1996] 4 All ER 546 at 558 and 562 applied.

^a Section 11A, so far as material, is set out at [8], below

^b Section 54, so far as material, is set out at [8], below

Notes

- a** For duty of new landlord to furnish particulars of disposal unlawfully made, see 2003 Supp to 27(2) *Halsbury's Laws* (4th edn reissue), para 1601.

For the Landlord and Tenant Act 1987, ss 11A, 54, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue), 420, 463.

b Cases referred to in judgment

Belvedere Court Management Ltd v Frogmore Developments Ltd [1996] 1 All ER 312, [1997] QB 858, [1996] 3 WLR 1008, CA.

Burman v Mount Cook Land Ltd [2001] EWCA Civ 1712, [2002] 1 All ER 144, [2002] Ch 256, [2002] 2 WLR 1172.

- c** *Byrnlea Property Investments Ltd v Ramsay* [1969] 2 All ER 311, [1969] 2 QB 253, [1969] 2 WLR 721, CA.

Elnaschie v Pitt Place (Epsom) Ltd (1998) 78 P & CR 44, CA.

Howard v Bodington (1877) 2 PD 203, Arches Ct.

Howard v Secretary of State for the Environment [1974] 1 All ER 644, [1975] QB 235, [1974] 2 WLR 459, CA.

- d** *Kay Green v Twinsectra Ltd* [1996] 4 All ER 546, [1996] 1 WLR 1587, CA.
Speedwell Estates Ltd v Dalziel [2001] EWCA Civ 1277, [2002] 1 EGLR 55.

Appeal

- e** The defendant, M25 Group Ltd, appealed from the decision of Judge Cooke on 17 March 2003 dismissing the defendant's application to strike out the claim of John James Tudor, Ruth Watts Davies, Richard Earlam, Edith Dorothy Stock and Canara Ltd, under s 19 of the Landlord and Tenant Act 1987 requiring the defendant to comply with the claimants' notice under s 11A of the 1987 Act in respect of property unknown as Brambridge House, Brambridge Park, Bishopstoke, Hampshire. The facts are set out in the judgment of Carnwath LJ.

- f** *Jonathan Gaunt QC* (instructed by *Rochman Landau*) for the tenants.
Anthony Radevsky (instructed by *Wallace & Partners*) for the landlord.

Cur adv vult

- g** 4 December 2003. The following judgments were delivered.

CARNWATH LJ.**INTRODUCTION**

- h** [1] Part I of the Landlord and Tenant Act 1987 conferred upon 'qualifying tenants' of flats rights of first refusal, enabling them to purchase the interest of their landlord if and when he proposes to dispose of it. It followed recommendations of a committee chaired by Edward Nugee QC on the *Management of Privately Owned Blocks of Flats* (1985): see extracts cited in *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312 at 325, [1997] QB 858 at 874–875.
- j** The committee was concerned by evidence of cases in which ownership of the freehold passed through several hands in quick succession, leaving tenants uncertain who their landlord was. It was not at that stage thought right to give tenants a right to buy the interest of a landlord who wished to continue to own the property. However, where the landlord wished to dispose of his interest, the 'presumption against expropriatory legislation' was thought to apply with less force; it was recommended that in that event tenants

should have an opportunity to purchase the reversion themselves (vol 1, para 6.18). a

[2] Since that time there have been a number of legislative interventions in this field, designed to give leaseholders greater rights to secure ownership, or to manage their buildings, the most recent being the Commonhold and Leasehold Reform Act 2002.

[3] In the meantime the right of pre-emption under the 1987 Act has remained, but in a much modified and expanded form. Experience revealed serious problems with the drafting of Pt I, as well as a lack of any effective means of enforcement. Extensive amendments and substitutions were made by the Housing Act 1996. It is in that amended form that it falls to be considered in this case. In looking at the authorities, it is necessary to bear in mind that most of them pre-date the amendments. b
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THE SCHEME

[4] Part I applies to a building which contains two or more flats held by 'qualifying tenants', if the number of flats held by qualifying tenants exceeds 50% of the total number of flats in the building (s 1(2)). A 'flat' for these purposes is a 'separate set of premises' adapted for use as a dwelling and divided horizontally from some other part of the building (s 60(1)). A 'qualifying tenant' is any tenant, other than one under a protected shorthold tenancy, a business tenancy, an assured tenancy, or one linked to employment (s 3(1)). Other exclusions from the definition of qualifying tenant are any tenant of at least three flats in the same premises (s 3(2)), and any tenant whose landlord is a qualifying tenant of the same flat (s 3(4)). d
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[5] The principal substantive rule is found in s 1: a landlord must not dispose of the premises to which Pt I applies, unless he has first served a notice on the qualifying tenants under s 5 of the Act. The notice must comply with requirements set out in four sections (ss 5A–5D), depending on the proposed form of sale. In the typical case of a contract to be completed by conveyance, the notice must contain particulars of the principal terms of the disposal, and state that it constitutes an offer by the landlord to enter into a contract on those terms which may be accepted by the requisite majority of qualifying tenants of the constituent flats, within a specified period (s 5A(3)). The 'requisite majority' for the purposes of a notice under s 5 means qualifying tenants of more than 50% of the flats let to qualifying tenants at the time when the offer expires (s 18A(1), (2)(a)). Sections 6–10 provide the machinery for acceptance of the landlord's offer, beginning with an 'acceptance notice' served by the qualifying tenants (s 6(2), (3)). f
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[6] If the original landlord disposes of the premises without serving the required notice, then a new set of rights comes into play against the purchaser (ss 11–12C). The first, which is in issue in this case, is the right of qualifying tenants to obtain information as to the terms of disposal (s 11A). The others are designed to give them the right to ensure that the landlord, or the purchaser (if the sale has been completed), sells the property to them on the original terms (ss 12A–12D). The time limit for serving a notice requiring such a sale is six months beginning from the date when the tenants were given notice of the sale, or, if a notice has been served under s 11A, the date when the purchaser complied with the notice (s 12A(2)). h
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[7] Section 19 enables the court on the application of any person interested to make an order requiring any person 'who has made default in complying with

- a any duty imposed on him by any provision of this Part' to make good the default within the time specified in the order. The application cannot be made until 14 days have elapsed since the service of a notice requiring the other person to make good the default. In addition to this means of enforcement, the 1996 Act introduced a penal element. A landlord who makes a relevant disposal without complying with s 5, or in contravention of a prohibition imposed by ss 6–10, commits an offence triable summarily (s 10A(1)).
- b [8] The issue in this case turns on the effect of s 11A taken with s 54.

'11A. *Right to information as to terms of disposal, &c.*—(1) The requisite majority of qualifying tenants of the constituent flats may serve a notice on the purchaser requiring him—(a) to give particulars of the terms on which the original disposal was made (including the deposit and consideration required) and the date on which it was made, and (b) where the disposal consisted of entering into a contract, to provide a copy of the contract.

c (2) The notice must specify the name and address of the person to whom (on behalf of the tenants) the particulars are to be given, or the copy of the contract provided...

d (4) A person served with a notice under this section shall comply with it within the period of one month beginning with the date on which it is served on him...

54. *Notices.*—(1) Any notice required or authorised to be served under this Act—(a) shall be in writing; and (b) may be sent by post.

e (2) Any notice purporting to be a notice served under any provision of Part I or III by the requisite majority of any qualifying tenants (as defined for the purposes of that provision) shall specify the names of all of the persons by whom it is served and the addresses of the flats of which they are qualifying tenants.'

f FACTUAL BACKGROUND

[9] The defendant acquired the freehold reversion of Brambridge House in Hampshire on 3 December 2001. The claimants are a number of tenants of flats in the building. A s 5 notice was given by the previous landlords but there is a dispute (largely turning on the treatment and valuation of fishing rights attached to the property) as to whether the subsequent disposal contravened the provisions of ss 6–10 of the 1987 Act. That is not before us. For the purpose of this appeal it is to be assumed that there was such a contravention. On 13 May 2002 notice was given (under ss 3 and 3A of the Landlord and Tenant Act 1985) notifying the tenants of the change of ownership.

g [10] On 27 May 2002 notice was given on behalf of the claimants, purportedly under s 11A, requiring information about the disposal. There was no response to that notice. On 29 May 2002 the appellant's solicitors, Wallace & Partners wrote: 'We do not believe that the notice enclosed with your letter constitutes a valid notice...' On 8 September 2002, the claimants gave notice under s 19 requiring compliance. The statutory 14 days elapsed without response, and these proceedings were commenced. For present purposes there is no dispute that the persons giving the s 11A notice were the requisite majority of the qualifying tenants.

j [11] I turn to the form of the notice, which is under challenge. There is no prescribed form for such a notice. Accordingly the only guidance available as to its contents is that contained in the Act. The notice was signed by the solicitors for the named tenants. It was addressed to the M25 Group at the address of their

solicitors. It referred to the notice of the disposal given on 13 May 2002. It required the purchasers to give particulars of the terms on which the disposal was made, including the consideration paid and a copy of the contract. It required those particulars to be sent 'to us as solicitors to the above qualifying tenants'. a

[12] So much is uncontentious. The difficulty arises over the identification of the tenants, which was stated as follows:

'We act for John James Tudor, Ruth Watts Davies, Richard Earlam, Edith Dorothy Stock and Canara Limited, who are the qualifying tenants in respect of Brambridge House, Brambridge Park, Bishopstoke, Hampshire.' b

There is no dispute that all those named were qualifying tenants, and that accordingly the first part of s 54(2) was satisfied. However the notice failed to state 'the addresses of the flats of which they are qualifying tenants', as required by that subsection. It is also common ground that, if the s 11A notice was not valid, then the time for exercising the tenants' rights under s 12 has expired, and those rights are effectively lost. It is in these circumstances that the defendant applied to strike out the claim. c

[13] In so far as it is relevant to inquire as to the defendant's state of knowledge at the time, the judge said: d

'It is clear from the claimants' evidence that prior to the acquisition by the defendant the previous landlords' solicitors were made aware of the addresses of all the relevant tenants and that subsequent to the questioned notice, 23 July 2002, the tenants' solicitors wrote to the (new) landlords' solicitors setting out the relevant flat numbers.' e

He also referred to a schedule of qualifying leases, said to have emanated from the vendor landlords, apparently dating from about January 2001, which relates the names to the relevant flat numbers. It is uncertain on the evidence whether that was known to the purchasers. The judge noted that Mr Gaunt QC, for the tenants, had 'trailed his coat a little' by saying that he took it to be agreed that the landlords knew of the schedule of lettings, and had elicited no reply from Mr Radevsky for the purchaser. The judge said: f

'It seems to me that if this is a relevant consideration then (1) it is highly probable as a matter of ordinary common sense that the landlord would know what the lettings were, and (2) if the landlords are saying they did not know that would be a triable issue on the facts and not open before me on this application.' g

[14] I did not understand Mr Radevsky, before us, to challenge that particular passage, although his general submission was that the purchaser's state of knowledge was irrelevant. h

[15] The sole issue for the appeal is whether the failure to state the addresses was fatal to the validity of the notice: in other words, whether the requirement was 'mandatory' or 'directory'. I should add that no excuse is put forward for the omission; it was an unfortunate oversight by the solicitors. j

THE JUDGMENT BELOW

[16] The judge referred to 'two different lines of authority', relied on by counsel. The first was exemplified by the recent decision of this court in *Burman v Mount Cook Land Ltd* [2001] EWCA Civ 1712, [2002] 1 All ER 144, [2002] Ch 256. It concerned a requirement under the Leasehold Reform Act 1993, for the landlord

- a to serve a counter-notice saying whether or not the right to a new lease was admitted and, if so, which of the tenants' proposals were acceptable. The notice in question did not contain such a statement. The judge had upheld the notice on the basis that 'a reasonable tenant' would not have been misled. That decision was reversed in this court. Chadwick LJ, giving the leading judgment said that the answer could only be found by construing the statutory language in the context of the statutory scheme. Having reviewed the complex statutory requirements in detail he concluded that the landlords' counter-notice was 'integral' to the proper working of the statutory scheme, and the failure to comply with the statutory requirements was fatal to its validity.
- b

- [17] Other cases to similar effect mentioned by the judge are *Elnaschie v Pitt Place (Epsom) Ltd* (1998) 78 P & CR 44, and *Speedwell Estates Ltd v Dalziel* [2001] EWCA Civ 1277, [2002] 1 EGLR 55, both decisions of this court. An earlier case in the same line, relied on by Mr Radevsky before us but not cited to the judge, was *Byrnlea Property Investments Ltd v Ramsay* [1969] 2 All ER 311, [1969] 2 QB 253. This related to a requirement of the Leasehold Reform Act 1967 for the notice of a lessee, seeking to extend his interest under that Act, to indicate whether he was seeking the freehold or an extended lease. This failure was held to be fatal, because under the statutory scheme, the notice was designed to lead to a 'statutory contract' binding on both parties (see [1969] 2 All ER 311 at 314, [1969] 2 QB 253 at 263 per Lord Denning MR). As Edmund Davies LJ pointed out ([1969] 2 All ER 311 at 317, [1969] 2 QB 253 at 267), if the notice had been held to be valid—
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- d

- e 'the remarkable result would be that there would instantly spring into being at the moment of its service two statutory contracts, both binding on the parties and each differing in important respects from the other.'

[18] On this line of authority, the judge commented:

- f 'All these authorities are completely consistent. If you are seeking to see whether a notice complies with the statutory requirement you construe the statute and apply it to the notice. You do not ask the question "what would a reasonable recipient think". On those authorities, and if those were the only line of authorities, that notice plainly does not comply. The addresses are not there in any shape or form.'
- g

- [19] As the judge noted, Mr Gaunt did not dispute the effect of those cases, on their own facts. He accepted that the notice in this case failed to comply with the statute; but the question was: 'What is the effect of that failure and does it matter?' For this purpose Mr Gaunt relied on a second line of authority, which establishes that not every failure to comply with a statutory requirement for the form of notice makes the notice a nullity. The law draws a distinction between requirements regarded as 'mandatory' and those regarded as 'directory' or 'permissive'. The distinction is easier to state than to apply, but, as the judge said, the principle has a long history dating back more than 100 years (see e.g. *Howard v Bodington* (1877) 2 PD 203).
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- j

[20] In the present context, fortunately, we have very recent guidance from this court, in a case concerning Pt I of the 1987 Act, in its unamended form: *Kay Green v Twinsectra Ltd* [1996] 4 All ER 546, [1996] 1 WLR 1587. In that case the former landlord had sold a number of buildings, some of which fell within Pt I of the 1987 Act. The required s 5 notice had not been served. Furthermore, the vendor had failed to comply with his duty (under s 5(5)) to 'sever' the transaction,

so that the buildings within Pt I of the Act were sold separately. A majority of the tenants in three of the buildings containing flats subsequently served a purchase notice on the new landlord under s 12 as it then was. Section 12(3)(a) provided that, where the interest subject to the disposal related to property in addition to the premises within Pt I, the purchase notice 'shall ... (i) require the new landlord to dispose of that estate or interest only so far as relating to those premises', subject to 'such modifications as are necessary or expedient in the circumstances'. Contrary to that requirement, the purchase notice required the transfer of all the buildings, whether or not within Pt I. The judge held that that was a clear breach of the section, which was fatal to the validity of the notice. The Court of Appeal reversed that decision, holding that that particular requirement was directory only.

[21] In reaching that conclusion the court relied on two previous authorities. The first was *Howard v Secretary of State for the Environment* [1974] 1 All ER 644, [1975] QB 235. Although in a very different area of the law, it is of some relevance to this case, because there also the notice included some, but not all, of the information required by the statute; but (unlike in this case) it was not information readily available to the recipient. The case concerned the requirements for a notice of appeal against an enforcement notice, under the Town and Country Planning Act 1968. The Act required that an appeal should be made by notice in writing to the minister, 'which shall indicate the grounds of the appeal and state the facts on which it is based'. Failure to submit a valid notice of appeal within the permitted time limit would result in the enforcement notice taking effect and any right to challenge it being lost. There was no power to extend the time. In that case a notice of appeal was served in time, but it failed to state either grounds or facts. A letter was sent by the appellant's solicitors giving the necessary information, but owing to office error it was not posted until after the period had elapsed. The Court of Appeal held that, although the requirement for a written notice of appeal was mandatory, the requirement to set out the grounds and the facts was directory only. Stamp LJ said ([1974] 1 All ER 644 at 649, [1975] QB 235 at 243):

'The machinery of the enforcement provisions and the appeal therefrom simply would not work unless there was some fixed time put in s 16(1) to limit the time in which an appeal is to be brought. That provision is therefore mandatory and a failure to appeal within the time there limited clearly goes to the jurisdiction. The provisions of sub-s (2) requiring the notice to indicate the grounds of appeal and to state the facts on which it is based appear to me to be more in the nature of procedural matters which are directory and do not go to the jurisdiction.'

[22] The other case relied on in the *Kay Green* case was a decision already mentioned, *Belvedere Court Management Ltd v Frogmore Developments Ltd* [1996] 1 All ER 312, [1997] QB 858 (see [1], above). The relevant passage comes at the end of the judgment of Hobhouse LJ ([1996] 1 All ER 312 at 335, [1997] QB 858 at 886), where he said:

'By way of final comment I would add that I am strongly attracted to the view that legislation of the present kind should be evaluated and construed on an analytical basis. It should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Further, the provisions which fall into the latter category

a should be examined to assess whether they are essential parts of the mechanics or merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances. In other words, as in the construction of contractual and similar documents, the status and effect of a provision has to be assessed having regard to the scheme of the legislation as a whole and the role of that provision in that scheme—for example, whether

b some provision confers an option properly so called, whether some provision is equivalent to a condition precedent, whether some requirement can be fulfilled in some other way or waived. Such an approach when applied to legislation such as the present would assist to enable the substantive rights to be given effect to and would help to avoid absurdities or unjustified lacunae.'

c [23] Following the approach of those two cases Aldous LJ, giving the leading judgment in the *Kay Green* case, said ([1996] 4 All ER 546 at 558, [1996] 1 WLR 1587 at 1600):

d 'A purchase notice must give adequate notice to the new landlord of the qualifying tenants desire to purchase the estate or interest that they should have been offered by the original landlord. That is imperative, in the sense that it must be followed to the letter, but some of the other requirements of s 12 are only directory.'

e On the other hand, the requirement in s 12(3)(a) that the notice should require disposal 'only' of the premises within Pt I was 'directory'. He said ([1996] 4 All ER 546 at 560, [1996] 1 WLR 1587 at 1602):

f 'In this case, the purchase notice included extra property, but that did not invalidate the notice as a whole ... the landlord was given adequate notice that the tenants of buildings 1 and 4 of Tudor Court and Tudor House wished to acquire the freehold interest in them. That was in my view sufficient.'

[24] Staughton LJ agreed ([1996] 4 All ER 546 at 562, [1996] 1 WLR 1587 at 1604):

g 'I cannot regard this defect in the tenants' purchase notice as so significant as to render it altogether invalid, for three reasons. In the first place, it was in all probability caused by the original landlord's failure to serve a notice under s 5 and in doing so to sever the transaction as required by sub-s (5) of that section. Secondly, it must have been perfectly obvious to the new

h landlord which parts of Tudor Court could, and which could not, qualify under Pt I of the 1987 Act. And thirdly, the purchase notice allowed as an alternative that the terms might be determined by a rent assessment committee, which would have jurisdiction under s 13(1)(a) to determine "the identity of the property to be disposed of". I would therefore conclude

j that the purchase notice did not comply with s 12 in any respect that was imperative or mandatory, but at most where it was directory...'

The other member of the court (Sir John May) agreed with both judgments.

[25] In the present case Judge Cooke held that the same principle applied. He correctly observed that the court 'is not operating some sort of seventeenth century dispensing power', and that, in dealing with the subject of

enfranchisement, lease extension and matters of that kind, many of the requirements of notices must be treated as mandatory. On the other hand: a

‘One ought to remember that these sort of statutory provisions are aimed at providing a commercially fair result so that recipients of notices are told what they have to be told but that the object of the exercise is the giving of information and the defining of issues, not prescription of steps in a ritual dance or a complex game, one false step in which is intended to produce disaster.’ b

[26] He said rightly that the starting point must be the purpose for which the statute requires a notice containing the information; and that the purpose of the s 11A notice is: c

‘(a) as regards the givers, the tenants, to seek information as to the transactions; (b) as regards the recipient landlord to tell him who seeks the information and whether the seeker of the information equals a majority of the qualifying tenants and is therefore entitled to it at all.’ d

He accepted Mr Gaunt’s submission that in relation to the second purpose, the notice is at best of only limited assistance to the landlord in deciding whether or not he is obliged to give the information. The landlord needs to know, not merely the identities of the qualifying tenants and which flats they occupy, but how they relate to the total number of flats and the total number of qualifying tenants, in order to see whether those serving the notice are ‘the requisite majority’. The judge concluded that the ‘irreducible minimum’ of matters that must be regarded as mandatory are ‘matters which but for the notice the landlords could never know’. He gave as examples: e

‘Who is giving the notice, what their proposals are, whether they accept the other party’s proposals, what property they seek to acquire, are all things the recipients of a notice must be entitled to receive “en clair” and not have to guess at. By contrast it seems to me that where the information which the notice contains achieves the purposes of the notice then the further statements which the statute requires but which once given the mandatory facts are common ground or readily and indisputably ascertainable are likely to be regarded as directory only. It will be helpful to have them but the purpose of the notice is achieved without them.’ f

He regarded the *Kay Green* decision as strongly influenced by the fact that the recipient of the notice would have ‘uncontroversially known the true position as to the relevant facts’. He continued: g

‘Whether or not one accepts that the schedule was definitely known to the present landlords, what is clear is that ... a landlord receiving a notice would have had in any case to relate it to the underlying tenancies which were on the facts uncontroversial and something the landlords would either have known or could easily have discovered. Once the identity of the notice givers was known it could by relating the notice to the uncontroversial facts (some of which should have been contained in the notice but others of which would not have been) have answered the question “Are these people entitled to information?”’ h

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SUBMISSIONS IN THIS COURT

a [27] I agree with Mr Radevsky that the state of the landlords' knowledge in fact is not the material issue (*Speedwell Estates Ltd v Dalziel* [2002] 1 EGLR 55 at [24] per Rimer J (see [17], above)). On the other hand, I regard it as important that the parties are in an existing landlord and tenant relationship, which the new landlord has undertaken voluntarily. In recognition of that relationship, the draftsman has clearly proceeded on the basis that each side will have, or be able to obtain, relevant knowledge about the tenancies in the building. The concept of a 'requisite majority' of qualifying tenants implies an assumption that those tenants who wish to rely on the 1987 Act will know, or be able to find out, the relevant information about the other tenancies; and conversely that the landlord will be able to obtain that information in order to check the position. As the judge said, he will not obtain that information, even from a notice which complies in every particular with the Act.

b [28] Thus, to use the judge's phrase, the Act proceeds on the basis that certain facts are 'readily and indisputably ascertainable'. It is permissible to construe s 54 with that in mind. Whether or not the new landlords had the schedule of addresses, it is not suggested by Mr Radevsky that they would have had any practical difficulty in discovering them.

c [29] Mr Radevsky submits further that if the requirement for addresses is to be held to be 'directory', it is the same as treating it as optional, which is contrary to what the section says. The same point could often be made of provisions held to be directory. For example in *Howard v Secretary of State for the Environment* [1974] 1 All ER 644, [1975] QB 235, the court's decision resulted in effect in the requirement to state grounds and the facts relied on becoming optional as far as the original notice was concerned. The answer in that statutory scheme, as Lord Denning MR said ([1974] 1 All ER 644 at 648, [1975] QB 235 at 243), was that the defects could be remedied later, either before or at the hearing of the appeal, provided the authority was given an opportunity to deal with the points raised. It might have been thought that the requirement to know the grounds of appeal (which were entirely in the knowledge of the appellant) was more significant to the authority than the requirement in this case to state the addresses.

d [30] Mr Radevsky also made certain points on the detail of the schedule supplied to the previous landlords in 2001. For example he drew attention to the fact that in relation to Flat 10 there were two joint tenants, Mrs Watts Davies and Mr Earlam, whereas from the s 11A notice both names were given without any indication that they were occupying the same flat. On the other hand Mrs Stock, also referred to in the s 11A notice, was apparently occupying three flats, which according to the 2001 schedule had been joined together into one flat. e Mr Radevsky hypothesised that the flats might have been divided before the time of the s 11A notice (as apparently has happened more recently, after their acquisition by the present landlords). He refers rightly to the fact that the s 11A notice must reflect the position at the time of the notice, which may not be the same as it was at the time of the disposal. However, it does not seem to me that these points add anything to his main point. Once one accepts that the landlord has to do some checking of the information in order to know whether any obligation under Pt I arises, then there is no difficulty in accepting that these matters also may have to be checked.

f [31] As to what would happen in the unlikely event that the tenants refused to supply their addresses, it is perhaps unnecessary to speculate, since it is difficult to envisage circumstances in which a problem would arise. However Mr Gaunt

suggested that in such a case s 19 of the Act, which provides powers to enforce any 'duty' under Pt I, would enable the court to order the party serving the notice to provide the missing details. Mr Radevsky (somewhat unconvincingly taking the part of the hypothetically defaulting tenant) suggested that the section would not apply, because the tenant would be in breach of no 'duty', there being no duty to serve a s 11A notice in the first place. I would prefer not to decide a point which may be relevant in other circumstances. However, it would come oddly from a tenant, having chosen to rely on a notice under s 54, to argue that he was under no 'duty' to do what the section requires him to do. Mr Radevsky also pointed out that in that hypothetical event, there might be difficulties with the time limits provided under s 12A(2), which may depend on the time at which the s 11A notice is treated as effective. That again seems to be a bridge to be crossed when one comes to it. In the unlikely event of a problem arising in practice, I have no doubt that a purposive construction of the Act would enable a solution to be found.

[32] Of more concern, was Mr Radevsky's submission that s 54 could not be construed with only s 11A in mind. This was not a point considered by the judge, and at first sight it raises a difficulty. Section 54 applies the same formal requirements to any provision of Pts I or III requiring a notice by a requisite majority of qualifying tenants. It is unnecessary to refer to all the provisions where such a requirement may arise. The high point of the submission seems to me in relation to notices which may have penal consequences. The best example is s 6(2), which provides that where an acceptance notice has been served on the landlord he may not dispose of the protected interest except to a person nominated by the qualifying tenants. An acceptance notice, as defined by s 6(3), is subject to s 54, and must therefore include a statement of both names and addresses. A disposal in contravention of the prohibitions imposed by s 6 is one of the matters giving rise to a potential offence under s 10A. A landlord charged with such an offence, so the argument runs, would be able to insist that the prosecution proved strict compliance with the statutory formalities. The mandatory/directory divide should not be permitted to apply in such a penal context.

[33] I would be reluctant in the context of this appeal, to decide an issue which might arise in criminal proceedings on entirely different facts. Although there is obvious theoretical attraction in the submission that s 54 must be interpreted in the same way throughout the Act, practical considerations entitle the court to take a more flexible approach. The issue is not the meaning of s 54, which is quite clear, but the consequences in different situations of a failure to comply with it. Section 54 is not a substantive provision, but is ancillary to the various notice provisions. A less economical approach to drafting might have resulted in the requirements being stated separately in each of the sections to which it applies. In deciding the consequences of non-compliance in any case, we are entitled in my view to consider the issue in the particular statutory context in which it arises. I bear in mind also that the penal provision of s 10A was included by the 1996 Act in an attempt to strengthen the position of tenants. It would be surprising if one of the results was to subject the tenants to a more formalistic approach to their own obligations, even in cases where no penal consequences can arise.

CONCLUSION

[34] In my view, the judge was entirely correct in upholding the validity of the notice, and I would have been content to adopt his reasons. The same result may

- a* be arrived at by applying the analytical approach advocated by Hobhouse LJ. That involves considering which of the provisions are substantive and which are secondary or 'machinery'; and in relation to the latter, considering whether they are 'essential parts of the mechanics or merely supportive of the other provisions'. Here the substantive provisions are those conferring the right to acquire the freehold. The secondary (machinery) provisions include the notice requirements of s 11A itself, and the formal requirements of s 54, including the requirement for the addresses. The requirement for a notice is essential machinery, as no doubt is the requirement to indicate who is giving the notice. However, in agreement with the judge, I would hold that the requirement to state addresses in the notice is 'merely supportive'; and that accordingly a failure in this respect does not invalidate the notice.
- c* [35] For these reasons, I would dismiss the appeal.

POTTER LJ.

[36] I agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Jameel and another v Wall Street Journal Europe SPRL a

[2003] EWHC 2945 (QB)

QUEEN'S BENCH DIVISION

EADY J b

24, 25 NOVEMBER, 5 DECEMBER 2003

Libel and Slander – Parties – Right to sue – Corporation – Foreign corporation – Right to freedom of expression – Common law presumption of damage under English law once publication of libel established – Whether right to freedom of expression modifying common law presumption in relation to foreign corporation – Human Rights Act 1998, Sch 1, Pt I, art 10(2). c

The defendant was the publisher of a newspaper. The second claimant was a company incorporated in Saudi Arabia. The claimants issued proceedings against the defendant in libel. At a preliminary hearing, the defendant challenged the second claimant's standing to sue, contending that the effect of art 10^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which provided for the right of freedom of expression, and further provided, in art 10(2), that the exercise of the right, 'may be subject to such ... restrictions ... as are prescribed by law and are necessary in a democratic society ... for the protection of the rights and freedoms of others ...', was that the common law principle that claimants were entitled to rely upon a presumption of damage once the publication of a libel had been established, required to be modified to the extent that a foreign corporation had to prove some actual measurable damage to its trading or business reputation, as it could not be said to be 'necessary' for media defendants to labour under the disadvantage of the common law presumption when investigating and reporting on matters of public interest touching upon foreign corporations. The claimants submitted that the values of the convention, as reflected in the use of such concepts as necessity and proportionality, were already sufficiently honoured in the approach of domestic courts to quantum, in that if a company were unable to establish actual measurable damage to its reputation, it would generally achieve vindication through a modest or nominal award, and that if it were not permitted to sue and put the record straight in respect of defamatory publication, then domestic law would not be giving sufficient weight to protection of reputation. d
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Held – There was nothing inherent in the values of the convention in general or of art 10(2) in particular, that required foreign corporations with a recognised cause of action in defamation to be deprived of a remedy by way of vindication for no better reason than that they were unable to establish, on the balance of probabilities, that they had suffered actual financial loss. A presumption of j

^a Article 10, so far as material, provides: '(1) Everyone has the right to freedom of expression ... (2) The exercise of these freedoms ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the rights and freedoms of others ...'

- a damage was not a presumption of substantial loss and it followed that it was not inherent in the principle that claimants were entitled to rely upon a presumption of damage once the publication of a libel had been established, that any remedy achieved by a corporate claimant was bound to be disproportionate. In the context of freedom of speech, where the court was faced not with a choice between two conflicting principles, but with a principle of freedom of expression
- b that was subject to a number of exceptions which had to be narrowly interpreted, it was necessary to be wary of referring to balancing exercises, but it had to be recognised that the exercise of reconciling the demands of competing rights involved an element of balancing. In the instant case, the court was concerned with balancing the right to freedom of expression and such restrictions as were necessary for protecting the reputation of foreign trading corporations. The
- c rights of journalists to freedom of expression should not be given so high a priority that those foreign corporations which were able to overcome the applicable jurisdictional hurdles should nevertheless be deprived of remedies which would be open to United Kingdom corporations which had been libelled merely because they were unable to prove that actual financial loss had been
- d caused. The application would, accordingly, be dismissed (see [23]–[25], [28], [29], below).

Notes

- e For damage in libel, and for the right to freedom of expression, see, respectively, 28 *Halsbury's Laws* (4th edn reissue), para 18, and 8(2) *Halsbury's Laws* (4th edn reissue) para 107.

For the Human Rights Act 1998, Sch 1, Pt I, art 10, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

Cases referred to in judgment

- f *Australian Broadcasting Corp v Comalco Ltd* (1986) 68 ALR 259, Aus FC.
Berezovsky v Forbes Inc [2001] EWCA Civ 1251, [2001] EMLR 1030.
Cassell & Co Ltd v Broome [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL.
- g *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65, [1992] QB 770, CA; *aff'd* [1993] 1 All ER 1011, [1993] AC 534, HL.
- English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 All ER 1, [1940] 1 KB 440, CA.
- Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151, sub nom *Rubber Improvement Ltd v Daily Telegraph*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234, [1963] 2 WLR 1063, HL.
- h *National Refining Co v Benzo Gas Motor Fuel Co* (1927) 20 F 2d 763, US Ct of Apps (8th Cir).
- Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, HL.
- j *Shevill v Presse Alliance SA* [1996] 3 All ER 929, [1996] AC 959, [1996] 3 WLR 420, HL.
- South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548, CA.
- Steel v McDonald's Corp* [1999] All ER (D) 384, CA.
- Sunday Times v UK* (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECtHR.
- Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, Aus HC.

Application

The Wall Street Journal Europe SPRL, the defendant in libel proceedings brought by Mohammed Abdul Latif Jameel (the first claimant) and Abdul Latif Jameel Co Ltd (the second claimant), applied to strike out the second claimant as a party to the action. The facts are set out in the judgment. a

Geoffrey Robertson QC and Rupert Elliott (instructed by *Finers Stephens Innocent*) for the defendant. b

James Price QC and Justin Rushbrooke (instructed by *Peter Carter-Ruck and Partners*) for the claimants.

Cur adv vult c

5 December 2003. The following judgment was delivered.

EADY J.

[1] On 24 and 25 November 2003, a week before the trial began, I heard various submissions at a pre-trial review. In particular, Mr Robertson QC for the defendant sought to undermine the second claimant's standing to sue in these proceedings for injury to reputation. There were three grounds of attack. First, it is suggested that this claimant, which is a Saudi company, does not actually trade at all and thus cannot have a trading or business reputation that would be recognised by the law of defamation in this jurisdiction. Secondly, even if it is established that it does trade or carry on business in Saudi Arabia, he argues that it has no reputation within England and Wales such as to permit libel proceedings to be brought here. Leaving aside the question as to whether that is correct as a matter of law, it is quite obvious that both these submissions depend upon certain factual assumptions. It is accepted that they cannot therefore be resolved until at least the claimants' evidence on the nature of the company, and the extent of its reputation here, has been placed before the court. At some stage I may have to rule on these matters in the light of any further submissions the parties care to make. d
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[2] There is, however, a third line of attack which, in Mr Robertson's phrase, would enable him to 'bowl out' the second claimant on a preliminary issue and without the need for further evidence. He recognises that the argument is novel. He refers to the well-known principle of English law that claimants are entitled to rely upon a presumption of damage once the publication of a libel has been established, as confirmed by the House of Lords for example in *Shevill v Presse Alliance SA* [1996] 3 All ER 929, [1996] AC 959, and submits that the Human Rights Act 1998 requires modification to this general rule—at least to the extent that a foreign corporation must prove some actual measurable damage to its trading or business reputation in order to recover. g
h

[3] He submits that such a limitation is needed because there is no 'pressing social need' for freedom of communication to be so restricted; especially it cannot be said to be 'necessary' for media defendants to labour under the disadvantage of such a presumption when investigating and reporting on matters of public interest touching upon foreign corporations. He argues, in effect, that if any such entity is permitted to come to this court to seek vindication in respect of its reputation then it should at least be called upon to demonstrate that some such damage has occurred. The presumption of damage may be of long standing but, j

- a according to Mr Robertson, it has never been properly thought through in any English authority; in any event, even long-standing principles, or 'sacred cows', may sometimes have to be jettisoned under the analytical glare of art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act: see eg *Berezovsky v Forbes Inc* [2001] EWCA Civ 1251 [2001] EMLR 1030 at [10] per Sedley LJ.
- b [4] Mr Price QC has argued for the claimants that the values of the convention, as reflected in the use of such concepts as 'necessity' and 'proportionality', are already sufficiently honoured in the approach of English courts to quantum of damages. If a corporate entity, foreign or otherwise, is unable to establish actual damage to its reputation or goodwill in the sense of measurable financial loss, then because it does not suffer anxiety, stress or hurt feelings, it will generally achieve vindication through a modest or even nominal award. If it were not even permitted to sue and put the record straight in respect of a defamatory publication, then English law would surely not be giving sufficient weight to protection of reputation. In *Berezovsky* itself the Court of Appeal acknowledged both '... the legitimate purpose, recognised by
- d Article 10(2), of protecting people from the publication of damaging and unjustified falsehoods' and the significance of Lord Hobhouse of Woodborough's reminder in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127 that '... a democratic society has no interest in the dissemination of untruths' (see [2001] EMLR 1030 especially at [12]).
- e [5] Mr Price argues, against that background, that since the law makes no provision (save in the very limited circumstances contemplated by ss 8–10 of the Defamation Act 1996) for a declaration of falsity, or any other mechanism for putting the record straight, it would be defective in protecting reputation if a corporation, which has ex hypothesi been libelled within this jurisdiction, were not even able to achieve nominal damages for that purpose. It would mean that
- f false allegations, however serious, would remain uncorrected and to that extent the public could be seriously misled.
- [6] It was recognised by Sir Brian Neill's committee in their *Report on Practice and Procedure in Defamation* in July 1991, and eventually in the 1996 Act which to a large extent followed its recommendations, that it would be wholly
- g unacceptable for the law to compel journalists to publish corrections or apologies. Sometimes where defendants cannot prove the truth of what they have published, but nevertheless still believe it to be true, or even that it may be true, it would be an unacceptable restriction upon their freedom of communication to require that they publish the contrary. Correspondingly, of
- h course, there would be a real possibility of the public being given a false impression by such a compulsory vindication. Mr Price argues that, since the rights of journalists are so protected, the other side of the coin is that the law must afford some proportionate means for those who have been libelled to achieve an authoritative vindication. The only method of obtaining this objective known to
- j the common law is by an award of damages. Since it is obvious that a company can only suffer 'in its pocket', as Lord Reid put it in *Lewis v Daily Telegraph Ltd*, *Lewis v Associated Newspapers Ltd* [1963] 2 All ER 151 at 156, sub nom *Rubber Improvement Ltd v Daily Telegraph*, *Rubber Improvement Ltd v Associated Newspapers Ltd* [1964] AC 234 at 262, it will often be appropriate in the absence of demonstrable loss that a company will require only a relatively modest award to achieve the object of vindication.

[7] It has long been said that the purpose of general damages in a libel action is threefold. First, in the case of an individual claimant, there may be a need to compensate for hurt feelings or distress. Secondly, there will be the need to compensate for any actual injury to reputation. Thirdly, there is the element of vindication. In a classic passage in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 824, [1972] AC 1027 at 1071 Lord Hailsham of St Marylebone LC explained this as follows:

‘Such actions involve a money award which may put the plaintiff in a purely financial sense in a much stronger position than he was before the wrong. Not merely can he recover the estimated sum of his past and future losses, but, in case the libel, driven underground, emerges from its lurking place at some future date, he must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge. As Windeyer J well said in *Uren v John Fairfax & Sons Pty Ltd* ((1966) 117 CLR 118 at 150): “It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways—as a vindication of the plaintiff to the public, and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money.” This is why it is not necessarily fair to compare awards of damages in this field with damages for personal injuries.’

[8] Obviously it is necessary to distinguish between human and corporate claimants to the extent that the former have characteristics that cannot possibly have any application to the intellectual construct that a corporation represents. The most obvious example is the capacity to feel and to suffer. There is no reason, as a matter of logic, to distinguish between human and corporate claimants save to that extent.

[9] In particular, there is a need to include an element of vindication in any award of damages to a corporation that succeeds in libel proceedings. That might well be achieved by an award of special damages where significant and measurable loss has been established. As with a human being, on the other hand, there is no rational basis to preclude the element of vindication merely because there happens to be no demonstrable financial damage.

[10] This seems to me to be clearly what underlay the words of Goddard LJ in *English and Scottish Co-op Properties Mortgage and Investment Society Ltd v Odhams Press Ltd* [1940] 1 All ER 1 at 12–13, [1940] 1 KB 440 at 461–462:

‘There is no obligation on the plaintiffs to show that they have suffered actual damage. A plaintiff can, if he likes, by way of aggravating damages, show that he has suffered actual damage, which he can prove, but in every case he is perfectly entitled to say: “Here is a serious libel upon me. The law assumes I must have suffered damage, and I am entitled to substantial damages.” If the defendant, by giving evidence in mitigation of damages, or by saying that the libel is very nearly true, but not quite, can mitigate the damages, be it so. In this case, however, there was not anything of that sort. It would have been open to the defendants in this case to have justified the libel by saying: “We are not bound by what the magistrate found in the police court proceedings. We say that this was a dishonest return. You did

a it dishonestly.” However, they did not choose to do that. They accepted the position that there was no moral obliquity on the plaintiff company at all. Therefore, one has the position of a trading company having being charged, as the jury find by the answers to the questions left to them on the innuendo, with the most disgraceful conduct with which any company could be charged, and yet having been told, because they have not given any evidence showing actual pecuniary loss, that they are to be compensated by a farthing. b The fact is, there was misdirection here.’

[11] More recently, in *Steel v McDonald's Corp* [1999] All ER (D) 384, by which time judges were well used to taking into account the convention, Pill LJ made a very similar point:

c ‘As with an individual plaintiff, where a company brings proceedings for libel, there is no obligation on them to show that they have suffered actual damage ... The effect of this is, not that there is an irrebuttable presumption of substantial damage, but that a corporate plaintiff which shows that it has a reputation within the jurisdiction, and that the defamatory publication is d apt to damage its goodwill, has a complete cause of action capable of leading to an award of substantial damages. Other considerations could lead to an award of nominal damages ...’

[12] In a letter of 24 September the defendant’s solicitors sought to compare the law in other jurisdictions. I was invited first by Mr Robertson to consider the e American case of *National Refining Co v Benzo Gas Motor Fuel Co* (1927) 20 F 2d 763, a decision of the Circuit Court of Appeals, Eighth Circuit. Even having regard to the constraints of the First Amendment, it was there recognised by Circuit Judge Booth (at 766) that ‘... the legal principles constituting the law of libel are the same whether corporations or individuals are involved’. Such distinctions as are f recognised grew largely out of the difference between natural and artificial persons.

[13] Reference was also made to the decision of the Federal Court of Australia in *Australian Broadcasting Corp v Comalco Ltd* (1986) 68 ALR 259. There Pincus J referred to what was described as a ‘trend of authority in the United States’ and in particular cited the *Benzo Gas* case, and the passage to which I have already g referred, and accepted that the idea of a solatium for a corporation (as apparently adopted by the trial judge in the *Comalco* case) ‘was difficult to reconcile with the theory of corporate personality in systems based on English law’. Pincus J concluded in this context that it was enough to express the view that ‘the learned trial judge was in error in treating this trading corporation as entitled to damages h for “reputation as such”, apart from any direct or indirect financial loss’. He appeared to express agreement with the words of Judge Booth in the *Benzo Gas* case (at 766) to the effect that libels against a corporation, in order to be actionable, had to be confined to ‘attacks which injure the property, the credit, the business of the corporation’.

i [14] It is none the less important to recognise that this is not to be equated to the proposition that a corporation can only succeed in such proceedings if able to establish actual financial loss. As it was expressed by Pincus J ((1986) 68 ALR 259 at 351):

‘The absence of any evidence as to damages from a single person with the capacity to do the respondent harm did not oblige the learned judge to refrain from giving damages for the mere risk of financial harm, and the

contention on behalf of the appellant to the contrary must be rejected.' (My emphasis.) a

Nevertheless the absence of any evidence of harm, for example from viewers of the relevant television programme, was a matter to which considerable weight should be attached in the assessment of damages. Notwithstanding the absence of specific loss, the court felt it right, although reducing the sum awarded at trial, to assess the appropriate sum at \$AUS100,000. b

[15] In the *Comalco* case Neaves J also accepted that a corporation would not have a 'reputation as such', being a reputation other than what is encompassed by its reputation in the way of its trade or business. She also accepted, however, that 'damages are at large in the sense that it is unnecessary for *Comalco* to prove special damage'. Her conclusion was expressed (at 334–335): c

'Turning to the question of general damages, the trial judge referred in some detail to the evidence adduced by *Comalco* to demonstrate the circumstances in which the publication of the programme could have resulted in injury to its business activities. But it is of considerable significance that no evidence was adduced by *Comalco* to show any actual loss suffered by reason of the publication. The absence of such evidence must, of necessity, make the task of assessing a proper award of damages more difficult. One is left largely to speculate from the degree of seriousness of the defamatory material published and the general nature of *Comalco*'s business, involving as it does substantial dealings with governments and large commercial enterprises both in Australia and abroad as well as dealings with the general public, what was the likelihood of injury to *Comalco* resulting from the publication of the programme in the Australian Capital Territory and the States of Victoria and South Australia (excluding from consideration publication or republication elsewhere).' d e f

[16] These authorities appear thus to recognise that, even in the absence of special damage, it is appropriate to award a corporation (even a non-trading corporation in the appropriate circumstances) general damages to take account of the 'likelihood of injury' or for the 'mere risk of financial harm'. Thus, an inference may be invited that some damage is likely to be done to the company's goodwill from the very nature of the libel and the scale of its publication. It needs hardly to be stated that this exercise is by no means to be equated with relying on a presumption of damage. Mr Price wishes to invite such an inference here. g

[17] There is, naturally, no question of solatium but the legitimate objective of vindication may be just as appropriate for a corporate entity as for an individual human being. These cases from other common law jurisdictions thus would appear to confirm that there is nothing about the nature of a corporate entity, or its characteristics which are different from those of a human being, which requires vindication to be eliminated along with solatium. h

[18] There is no doubt that art 10 of the convention was considered both by the Court of Appeal and their Lordships in *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65, [1992] QB 770; *affd* [1993] 1 All ER 1011, [1993] AC 534, albeit for the limited purposes taken into account prior to the enactment of the 1998 Act. It was clearly critical to the decision that a local authority, as opposed to other non-trading corporations, should not be permitted to sue for libel. Yet no reference was made to any comparable considerations of public policy that j

a required any qualification to the right of *other* corporations to sue for libel. For example, Butler-Sloss LJ observed ([1992] 3 All ER 65 at 92, [1992] QB 770 at 829):

b 'Consequently, from the authorities to which I have referred above and a number of decisions in other common law jurisdictions which we have been invited to consider, I have come to the conclusion that there is no difference in principle between a trading company and a non-trading corporation for the purposes of suing in tort, including the tort of defamation. In each case a corporation has its reputation, separate from its members, capable of being adversely affected by defamatory statements and which it is entitled to protect by recourse to an action for libel.'

c [19] One of the authorities to which Butler-Sloss LJ was referring was *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, [1891–4] All ER Rep 548 and, in particular, the words of Lord Esher MR ([1894] 1 QB 133 at 138–139, [1891–4] All ER Rep 548 at 550):

d 'The question is really the same by whomsoever the action is brought – whether by a person, a firm, or a company. But though the law is the same, the application of it is, no doubt, different with regards to different kinds of plaintiffs ... Then, if the case be one of libel – whether on a person, a firm, or a company – the law is that the damages are at large. It is not necessary to prove any particular damage; the jury may give such damages as they think fit, having regard to the conduct of the parties respectively, and all the circumstances of the case.'

e [20] It is true that in the *Derbyshire CC* case the Court of Appeal was only required to take into account the disciplines of art 10 because the English common law was perceived at that stage to be sufficiently unclear with regard to local authorities, as opposed to trading and other non-trading corporations, to justify resort to European jurisprudence. It is, of course, no longer necessary to establish any such pre-condition for art 10 to become relevant. Since October 2000, it must be taken into account even when considering principles of English law which have hitherto been thought to be clear and well established.

f [21] Mr Price has argued that if a foreign corporation is properly before the court, in respect of a libel published about it in this jurisdiction, then there is no reason in law or logic to discriminate between corporations trading within this country and those from abroad. The same principles should apply.

g [22] Mr Robertson, on the other hand, argues that whatever the position may have been in English law in the nineteenth century or at any moment down to the coming into effect of the 1998 Act in October 2000, a court must now give effect to the values and imperatives of the convention by creating just such a distinction. He submits that the law does now require courts to distinguish between foreign corporations and companies registered within this jurisdiction—to the extent that the former should be made to prove special damage, even though the latter need not. (I do not understand Mr Robertson to go so far as to suggest that art 10 now requires that even United Kingdom corporations must prove special damage.)

h [23] As Sedley LJ made clear in *Berezovsky's* case [2001] EWCA Civ 1251, [2001] EMLR 1030 at [11], it remains for national legal systems to set their own thresholds of defamation, subject always to the convention standard of 'proportionality' and the right to a legal remedy for breaches. I come back to the point which has been made by a number of judges in the past (not least by Pill LJ

in *Steel's* case) to the effect that a presumption of damage is not a presumption of substantial loss. It is not, therefore, inherent in the principle that any remedy achieved by a corporate claimant is bound to be disproportionate. I turn therefore to the equally important art 10 test of 'necessity'. Is it necessary to encroach upon freedom of communication to the extent of affording a remedy to foreign corporations, which have ex hypothesi been libelled in this jurisdiction, even though they may not be able to establish actual financial loss? If this approach were not adopted, it is clear that foreign corporations would be treated differently not only from individual human claimants but also from United Kingdom corporations.

[24] In my judgment, it is clear that the convention gives a high priority to the protection of reputation. Moreover, in so far as it is possible to avoid it, it is undesirable that the public should be misinformed—especially on matters of genuine public interest. I see nothing inherent in the values of the convention, or of art 10(2) in particular, that requires foreign corporations with a recognised cause of action in defamation to be deprived of a remedy by way of vindication—for no better reason than that they are unable to establish, on the balance of probabilities, that they have suffered actual financial loss.

[25] I recognise, of course, that it is necessary to be wary of referring to balancing exercises in the context of freedom of speech, having regard to what was said by the European Court of Human Rights in *Sunday Times v UK* (1979) 2 EHRR 245 at 281:

'The court is faced not with a choice between two conflicting principles, but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted.'

None the less, provided that is understood, it has to be recognised that inevitably the exercise of reconciling the demands of competing rights involves an element of balancing. As Balcombe LJ accepted in the Court of Appeal in *Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65 at 79, [1992] QB 770 at 814:

'... art 10 requires a balancing exercise to be conducted: the balance in this case is between the right to freedom of expression and such restrictions as are necessary in a democratic society for the protection of the reputation of a non-trading corporation which is also a public authority.'

In this case, by contrast, the court is concerned with balancing the right to freedom of expression and such restrictions as are necessary for protecting the reputation of foreign trading (and perhaps even of non-trading) corporations.

[26] If Mr Robertson's argument were to prevail, it would mean that journalists would be free within this jurisdiction to publish whatever they liked about a foreign corporation, however serious, while the corporation would be entirely powerless to achieve a public vindication unless it so happened that it could prove financial loss directly attributable to the relevant publication. What is more, it would seem that the public might therefore continue to be misinformed by the uncorrected and ex hypothesi false allegations. Mr Price said it would be 'open season'.

[27] Mr Robertson was somewhat scornful of what he categorised as a 'floodgates argument'. None the less, a judge who is asked to 'cull sacred jurisprudential cows' (as it was put in *Berezovsky's* case) would always be wise to have regard to the width of any principle to be overturned and to be conscious of any consequences beyond the particular case in question.

- a* [28] I am not persuaded that the rights of journalists to freedom of expression should be given so high a priority that foreign corporations, which are able to overcome forum conveniens or other jurisdictional hurdles, should nevertheless be deprived of remedies (that would be open to United Kingdom corporations which had been libelled) merely because they are unable to prove that actual financial loss had been caused.
- b* [29] I accordingly reject Mr Robertson's submission on the preliminary issue and will allow the second claimant to remain in the proceedings at least for the time being.

Application dismissed.

Aaron Turpin Barrister.

Greene King plc v Harlow District Council

[2003] EWHC 2852 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

GOLDRING J

12, 27 NOVEMBER 2003

Food and Drugs – Food safety – Offences – Proper defendant – Defendant parent company of number of wholly owned subsidiary companies – One of subsidiaries owning public house found to be in contravention of food hygiene regulations – Whether defendant ‘proprietor’ of a ‘food business’ for the purposes of the prosecution – Food Safety (General Food Hygiene) Regulations 1995, reg 4(1) and (2) – Food Safety Act 1990, s 53.

The appellant company was the parent company of a number of wholly-owned subsidiary companies. One of those subsidiaries owned a public house, and others provided that public house with employees. The public house was visited by officers from the environmental health department of the respondent local authority who found breaches under reg 4(2)^a of the Food Safety (General Food Hygiene) Regulations 1995. They accordingly prosecuted the company under reg 4(1)^b which provided that a proprietor of a food business had to ensure that the handling and offering for sale or supply of food was carried out in a hygienic way. The company was convicted in the magistrates' court and appealed to the Crown Court. As a preliminary issue, the company submitted that it was not a 'proprietor' as defined by s 53^c of the Food Safety Act 1990, since it was not 'the person by whom that business is carried on'. It argued that a wholly-owned subsidiary was a different legal entity in law to its parent and that it carried out none of the activities within the definition of food business in reg 2^d of the 1995 regulations in that it did not carry out any handling or offering for sale or supply of food. The Crown Court was of the opinion that the authority did not have to prove that the company was doing everything which was done by the subsidiaries. It only needed to prove that the company was a proprietor. The court found that the authority had done so since as a matter of common sense the company was carrying on a food business. They established a structure, set the vision and determined the direction. Moreover, the performance-related remuneration of the directors could only logically point to their remuneration flowing from the activities of some or all of the profit producing subsidiary companies. Looked at overall, therefore, the activities of the company went a great deal further into the realms of control and involvement than the mere shareholder role. They convicted the company, which appealed by way of case stated. The company intimated that if it failed in its submissions on the preliminary issue it did not wish to contest the substance of the appeal.

Held – For the purposes of legislation the 'proprietor' did not have to be the owner of the business, although it might be. Nor was involvement in the

^a Regulation 4(2), so far as material, is set out at [5] and [6], below

^b Regulation 4(1), so far as material, is set out at [4], below

^c Section 53, so far as material, is set out at [8], below

^d Regulation 2, so far as material, is set out at [9], below

- a day-to-day running of that business necessary. Provided it could be said on the evidence that it was that person by whom the business was carried on, it would be the proprietor, whether it was an individual or a limited company. Moreover, it was not necessary for the 'proprietor' to carry out any, let alone all, of the functions that appeared in the definition of 'food business' in reg 2 of the 1995 regulations. Once it was established that the business in question was a food business, the only remaining issue was whether the defendant was the proprietor. In deciding whether the evidence disclosed that the defendant was carrying on a food business, the court was entitled to make a realistic assessment of the actual role of the defendant bearing in mind that there might be much involved in carrying on a food business that fell outside the purely physical processes listed in reg 2. In the instant case, the Crown Court had been entitled to conclude that the company did much more than simply act as a shareholder, had taken an active and independent role in the management of the company and was the proprietor for the purposes of the Act. Accordingly, the appeal would be dismissed (see [33]–[35], [37]–[38], below).
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- c
- d *Ahmed v Leicester City Council* [2000] All ER (D) 337 applied.
Salomon v Salomon [1897] AC 221 considered.

Notes

- e For obligations on proprietors of food businesses, see 18(2) *Halsbury's Laws* (4th edn reissue) para 295.
For the Food Safety Act 1990, s 53, see 18 *Halsbury's Statutes* (4th edn) (2002 reissue) 1005.
For the Food Safety (General Food Hygiene) Regulations 1995, see 8 *Halsbury's Statutory Instruments* (2002 issue) 398.
- f

Cases referred to in judgment

- Ahmed v Leicester City Council* [2000] All ER (D) 337, DC.
Curri v Westminster City Council (25 May 1999, unreported), DC.
- g *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33, HL.

Case stated

- Greene King plc appealed from the decision of the Crown Court at Chelmsford on 10 January 2003 dismissing its appeal from the decision of the Epping Magistrates' Court on 9 October 2002, on a preliminary issue, namely whether the respondent authority, Harlow District Council had correctly prosecuted the appellant for breaches of reg 4(1) of the Safety (General Food Hygiene) Regulations 1995. The question for the opinion of the High Court is set out at [15], below. The facts are set out in the judgment.
- h
- j

Fred Philpott (instructed by DLA, Birmingham) for the defendant.
Iain MacDonald (instructed by Owen Wilcox, Harlow) for the authority.

17 November 2003. The following judgment was delivered.

GOLDRING J.

THE ISSUE

[1] This is an appeal by way of case stated from the decision of the Crown Court at Chelmsford when it dismissed the appellants' appeal from the Epping Magistrates' Court. The issue it raises is this. Was the appellant company the 'proprietor of a food business' for the purposes of unchallenged breaches of reg 4(1) of the Food Safety (General Food Hygiene) Regulations 1995, SI 1995/1763? It is the appellants' case it was not: the respondents have prosecuted the wrong company. Both the Crown Court and the magistrates were wrong when they found to the contrary.

THE FACTS AND THE CONVICTIONS

[2] On 5 July 2001 officers from the environmental health department of Harlow Council inspected a public house in Epping called the Moorhen. What was discovered was summarised in the careful judgment given by Mr Recorder Turner QC and his colleagues on the appeal: overflowing refuse bins, an infestation of flies, poor cleanliness and repair of premises and storage of raw materials in a manner which was unlikely to prevent their deterioration. Five informations were preferred against the appellants. They alleged respectively a failure to ensure that food premises were kept clean contrary to reg 4(2)(a), a failure to ensure that the layout, design, construction and size of the food premises permitted good food hygiene practices, allowing the premises to become contaminated with pests, namely flies contrary to reg 4(2)(a), a failure to ensure that food waste and other refuse was deposited in appropriate containers contrary to reg 4(2)(d), a failure to provide for adequate removal and storage of food waste and other refuse, thereby allowing pests access to the waste contrary to reg 4(2)(d) and a failure to ensure that raw materials and ingredients were stored in appropriate conditions contrary to reg 4(2)(d).

[3] Whether the appellant company was the correct defendant was heard by the Crown Court, as it had been by the magistrates' court, as a preliminary issue. On the decision by the Crown Court in favour of the respondents on that issue, the appellants intimated that they did not wish to contest the substance of the appeal.

THE RELEVANT STATUTORY FRAMEWORK

[4] Regulation 4(1) of the 1995 regulations provides that:

'A proprietor of a food business shall ensure that in any of the following operations, namely, the preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling and offering for sale or supply, of food are carried out in a hygienic way.'

[5] Regulation 4(2)(a) provides that:

'A proprietor of a food business shall ensure that ... the requirements set out in Chapter I of Schedule 1 are complied with as respects any food premises used for the purposes of that business ...'

a [6] Regulation 4(2)(d) provides that: '[A proprietor of a food business shall ensure] the requirements set out in Chapters IV to X of Schedule 1 are complied with as respects that business.'

[7] It is not necessary for present purposes to set out the content of the chapters referred to.

b [8] The 1995 regulations were made under the Food Safety Act 1990. Section 53(1) of that Act defines proprietor in the following terms: '... "proprietor", in relation to a food business, means the person by whom that business is carried on ...'

[9] Regulation 2(1) defines 'food business'. It states that—

c "“food business” means any undertaking, whether carried out for profit or not...carrying out any or all of the following operations, namely, preparation, processing, manufacturing, packaging, storing, transportation, distribution, handling or offering for sale or supply, of food ...'

[10] There is no doubt that the Moorhen was a 'food business'. The issue is, was the appellant its proprietor?

d THE CROWN COURT'S FINDINGS OF FACT

[11] The court heard evidence regarding the corporate structure of Greene King plc and the position of the Moorhen in that structure. Its findings of fact are set out in para 3 of the case:

e '(a) The appellants were first incorporated under the name Greene King plc in September 1990. Its predecessors had carried on the business since about 1799. The appellants were described as a holding company for 28 other companies some of which are dormant, some employment companies and some operating companies. The appellants have some 8,300 shareholders and the company is itself a 100% shareholder in all of the subsidiary companies. The appellants have no employees. The company secretary is employed by a service company referred to at (d) below.

f (b) One of the two main operating companies is Greene King Brewing and Retailing Ltd (Retailing). The activities of Retailing are the brewing of beer, wholesaling and distribution of beer, wine, spirits and soft drinks, and the ownership and operation of managed, tenanted and leased public houses. It became incorporated under the name Retailing on 4 March 1997. Retailing uses three trading names, Greene King Pub Company in respect of managed houses (of which the instant managed house, the Moorhen, is one), Greene King Pub Partners in respect of tenanted public houses and Greene King Brewing and Brands in respect of the brewery and beer production themselves. All of these businesses operate from the same address; namely, The Westgate Brewery in Bury St Edmunds. Mr Bellhouse is the company secretary of the appellants and all the other companies including Retailing. Each company in the group is a separate legal entity with its own board of directors and the capacity to make decisions.

g (c) By a business sale agreement dated 2 May 1997, the appellants transferred their entire business and assets to Retailing. By a further agreement dated 20 October 2000 the appellants transferred the freehold of the Moorhen public house to Retailing.

h (d) The premises and the business of the Moorhen public house are owned, in law, by Retailing. The staff are employed by two sister companies of Retailing (ie they are also subsidiaries of the appellants). The weekly paid

staff are employed by Greene King Retail Services Ltd and the monthly paid staff are employed by Greene King Services Ltd. The latter company is Mr Bellhouse's employer. These two employment companies plainly provide services for the appellants. A number of contractual or service agreements to which Retailing were a party were in existence at the material time and these covered subjects such as waste management, staff clothing and textiles and pest control services in respect of the licensed premises operated by Retailing including the Moorhen. The menu cards in the Moorhen referred to the customer services team of the Greene King Pub Company; ie one of the trade names of Retailing. The induction records of new staff employed at the Moorhen were headed with the name of Retailing. The name given in the notice under s 5 of the Business Names Act 1985 was Retailing. There was a rubber stamp to use to indorse the name of the payee for customers' cheques in the name of Retailing. All day-to-day routine business transactions were in the name of Retailing.

(e) The appellants were neither the owners nor the employers of staff at the Moorhen.

(f) When the environmental health officer attended the premises to carry out an inspection of 5 July 2001, the manageress of the Moorhen said that the appellants were the proprietor. The respondents served improvement notices under s 10 of the Food Safety Act 1990 following that inspection. These referred to "Your food business: The Moorhen" and were served on and evidently complied with by them. All correspondence in the matter has been carried out on notepaper headed with the appellants' name. Much of that correspondence had been with Mr Mike Gore with the title group health and safety manager who evidently believed himself to be employed by the appellants. That misunderstanding was shared by other staff. After the issue of correct defendant to the criminal proceedings had been raised, the environmental health officer enquired of all other local authorities in the country as to whether the appellants were named in official notices relating to the very substantial Greene King business. The result was that there were eight statutory notifications of accidents in 2000 and 2002 in respect of public houses, seven being in respect of the Moorhen, using the name of the appellants (the other was in Herefordshire). On such forms the type of work or industry code was indicated as "Brewers/Retailers".

(g) A number of licence transfer documents and forms of application for registration of food premises in the period 2001–2002 relating to premises other than the Moorhen had the name of the appellants on them. A licence transfer (for premises in Norfolk) had the appellants named as the address for the area manager. The application for registration of food premises in the case of the Moorhen named the Greene King Pub Company (ie a trade name of Retailing) as the proprietor. The annual returns for the appellants from 1998 to 2002 all refer (by word or code number) to the principal business activities of the appellants as "operating managed and tenanted public houses, brewing and wholesaling beers, wines and soft drinks". This was an error on the part of the company secretary as the information had unintentionally been carried forward in computer-generated information from the time when the appellants did indeed carry on the business of the public houses. The certificate of employers' liability insurance relating to the Moorhen for May to October 2002 showed the policy as "Greene King Plc and subsidiary companies".

a (h) When the matter which led to the laying of the informations was being investigated, the environmental health officers of the respondents carried out a formal interview with Mr Gore on 8 August 2001. One of the officers asked Mr Gore how many food businesses the appellants ran and he replied "none". He was asked about the Moorhen and replied: "No, we own the building but we do not own the operational area." He was wrong about the ownership of the building because, as set out above, the freehold vested in Retailing. He was asked who owned the operational area and replied "Greene King Brewery and Retail Limited" or possibly "Green King Brewing and Retailing Limited". We were unable to determine from the tape recording what exactly was said.

b (i) The officer did a search of the Companies House website and found no company with the name Greene King Brewery and Retail Ltd and therefore that tended to confirm her view that the appellants were the appropriate defendant. She could have served a notice under s 16 of the Local Government (Miscellaneous Provisions) Act 1976 to obtain particulars of the true occupier or she could have acted under s 33 of the Food Safety Act 1990 to require information but she did not. The notice under the Business Names Act 1985 may have been on display at the premises in July 2001 but she did not seek to read it if it was there.

c (j) The annual report of the appellants for 2000–2001 states, in the directors' report that the appellants are "the holding company for a group whose principal activities are operating, managed, tenanted and leased public houses, brewing beer and wholesaling beers, wines and soft drinks". The corporate governance provisions indicate that the board of the appellants is "ultimately responsible for the company's system of internal control". In respect of internal audit, it is said: "The controls over the Group's managed houses are enhanced by an internal audit team and the availability of comprehensive information from EPOS (electronic point of sale) till system. On behalf of the board, the audit committee regularly monitors the procedures and scope of internal audit within the group, including seeking the views of the external auditors." In addition it states: "All directors have access to the advice and services of the Company Secretary and are provided with full and timely access to all relevant information, plus the opportunity to question the management as required."

e (k) The report refers to business plans and budgets and states: "Business plans and detailed annual budgets covering all financial aspect of the Group's business are evaluated and approved by the Board. The actual results are compared against these plans and budgets on a four-weekly basis and variances analysed in order that any appropriate action can be taken."

f (l) The report under the heading "Environmental Policy" states: "The overall responsibility for environmental policy rests with the Board, but specific responsibility for ensuring that adequate arrangements are made to implement that policy effectively throughout the Group is delegated to the managing director of the Brewing and Brands business unit."

g (m) The annual report also deals with senior staff and refers to four executive directors—the chief executive, the finance director and the managing directors of the Pub Partners and Pub Company Divisions. The remuneration report states: "A significant proportion of each Executive Director's potential remuneration package is performance-related." Bonus

payments are said to be "based upon the achievement of financial performance targets for the year". a

(n) The annual report also contains a group profit-and-loss account and other financial information as well as a great deal of narrative detail about the group's productivity, strategy, record and highlights. The chief executive in his review summarises the position as: "Our current structure, which is based on empowered and accountable business units operating in support of the corporate strategy, is an important component of this success ... our business comprises a number of complementary strands, which are focussed on serving the same end consumer and which together allow us to achieve significant scale benefits and share skills within one corporate brand identity." b

(o) The annual report was a group document, which was a consolidated report, which would have become difficult to read if an attempt had been made accurately to delineate in it the specific functions of the individual companies in the group. The internal control and governance provisions were formal requirements of the Stock Exchange Code. c

(p) Each of the subsidiary companies in the group were separate entities but none could tell the other what to do so that, for example, only the immediate employer could compel, for example, staff training. Any corporate restructuring would require the involvement of the appellants and the board of the appellants monitored, as parent company, what went on in the subsidiaries. The regular health, safety and food hygiene audits prepared by Mr Gore were reports not only to Retailing but also they were seen, and notice was taken of them, by the board of the appellants.' d
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THE SUBMISSIONS TO THE CROWN COURT

[12] The appellants' submissions were to the following effect. A wholly-owned subsidiary is in law a different legal entity from its parent. There would be very significant consequences if a holding company were held to be carrying on the activities of its subsidiaries. The crucial issue was whether the appellants were '[a] proprietor of a food business' when they did not carry out any of the activities within the definition of such a business. They had no employees. They did not handle food or offer it for sale. The fact there was confusion as to the proprietor's identity could not change who the proprietor was. Everything pointed to Retailing being the exclusive proprietor. It purchased the food. Its sister company employed the staff who handled the food. It owned the premises and the equipment where the food was prepared. The proceeds of the sale of the food went into its bank account. f
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[13] The respondents submitted that a person could be the proprietor of a food business without handling or preparing food. More than one corporate entity could be proprietor. The corporate structure, as in the present case, might be such that one company employs the staff, another owns the property, another has responsibility for health and safety policy. Each would then be carrying on a food business. j

THE CROWN COURT'S OPINION

[14] The Crown Court's opinion is set out in para 7 of the case. It stated:

a ‘(a) The facts painted a picture of considerable uncertainty or confusion even up to quite a senior level in the business about who was exactly responsible for what and for whom in this group.

 (b) The respondents did not need to prove that the appellants were doing everything which was done by the subsidiaries. It only needed to prove that the appellants were a proprietor and to our minds they did so and did so convincingly.

b (c) As a matter of common sense the appellants were carrying on a food business. They established a structure, set the vision and determined the direction. They dealt budgets, policies and business plans. They monitored performance and acted on non-performance or poor performance. The corporate governance arrangements extended to internal audits at a high level of regularity. There was an overlap of staff and directors. The performance-related remuneration of directors of the appellants can only logically point to their remuneration flowing from the activities of some or all of the profit-producing subsidiary companies.

c (d) Looked at overall, the activities of the appellants go a great deal further into the realms of control and involvement than the mere shareholder role.

d (e) We therefore find the appellants were proprietors of the food business in question.’

THE QUESTION POSED BY THE CROWN COURT

e [15] The question is in the following terms:

 ‘Were we correct in law in finding that the defendant, Greene King plc, was a food proprietor, within the meaning of the Food Safety Act 1990, s 53(1), in respect of the Moorhen public house?’

f THE ARGUMENT BEFORE ME

 [16] In the course of argument, it became clear that Mr Philpott on behalf of the appellants and Mr MacDonald on behalf of the respondents agree about a number of matters. The appellant company is a holding company. It is a separate legal entity from its subsidiary companies. It cannot be criminally liable unless it is more than a mere shareholder. It must itself fall within the regulation. If the wrong company has been charged, the prosecution must fail.

MR PHILPOTT'S SUBMISSIONS

h [17] Mr Philpott's first and fundamental submission is this. For the appellant company to be criminally liable it has to be carrying on a food business. Food business is defined in reg 2 of the 1995 regulations. What is required is that the appellant company was carrying out one or more of those things specified in reg 2. Retailing, an independent corporate entity, was ‘carrying out’ those things specified in the regulation. Total control of Retailing by the appellants would not be enough to bring them into the net. The well-known case of *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33 makes that clear. For there, total control of the corporate entity by Mr Salomon was not enough to make him personally liable.

j [18] Mr Philpott accepts that there could be factual situations in which the holding company's conduct could bring it within the statutory framework. Agency might be one. However, he submits, this case was not. Mere supervision was not enough.

[19] He emphasises some of the Crown Court's findings. The appellants had one board of directors. Retailing had another. Each entity had the capacity to make decisions. Retailing owned the premises. One entity could not tell another entity what to do. All day-to-day routine business was done in Retailing's name. Any cheques were paid to Retailing. The takings were banked into its account. The menu was in Retailing's trade name. Staff were employed by service companies. Retailing dealt with their clothing. The appellants employed no staff.

[20] As to the reliance by the Crown Court on the appellants' annual report, he submits that nothing in that can lead to the conclusion that the parent appellant company was carrying on the business of its subsidiary, Retailing. The fact that the appellants have remuneration from Retailing is irrelevant, he submits. It is no more than an inevitable consequence of the fact that Retailing pays its dividends to the appellants. What the appellants were doing was no more than exercising proper corporate governance as befitted a publicly-quoted parent company when it dealt with its subsidiaries.

[21] As to the findings of fact, he submits that mistakes as to which entity was the food proprietor do not matter. They cannot make the appellants a proprietor if in fact it was not. Mr MacDonald agrees about that.

[22] Mr Philpott emphasises this is a criminal statute and must therefore be construed narrowly and in favour of the subject.

MR MACDONALD'S SUBMISSIONS

[23] Mr MacDonald's submissions can be summarised shortly.

[24] First, he submits that the statutory provisions mean that as a matter of law there can be more than one proprietor. That is not limited to such situations as partners. Corporate entities may so structure themselves as to result in more than one entity being a proprietor. That is the case here. Retailing was a proprietor on the facts. So were the appellants. Both were 'carrying on the business' for the purposes of s 53 of the 1990 Act.

[25] In support of that proposition he relies upon the observations of Kennedy LJ in *Ahmed v Leicester City Council* [2000] All ER (D) 337. I shall come to them shortly.

[26] He emphasises that if there is a corporate structure which divides responsibilities (as here), it is inevitable that there will be more than one proprietor for the purposes of some of the obligations under the 1995 regulations. For example, there is an obligation on the proprietor to ensure that food handlers engaged in the food business are supervised and instructed and/or trained in food hygiene matters. The handlers in this case are employees of another subsidiary of the appellants. That obligation would fall on that entity, as their employer. For it would be a person by whom a food business would be carried on. At the same time, an obligation would also fall on Retailing.

[27] Moreover, submits Mr MacDonald, the fact there may on given facts be more than one proprietor is consistent with the scheme of legislation such as this. This is legislation to protect the consumer. It needs to be flexible. (Although he did not put it quite in this way) Parliament must have intended it to be sufficiently flexible to cover what can be a complex corporate structure, such as the present.

[28] Mr MacDonald submits that no injustice would arise from the approach he advocates. In any given case the entity prosecuted can advance the defence of due diligence: see s 21 of the 1990 Act.

[29] Second, and fundamentally, he submits that Mr Philpott's interpretation of the provisions is too narrow. Regulation 2 sets out those businesses to which

a the regulation applies. If a business does one or more of the things set out, it is a food business. The regulation does not give an exhaustive definition of what it means to be 'the person by whom that business is carried on'.

[30] Third, on the facts found by the Crown Court, it was entitled to conclude that the appellant company was 'the person' (albeit not the sole person) 'by whom that business [was] carried on'.

b

MY CONCLUSIONS

[31] In *Ahmed's* case (see above) the issue was whether the appellant was correctly described as proprietor. He was a partner in a food business. He did not work there. Kennedy LJ, in *Ahmed* first cited part of Ognall J's judgment in *Curri v Westminster City Council* (25 May 1999, unreported) in which Ognall J said:

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'The researches of counsel have not yielded any material which assists in the proper construction of the essentially simple words "carrying on the business". One is therefore required ... to give those words their ordinary and natural meaning. It is necessary, in seeking so to do, to bear in mind that their application carries with it penal consequences. I remind myself that the word used in the regulations is "proprietor". That of itself plainly means "ownership". But I recognise that Parliament may have intended to widen the net of criminal responsibility ... so as to prevent unscrupulous evasion of liability by placing the business, for example, in the name of another, whilst in reality conducting it for oneself ... "carrying on the business" in the context of the case before us ... countenances, and must be taken to connote, an entrepreneurial role ...'

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[32] Of that part of Ognall J's judgment, Kennedy LJ said:

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'In my judgment it is right, save with respect, I, for my part would not agree to the interpretations of the concept of ownership. I entirely agree that in normal circumstances a proprietor is an owner, but the definition in s 53 does appear, on the face of it, not be inclusive. It says precisely what proprietor means for the purposes of the statute, it means the person by whom that business is carried on whether owner or not ... But the person by whom the business is carried on need not, in my judgment ... be involved in the day-to-day running of the business.'

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[33] Proprietor for the purposes of s 53 is therefore a term of art. The proprietor does not have to be the owner of the business, although it may be. It does not have to be involved in its day-to-day running. Provided it can be said that on the evidence it is the person by whom the business is carried on, it is the proprietor. Such a person may of course be an individual or a limited company.

[34] It follows that on the basis of such a definition, there may be more than one proprietor. It will all depend upon the facts of the particular case.

j

[35] Moreover, it seems to me that Mr MacDonald is right in his approach to these provisions. It is not necessary for the proprietor to carry out any, let alone all, of the functions which appear in the definition of 'food business' in reg 2. Once it is established that the business in question is a food business, the only remaining issue is whether the defendant is the proprietor, having regard to the statutory definition in s 53. If on the evidence the court is sure it is and is sure (as here) of a breach of reg 4, the case is made out.

[36] The issue therefore comes to this. Was the Crown Court, on the evidence adduced before it, entitled to be sure that the appellants were carrying on that business? If it was, the appeal fails. If not, it succeeds. a

[37] In deciding whether the evidence disclosed that the appellants were carrying on a business, the court was in my view entitled to make a realistic assessment of the actual role of the appellants in the group. It was entitled to bear in mind that there may be much involved in carrying on a food business which falls outside the purely physical processes listed in reg 2. That is what the Crown Court did. It carried out a careful analysis of the evidence before it. It placed considerable weight on what was said in the appellants' annual report. It was entitled to. It came to the conclusion that the appellants did much more than act simply as a shareholder. The company took an independent and active role in the management of the company. In short, it seems to me that given the court's findings of fact, it was entitled to come to the views expressed in paras 7(b) and 7(c) of the case. b
c

[38] I should add three final observations. First, there seems to me substance in Mr MacDonald's observations that Parliament intended this legislation to be as flexible as possible when it sought to protect the public. There may in any given case be complicated corporate structures which would make it difficult to identify the proprietor given the restricted interpretation advanced by Mr Philpott. I say that bearing in mind the powers the prosecutor has in seeking to identify the appropriate defendant. Second, a party in the appellants' position always has available the statutory defence if the facts justify it. d

[39] Finally, I should add this. There is not the slightest suggestion here that the complex corporate structure was in any way designed to try and avoid responsibility under this legislation. I have no doubt there were other corporate and economic motives. e

[40] I would therefore answer the question in the affirmative and dismiss the appeal. f

Appeal dismissed.

Martyn Gurr Barrister.

a **R (on the application of Thompson) v Law Society**

[2004] EWCA Civ 167

b COURT OF APPEAL, CIVIL DIVISION

KENNEDY, CLARKE AND JACOB LJJ

29, 30 JANUARY, 20 FEBRUARY 2004

c *Solicitors – Disciplinary proceedings – Inadequate professional services – Solicitor applying to Office for the Supervision of Solicitors (OSS) for oral hearing of complaint of inadequate professional services – OSS refusing oral hearing and directing reprimand, compensation and refunding of costs – Whether solicitor entitled to oral hearing – Whether determination of solicitor’s civil rights and obligations – Solicitors Act 1974, Sch 1A, para 5(1) – Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1.*

d The claimant solicitor applied for judicial review of eight decisions of the Office for the Supervision of Solicitors (the OSS), a part of the Law Society, arising out of complaints to the Law Society by two of his former clients. A client relations sub-committee of the OSS held that the claimant was guilty of inadequate professional services, that he should pay compensation to the first client for stress and inconvenience, and that he should refund any costs he had received relating to the first client from the legal aid board. Paragraph 5(1)^a of Sch 1A to the Solicitors Act 1974 provided that if a solicitor failed to comply with a direction to pay compensation, any person could make a complaint in respect of that failure to the Solicitors’ Disciplinary Tribunal, but no other proceedings might be brought in respect of it. A professional regulation casework committee, considering the claimant’s conduct as a solicitor, held that he should be referred to the Solicitors’ Disciplinary Tribunal and that a discretion should vest in the renewal of his practising certificate. Those decisions were all upheld by an OSS adjudication panel. In relation to the second client, an OSS adjudicator held that the claimant was guilty of inadequate professional services, that he should pay compensation to the client, and that in relation to his conduct as a solicitor he should be severely reprimanded. On review, an OSS adjudication panel reduced the compensation and substituted a reprimand for the severe reprimand. No oral hearing took place before any of those decisions was made, although in each case the claimant had the opportunity to make written representations and did so. e The claimant did not request an oral hearing with regard to the first client, but did so with regard to the second before the review by the adjudication panel. The panel considered the matter not to be of such complexity as to warrant an oral hearing and that the written material before it was sufficiently detailed to enable it to reach a fair conclusion. The claimant applied for permission to apply for judicial review of all eight decisions and his applications to the High Court were f refused. The Court of Appeal gave permission only on the ground that the claimant ought to have been afforded an oral hearing. The claimant contended, inter alia, that the decisions involved the determination of his civil rights and obligations, within art 6^b of the European Convention for the Protection of g h j

a Paragraph 5, so far as material, is set out at [16], below

Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and it followed that he was entitled to a fair and public hearing; and that he had an accrued right to the payment of fees in the first client's case, of which he had been deprived by the determination that he should refund costs he had received from the legal aid board, contrary to his right to his possessions under art 1^c of the First Protocol to the convention. a

Held – Professional disciplinary proceedings did not normally lead to the determination of civil rights and obligations unless they were directly decisive of those rights, such as being directly decisive of the right to continue in professional practice. In the instant case, while the effect of a reprimand might well be to increase the cost of the claimant's professional indemnity insurance, that could not fairly be said to put his right to continue to practise his profession as a solicitor at stake. The discretion conferred on the Law Society to impose conditions on a solicitor's practising certificate did not determine any of the solicitor's legal rights and if the Law Society were subsequently to impose a condition, the claimant had a right of appeal, with provision for a public hearing. The decision to refer the claimant to the Solicitors' Disciplinary Tribunal was also, plainly, not a determination of his civil rights and obligations and, since the direction to pay compensation did not have legal effect until complaint in respect of failure to pay had been made and the Solicitors' Disciplinary Tribunal had determined that the direction was to be enforced, neither was the direction to pay compensation. The direction to refund costs did have immediate legal effect, but the court was not satisfied that the claimant had any accrued right against the legal aid board or the Legal Services Commission for fees, capable of engaging his right under art 1 of the First Protocol to the convention. The applications would, accordingly, be dismissed (see [84]–[86], [88], [91]–[95], [98], [100], [102], [106], [112], [114], [115]). b

Le Compte v Belgium (1982) 4 EHRR 1 and *Albert v Belgium* (1983) 13 EHRR 415 considered. c

Notes d

For redress for inadequate professional services, for the right to a fair trial, for what constitutes a fair hearing, and for the right to property, see, respectively, 44(1) *Halsbury's Laws* (4th edn reissue) para 423 and 8(2) *Halsbury's Laws* (4th edn reissue) paras 134, 137, 165. e

For the Solicitors Act 1974, Sch 1A, para 5(1), see 41 *Halsbury's Statutes* (4th edn) (2000 reissue) 123. f

For the Human Rights Act 1998, Sch 1, Pt I, art 6, Pt II, art 1, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554, 556. g

Cases referred to in judgments h

App No 10331/83 v UK (1984) 6 EHRR 583, E Com HR.

Albert v Belgium (1983) 13 EHRR 415, [1983] ECHR 7299/75, ECt HR.

Ambruosi v Italy (2002) 35 EHRR 125, [2000] ECHR 31227/96, ECt HR.

Associated Provincial Picture Houses v Wednesbury Corp [1947] 2 All ER 680 [1948] 1 KB 223, CA. j

Bryan v UK (1996) 21 EHRR 342, [1995] ECHR 19178/91, ECt HR.

b Article 6, so far as material, is set out at [53], below

c Article 1, so far as material, is set out at [104], below

- Diennet v France* (1996) 21 EHRR 554, [1995] ECHR 18160/91, ECt HR.
- a** *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, [1994] 1 AC 531, [1993] 3 WLR 154, HL.
- FitzPatrick (Thomas Patrick)* 8845/2003 (5 February 2004, unreported), SDT.
- Fredin v Sweden* (No 2) [1994] ECHR 18928/91, ECt HR.
- Gautrin v France* (1999) 28 EHRR 196, [1998] ECHR 21257/93, ECt HR.
- b** *Göç v Turkey* [2002] ECHR 36590/97, ECt HR.
- H v Belgium* (1988) 10 EHRR 339, [1987] ECHR 8950/80, ECt HR.
- Jacobsson v Sweden* (No 2) (2001) 32 EHRR 463, [1998] ECHR 16970/90, ECt HR.
- Le Compte v Belgium* (1982) 4 EHRR 1, [1981] ECHR 6878/75, ECt HR.
- Obermeier v Austria* (1990) 13 EHRR 290, [1990] ECHR 11761/85, ECt HR.
- c** *Pine v Law Society* [2002] EWCA Civ 175, [2002] 2 All ER 658, [2002] 1 WLR 2189.
- R (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735, [2002] 1 WLR 2515.
- R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2001] 2 WLR 1389.
- d** *R (on the application of Nicolaidis) v General Medical Council* [2001] EWHC Admin 625, [2001] All ER (D) 390 (Jul).
- R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1269, [2004] 1 WLR 421.
- R (on the application of Vetterlein) v Hampshire CC* [2001] EWHC Admin 560, [2002] 1 P & CR 404.
- e** *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419.
- R v Law Society, ex p Singh and Choudry* (1995) 7 Admin LR 249.
- R v Solicitors Complaints Bureau, ex p Curtin* (1993) 6 Admin LR 657.
- Runa Begum v Tower Hamlets London BC* [2003] UKHL 5, [2003] 1 All ER 731, [2003] 2 AC 430, [2003] 2 WLR 388.
- f** *Tehrani v UK Central Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208, 2001 SLT 879, Ct of Sess.
- W v UK* (1988) 10 EHRR 29, [1988] ECHR 9749/82, ECt HR.
- White v Office for the Supervision of Solicitors* [2001] EWHC Admin 1149.
- g** *WR v Austria* [1999] ECHR 26602/95, ECt HR.
- X v Austria* App No 5362/72 (14 December 1972, unreported), E Com HR.
- X v Germany* App No 852/60 (19 September 1961, unreported), E Com HR.

Applications for judicial review

- h** The claimant, Wayne Thompson, with permission granted by the Court of Appeal (Mantell and Buxton LJ) on 13 June 2003, applied for judicial review of (i) three decisions of a client relations sub-committee of the Office for the Supervision of Solicitors (the OSS), a part of the Law Society, finding the claimant guilty of inadequate professional services and directing him to pay compensation and to refund costs to the legal aid board, which were upheld on review by an OSS adjudication panel on 16 August 2001; (ii) two decisions of the OSS professional regulation casework committee on 16 August 2001 directing that the claimant be referred to the Solicitors' Disciplinary Tribunal and vesting a discretion in the renewal of his practising certificate, which were upheld on review by an OSS adjudication panel on 26 August 2001; and (iii) three decisions made by an OSS adjudicator on 14 January 2002 finding the claimant guilty of inadequate

professional services, directing him to pay compensation, and directing that he receive a severe reprimand in relation to his conduct as solicitor, which were upheld on review by an OSS adjudication panel on 13 August 2002, save that the amount of compensation was reduced and a reprimand substituted for the severe reprimand. The facts are set out in the judgment of Clarke LJ.

Philip Engelman (instructed by *Reid Sinclair*) for the claimant.

Timothy Dutton QC and *Rosalind Phelps* (instructed by *Wright Son & Pepper*) for the Law Society.

Cur adv vult

20 February 2004. The following judgments were delivered.

CLARKE LJ (delivering the first judgment at the invitation of Kennedy LJ).

INTRODUCTION

[1] There are before the court two applications for judicial review, both by the claimant, Mr Wayne Thompson, who is a solicitor and who at the relevant time was practising as a sole practitioner in the name of Wayne Thompson & Co. Both applications arise out of decisions of the Office for the Supervision of Solicitors (the OSS), which is an establishment set up by the Law Society and has offices and staff at Leamington Spa. It is part of the Law Society and has no separate legal existence of its own. The claimant challenges two sets of decisions of the OSS, arising out of complaints to the Law Society by two of his former clients, a Mr Rattigan and a Mrs Anderson.

[2] In the Rattigan case the claimant seeks judicial review of the following five decisions: (i) three decisions of Ms Dhanjal and Mr Venables, sitting as a client relations sub-committee of the OSS and considering a complaint of inadequate professional services (IPS), which decisions were upheld on review by an OSS adjudication panel on 16 August 2001: (a) that the claimant was guilty of IPS; (b) that he pay £500 by way of compensation to Mr Rattigan for stress and inconvenience; and (c) that he should not be entitled to any costs but should refund any costs he had received from the legal aid board to the Legal Services Commission; and (ii) two further decisions of Ms Dhanjal and Mr Venables, this time sitting as the OSS professional regulation casework committee (and considering the claimant's conduct as a solicitor) on 16 August 2001, also upheld on review by the same OSS adjudication panel on 26 September 2001: (a) that he be referred to the Solicitors Disciplinary Tribunal (SDT); and (b) that a discretion should vest in the renewal of his practising certificate.

[3] In the Anderson case the claimant seeks to review three decisions made by an OSS adjudicator on 14 January 2002 and reviewed by an adjudication panel on 13 August 2002. The first two decisions related to allegations of IPS and were that he was guilty of IPS and that he pay £1,000 by way of compensation to Mrs Anderson for stress and inconvenience. The third decision related to complaints about his conduct as a solicitor and was that he be severely reprimanded. On review those decisions were upheld save that the compensation was reduced to £500 and the severe reprimand was substituted by a reprimand.

[4] No oral hearing took place before any of those decisions was made, although in each case the claimant had ample opportunity to make written representations and did so. In Mr Rattigan's case the claimant did not seek an oral

a or public hearing at any time. On 4 March 2002, which was five months after the decision of the review panel, he issued the present application for judicial review. He explained the delay both on the ground that he had taken time seeking a review by the Master of the Rolls, who unfortunately had no jurisdiction to conduct such a review, and on the ground that he was under severe mental and emotional pressure because of the severe illness of his mother.

b [5] Before the application was considered by the Administrative Court it appears that the claimant met Mr Rattigan and showed him some documents, following which Mr Rattigan agreed to accept £1,000 and 'withdrew his complaint'. The claimant subsequently contacted the Law Society and asked it to withdraw the complaint but by a letter dated 20 September 2002 it declined to do so.

c [6] In Mrs Anderson's case the claimant made no request for an oral or public hearing before the adjudicator but did so before the review by the adjudication panel. However, he did not include a detailed statement with his notice of appeal in support of his application and on 18 April 2002 the panel decided that it could not determine the application for an oral hearing until it received the detailed

d statement which he had promised earlier. It accordingly stood the application over for 28 days to allow the claimant to produce further material in support of his application for an oral hearing. Subsequently, on 27 June, the claimant submitted a two-and-a-half-page document in support of an oral hearing and a further 78-page document in support of his appeal.

e [7] On 13 August the panel considered the application but rejected it on the ground that the matter was not one of such complexity as to warrant an oral hearing and that the written material was sufficiently detailed to enable it to reach a fair conclusion. As already indicated, it issued its decision on the same day. The claimant issued his application in the Anderson case on 26 September 2002.

f [8] Both applications were refused on paper and were renewed orally before Mackay J in the Administrative Court on 3 February 2003. In the Rattigan case the judge refused the application for an extension of time but he also considered the application on its merits and said that he would have refused it on the merits. In the Anderson case he refused the application on the merits.

g [9] The claimant renewed the applications to this court and they were heard by Mantell and Buxton LJ on 13 June 2003. The applications were granted but on a very limited basis. This can be seen from the following extracts from the judgments. Mantell LJ said:

h '2. We grant permission to apply for judicial review in both cases—that is to say, the case involving Mrs Anderson and the case involving Mr Rattigan—on one ground only in each case; that is, the one to which reference has already been made, namely the complaint that Mr Thompson ought to have been allowed an opportunity to make oral representations before the bodies which dealt with their cases. We do so on the basis that it is possibly arguable that in denying Mr Thompson the opportunity to address them, there was a breach on the part of those bodies of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and/or possibly of the rules of natural justice as might be applied under the domestic law.

j 3. We give permission to apply without enthusiasm or encouragement, but we think that the matter is of sufficient importance to require further

argument before the court. We direct that the hearing be before a constitution of the Court of Appeal.' a

Buxton LJ said:

'4. I agree with the order that Mantell LJ has made. I think it would be wrong if I did not say that I share the lack of enthusiasm that he has expressed. It seems to me that authority, not shown to us but referred to by Miss Phelps, at least at the level of the European Commission of Human Rights, presents a considerable difficulty to Mr Thompson in pursuing this application. But, like Mantell LJ, I consider this to be a matter of some significance, both for the legal profession generally and for the Law Society, and I think it would be right for the matter to be fully pursued in front of this court. Mr Engelman will, however, have taken note of the observations made both about the limited nature of the permission and about the matters that it is going to be necessary for him to address when he reappears before this court.' b c d

[10] As appears from those extracts, the sole ground upon which the court granted the claimant permission to apply for judicial review was that he ought to have been afforded an oral hearing so as to enable him to make oral representations to those who dealt with the two cases. It is important to note that he was not granted permission to challenge the decisions on the ground that they were otherwise wrong in law or unreasonable or irrational in the extended *Wednesbury* (*Associated Provincial Picture Houses v Wednesbury Corp* [1947] 2 All ER 680 [1948] 1 KB 223) (or any other) sense. This is important because I think that in the course of the oral argument Mr Engelman was inclined to trespass into those areas. I also note in passing that the claimant has not suggested that any of the committees or panels who took the decisions complained of were not independent. I therefore make no comment on that question. e f

[11] Mantell LJ made it clear that the applications for judicial review were to be made to this court, so that we are not acting as an appellate court but as a court of first instance. I shall assume that the court intended to grant the claimant an extension of time in Mr Rattigan's case. No such extension was or is necessary in Mrs Anderson's case. Given the narrow basis on which permission was granted I shall focus only on the question whether the Law Society infringed either the claimant's rights at common law or his rights under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in not ensuring that he had an oral hearing. g h

[12] As the court undoubtedly appreciated when granting permission to apply for judicial review, these questions are potentially important, not only from the point of view of the claimant (and indeed other solicitors who may become involved in the process), but also from the point of view of the Law Society. We were told that the outcome of this appeal might affect some 1,500 cases a year. j

[13] I propose to consider first whether an oral hearing was required in each case at common law, secondly whether, if not, art 6(1) applies and, thirdly, whether there is a breach of the claimant's rights under art 6(1) if an oral hearing is not held before a decision is made. However, before considering those questions I shall briefly discuss two topics, each of which has an important

- a bearing on the answer to each question. The first is the process adopted by the Law Society and the second is the facts.

THE PROCESS

- b [14] In both cases the OSS was considering allegations of IPS. The power to consider such allegations was first introduced in 1985 when the Solicitors Act 1974 was amended by the Administration of Justice Act 1985 to add a new s 47A. The purpose of the changes can perhaps be seen from the following extract from the *Eleventh Annual Report of the Lay Observer* (since replaced by the Legal Services Ombudsman) (HC Paper 323 (1985–86)) p 7 (para 15):

- c ‘When [the IPS powers are] brought into force, they will provide a limited but important form of redress to clients for certain types of complaint and will fill a gap which exists at present in the Society’s power to deal effectively with complaints of bad work by solicitors and in the ability of the Society to encourage and demand a higher level of performance where this is inadequate.’

- d The usual sanction was the payment of compensation to the client. In *R v Law Society, ex p Singh and Choudry* (1995) 7 Admin LR 249 at 253 the jurisdiction was described as disciplinary in nature, its intention being to maintain standards in the profession.

- e [15] Before the introduction of a procedure for complaining about IPS the Law Society had long had disciplinary powers in relation to solicitors. Under s 47 of the 1974 Act the power to strike off, suspend or fine a solicitor was (and is) vested in the SDT. The SDT is independent of the Law Society (see *Pine v Law Society* [2002] EWCA Civ 175, [2002] 2 All ER 658, [2002] 1 WLR 2189). It hears cases in public in accordance with the provisions of the Solicitors (Disciplinary Proceedings) Rules 1994, SI 1994/288. It is not in dispute that the procedures adopted by the SDT (and the SDT itself) fully comply with art 6(1) of the convention.

- g [16] The arrangements relating to IPS were replaced and updated by s 37A of and Sch 1A to the 1974 Act which were introduced into the Act by the Courts and Legal Services Act 1990. Section 37A provides: ‘Schedule 1A shall have effect with respect to the provision by solicitors of services which are not of the quality which it is reasonable to expect of them.’ Schedule 1A provides, so far as relevant:

- h ‘1.—(1) The Council may take any of the steps mentioned in paragraph (2) (“the steps”) with respect to a solicitor where it appears to them that the professional services provided by him in connection with any matter in which he or his firm have been instructed by a client have, in any respect, not been of the quality which is reasonable to expect of him as a solicitor ...

- j 2.—(1) The steps are—(a) determining that the costs to which the solicitor is entitled in respect of his services (“the costs”) are to be limited to such amount as may be specified in the determination and directing him to comply, or to secure compliance, with such one or more of the permitted requirements as appear to the Council to be necessary in order for effect to be given to their determination; (b) directing him to secure the rectification, at his expense or at that of his firm, of any such error, omission or other deficiency arising in connection with the matter in question as they may

specify; (c) directing him to pay such compensation to the client as the Council sees fit to specify in the direction; (d) directing him to take, at his expense or that of his firm such other action in the interests of the client as they may specify. a

(2) The "permitted requirements" are—(a) that the whole or part of any amount already paid by or on behalf of the client in respect of costs be refunded; (b) that the whole or part of the costs be remitted; (c) that the right to recover the costs be waived, whether wholly or to any specified extent. b

(3) The power of the Council to take such steps is not confined to cases where the client may have a cause of action against the solicitor for negligence ...

4.—(1) Where the Council have given a direction under paragraph 2(1)(a), then—(a) for the purpose of any taxation of a bill covering the costs, the amount charged by the bill in respect of them shall be deemed to be limited to the amount specified in the determination; and (b) where a bill covering the costs has not been taxed, the client shall, for the purposes of their recovery (by whatever means and notwithstanding any statutory provision or agreement) be deemed to be liable to pay in respect of them only the amount specified in the determination. c

(2) Where a bill covering the costs has been taxed, the direction shall, so far as it relates to the costs, cease to have effect.

5.—(1) If a solicitor fails to comply with a direction given under this Schedule, any person may make a complaint in respect of that failure to the Tribunal [ie the SDT]; but no other proceedings whatever shall be brought in respect of it. e

(2) On the hearing of such a complaint the Tribunal may, if it thinks fit (and whether or not it makes any order under section 47(2)), direct that the direction be treated, for the purposes of enforcement, as if it were contained in an order made by the High Court. f

The limit of compensation was £1,000 until 31 March 2000 when it was increased to £5,000, which was the relevant limit for the purposes of this case. In July 2003 the Council of the Law Society resolved to recommend an increase to £15,000.

[17] The Law Society's activities are governed by the Law Society's General Regulations 1997 as amended in 2001. Under s 79 of the 1974 Act the Law Society has a general power to delegate its functions. In the case of its powers under s 37A and Sch 1A those functions have been delegated to the 'Compliance Board' pursuant to reg 22(B)(1) of the 1997 regulations. The Board has in turn resolved to delegate the Sch 1A powers to adjudicators with an appeal lying to members of the Compliance Board. g

[18] Complaints of IPS are dealt with through the client relations office (the CRO) within the OSS. In May 2001 the compliance and supervision committee made and published a policy statement which began: 'The system of redress for [IPS] is intended to be informal, accessible and understandable by clients and solicitors.' In 2002 the CRO received 9,114 new complaints and there were 1,586 first instance decisions relating to IPS. The total of compensation awarded was £561,203, which was an average of £605 a case in which compensation was awarded. There were 473 appeals, 35% of which were allowed in whole or in part. The Law Society, in my opinion correctly, regards the jurisdiction with regard to IPS as of considerable value and importance, not only in order to h

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a compensate clients but also in order to encourage higher standards among solicitors.

[19] The OSS is concerned both with solicitors' conduct and with allegations of IPS. Its internal procedures are broadly similar in both cases. On receipt of a complaint, if the client has not already contacted the solicitor, the OSS refers the complaint to the firm in the hope that it can resolve it direct and we understand
b that a large number of complaints are resolved in this way. If the complaint cannot be resolved, a caseworker is assigned to the case by the OSS. The caseworker investigates the matter in correspondence and by telephone and attempts conciliation. If, and only if, that fails he prepares a report.

[20] The report (or 'agenda note') is disclosed in full both to the solicitor and to the client. The report and any submissions made by the parties are provided
c to an adjudicator or previously, as in Mr Rattigan's case, to a client relations sub-committee. The papers may (as in these cases) be voluminous. The OSS does not normally limit the length of the submissions that can be made and I would accept the submission that the purpose of the procedure is to give both parties, including of course the solicitor, a fair opportunity to comment on all
d relevant matters.

[21] In the case of a complaint of IPS, the adjudicator exercises the powers conferred on the Council by Sch 1A to the 1974 Act which are set out above. The solicitor has a right of appeal to or review by an adjudication panel. However, as I understand it, at the end of the process neither the adjudicator nor the
e adjudication panel has any powers in relation to a finding of IPS beyond those conferred on the Council by Sch 1A.

[22] I shall return to those powers below in the context of the facts of these applications but it is important to note that the Council's powers are to take the steps mentioned in para 2, which in each case (including para 2(1)) involves
f giving the solicitor a direction. Such a direction is not itself enforceable in law. By para 5(1), enforcement can only be effected by the making of a complaint to the SDT. Much of the debate between the parties centred on the effect of a direction given under the Schedule, since it was submitted by Mr Engelman that in some respects it has immediate effect (see further below).

[23] In addition to his powers in connection with complaints of IPS, when
g considering allegations relating to a solicitor's conduct in other respects, the adjudicator has a number of discrete powers under the Law Society's procedures, including a power to refer a complaint to the SDT, which will be done in the more serious cases, especially of misconduct. He also has power (unless of course he dismisses the complaint) to express regret but take no further action, to
h express disapproval of the solicitor's conduct, to reprimand the solicitor or severely to reprimand him. The power to refer the claimant to the SDT was exercised in the Rattigan case, as was a further power known as the vesting of a discretion to which I shall return below. The power to issue a severe reprimand and, subsequently, a reprimand was exercised in the Anderson case (again see
j further below). In each case there is a right of appeal to or review by an adjudication panel.

[24] An adjudication panel usually consists of three members but sometimes only two. Adjudication panel members are made up of members of the Council, non-Council solicitors and lay members appointed by the Master of the Rolls. The panel will have all the papers that were before the adjudicator together with

further submissions and often further evidence. The appeal consists of a full reconsideration of the case.

[25] Both the adjudicator and the adjudication panel have a discretion to hold an oral hearing. We were told, and I would accept, that an application for an oral hearing will be granted if the adjudicator or the adjudication panel thinks that fairness requires one, although they are very rare. The Law Society says that it would place a great, and probably intolerable, burden on the OSS if it were to have an oral hearing in every case. In 2003 the Law Society had 42 panel members. A panel of three sat on 140 occasions, each of which lasted about half a day and involved a considerable amount of reading in advance. We were also told that a large number of statutory responsibilities under the 1974 Act in addition to IPS and conduct have been delegated to the panel members under s 79.

[26] For my part, I see the force of the difficulties which would be involved if an oral hearing were required in every case like the present but I accept the submission that if such a hearing is necessary, either at common law or to ensure a fair trial or hearing under art 6 of the convention, the difficulties will have to be overcome.

THE FACTS

[27] I shall briefly refer to the facts of each case separately but, as I understand it, the claimant's principal concern in each is that he was held to have misled the client and that he might be thought to have been held to have acted dishonestly. While I can understand the claimant's sensitivity in this regard, his concern is not in my opinion well founded. Mr Dutton made it clear in the course of his submissions on behalf of the Law Society that the Law Society had at no stage made an allegation of dishonesty against the claimant in either case and that there is no suggestion that any of the tribunals which considered either case has made findings of dishonesty against him. That concession (if concession it is) was in my view correctly made.

Mr Rattigan's case

[28] The claimant acted for a legally aided client, Mr Rattigan, for a number of years in a claim for an alleged wrongful arrest which had taken place in 1985. The claim was eventually struck out for want of prosecution in November 1997. Mr Rattigan complained to the Law Society. After considering an extensive amount of documentation and the submissions of both Mr Rattigan and the claimant a caseworker prepared a detailed report dated 6 June 2001 into both the 'service' and 'conduct' aspects of the complaint. He also prepared a supplemental report dated 16 June 2001. He recommended that a finding of IPS be made, that the claimant pay compensation to Mr Rattigan and that he reduce his fees to reflect the inadequacies in the service. He also recommended that there be a finding that the claimant had acted in breach of various professional rules and guidelines in his handling of the case and that he be severely reprimanded.

[29] The report was referred to the two committees referred to above. The claimant made detailed written submissions to the committees on 21 June and 16 July 2001. The committees considered them together with the relevant documents and made their decisions on 16 August 2001 as set out above. The committee dealing with the complaint of IPS found that there was general delay on the part of the claimant, a delay in dealing with a lost court file, failure to reply to correspondence and non-compliance with r 15 of the Solicitors' Practice

a Rules 1990, which deals with costs information and client care. It made the orders set out above.

[30] The committee dealing with the conduct side of the complaint held that there had been serious delay in proceeding with the matter between 1987 and 1996, that the claimant had misled Mr Rattigan in relation to the court hearing date and that the claimant had failed to deal promptly with the correspondence.

b It made the orders set out above.

[31] The claimant exercised his right of appeal and sent the Law Society both appeal notices and further written submissions in support of his appeal contained in two bundles under cover of letters dated 3 and 16 September 2001. Those documents were forwarded to Mr Rattigan for his comments. On 26 September c the adjudication panel rejected both appeals. In each case the panel held that the findings reached at first instance were correct and that the claimant had not produced any or any sufficient evidence to overturn them.

[32] The claimant has over a considerable period sought to challenge those conclusions in a number of respects. However, those challenges have for the d most part focused, not on the failure to afford him an oral hearing or an opportunity to give evidence or to cross-examine Mr Rattigan, but on an alleged failure on the part of the relevant committee and panel to have regard to all the evidence. Reliance is placed in particular on a skeleton argument dated 30 January 2003 and on Mr Engelman's skeleton argument prepared for this appeal.

e [33] Thus in the latter document it is submitted that the essential issue in the case was the allegation that the claimant misled Mr Rattigan about a crucial court hearing date. It is submitted that the documents, and notably a letter sent to Mr Rattigan dated 20 May 1994, an attendance note dated the same day, an order of the court dated 25 November and drawn on 30 November 1994 fixing a trial f date and a letter dated 2 December 1994 from the claimant to Mr Rattigan confirming the order show that the claimant did not mislead Mr Rattigan. The thrust of the complaint is that in these circumstances the committee should not have held that the claimant had '[not] taken any steps to explain to Mr Rattigan the details of the arrangement for dealing with setting down and getting a hearing date'.

g [34] The difficulty which the claimant faces in this regard is that (as stated earlier) the claimant does not have permission to challenge the decisions on the basis that they were irrational or unlawful but simply on the basis that he was not afforded an oral hearing. It is not therefore appropriate for us to express a view on points of detail of the kind set out above. Reading the documents with care, h I have reached the clear conclusion that there was nothing unfair in either committee or the panel proceeding to consider Mr Rattigan's case without suggesting an oral hearing.

[35] I have no doubt that if the claimant had thought at the time that an oral j hearing was desirable, or if he had wanted to give oral evidence or to cross-examine Mr Rattigan, he would have asked to be permitted to do so. It is clear from the many documents which he has put before the various tribunals, the Administrative Court and the Court of Appeal that he is an extremely articulate solicitor and well able to look after himself. I can entirely understand his decision not to ask for an oral hearing or to call oral evidence because the issues were all eminently capable of being determined by a perusal of the documents.

[36] I shall return below to the suggestion that the claimant may have suffered an injustice arising out of the penalties imposed in Mr Rattigan's case.

Mrs Anderson's case

[37] The claimant was instructed by Mrs Anderson in 1992 in connection with a medical negligence action against a local authority. At the time that the claimant took over the case Mrs Anderson's claim had been dismissed for want of prosecution. The claimant successfully applied to have it reinstated but thereafter the action proceeded extremely slowly. Mrs Anderson complained to the Law Society. There were two principal areas of concern. The first related to what were said to be six years of delay after the action was reinstated in 1993 and the second arose out of letters written to Mrs Anderson indicating that the action had been set down for trial. It was alleged that the claimant never did set it down for trial despite positive assertions in the letters that he was doing so.

[38] A caseworker prepared a report dated 27 September 2001 which took account of comments made by both Mrs Anderson and the claimant. The caseworker was of the opinion, on the 'conduct' aspect of the case, that the claimant had behaved unprofessionally and that he was in breach of r 1 of the Solicitors' Practice Rules 1990 by misleading Mrs Anderson in respect of the progress of her case and recommended that he be reprimanded. On the 'service' aspect of the case, the caseworker concluded that that he was guilty of IPS and recommended that he pay Mrs Anderson compensation and that he should not be entitled to any fees.

[39] The claimant was able to put whatever documents he wished and to make written submissions to the adjudicator, which he did, but the adjudicator concluded in his 'hybrid' decision dated 14 January that the claimant had misled Mrs Anderson by indicating to her that her case was ready for trial but accepted that this was not motivated by anything more serious than a desire to placate the client. He directed that the claimant should be given a severe reprimand for this breach of the Solicitors' Practice Rules 1990. He also found that there had been IPS as a result of unreasonable delay and failure to explain the lack of progress to the client. As already indicated, he fixed compensation at £1,000. The claimant had made no request for an oral hearing or that the adjudicator should hear oral evidence.

[40] The claimant appealed to the adjudication panel and requested an oral hearing. In his two-and-a-half-page document dated 27 June 2002 in support of his application for an oral hearing he relied upon art 6(1) and (3)(d) of the convention and a number of decisions of the European Court of Human Rights to which I shall refer below. The thrust of his submission was that his right to practise his profession as a solicitor was at stake. His case on the facts was that it was only as a result of Mrs Anderson's refusal to submit to further medical examinations that no progress was made with her action and that Mrs Anderson had withheld certain documents from the OSS with the result that a false picture of the advice and explanations that she received was created. The claimant emphatically denied that Mrs Anderson was misled in any way.

[41] As already indicated, in addition to the above, the claimant submitted a long document in support of his case on the facts. The adjudication panel considered both and decided that it was not necessary to hold an oral hearing or to permit oral evidence on the grounds that the matter was not one of such complexity as to warrant an oral hearing and that the written evidence was

a sufficiently detailed. It was indeed very detailed and, as I understand it, the claimant submitted all the documents which he said that Mrs Anderson had previously withheld. Since his allegation that Mrs Anderson misled the OSS was essentially that she had failed to include and draw their attention to *all* the relevant documents, it seems to me that the adjudication panel was able to evaluate that submission by considering all the documents and arriving at a conclusion as to whether or not the conclusions reached by the adjudicator were or were not justified on the basis of all the documents now put before it by the claimant. I do not for my part see that an oral hearing or oral evidence was required in order fairly to determine the issues between the parties. However, I will briefly consider this point further below.

c [42] It is plain from the panel's decision that they considered all the material and, as already indicated, they allowed the appeal in part. In the skeleton argument prepared by Mr Engelman for this application (and indeed in his helpful oral submissions) he highlights a number of factual aspects of the case. He complains that the first allegation was that Mrs Anderson believed that she had been misled by the claimant and that that allegation was accepted at first instance, d whereas the adjudication panel put the conclusion differently in terms that were not put to him. Moreover it is submitted that if they had been, the claimant would have been able to show that the conclusion reached by the panel was wrong by reference to the documents. In short, his case is that the letters relied upon against him do not tell the whole story and that it was made clear to Mrs Anderson both in correspondence and at meetings evidenced by attendance e notes that without further medical evidence or the confidence that such evidence be available or the advice of counsel that it was not required it would not be possible to set the matter down for trial.

f [43] In support of the claimant's case on the facts Mr Engelman drew our attention to a number of documents, both in his skeleton argument and orally. As I understand it, they were all before the adjudication panel, as were very many other documents relied upon by the claimant. In so far as the claimant seeks to impugn the decision of the panel on grounds other than the failure of the panel to afford him an oral hearing, it is not open to him to do so. His application for judicial review was refused by Mackay J and, as I have already indicated, this court only gave him g permission to rely on the absence of an oral hearing and, in Mrs Anderson's case, on the panel's refusal to grant his application for such a hearing.

h [44] In these circumstances it is not appropriate for us to consider the other proposed grounds of challenge to the decisions and I turn to consider the question whether the claimant has made good his case that he ought to have been afforded an oral hearing or an opportunity to give oral evidence and to cross-examine his clients, either at common law or by reason of art 6(1) of the convention.

THE COMMON LAW

j [45] The question under this head is whether the claimant was entitled to an oral hearing in either case either before the adjudicator (or equivalent) at first instance or before the adjudication panel on appeal. The duty of each was to act fairly. What is fair depends upon the circumstances of the particular case. I can imagine circumstances in which an adjudicator or appeal panel might think it appropriate to hold an oral hearing and there may even be cases in which the court would intervene to quash a decision refusing to do so.

[46] The relevant principles have recently been considered by this court in *R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1269, [2004] 1 WLR 421, where this court considered and rejected a submission that the Parole Board should have held an oral hearing. In that context, Kennedy LJ approved [at [37]] the following test proposed by counsel. An oral hearing should be ordered where there is a disputed issue of fact which is central to the board's assessment and which cannot fairly be resolved without hearing oral evidence. In the present context it is to my mind difficult to think of such an issue, but nothing is impossible. a
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[47] I cannot at the moment think of a circumstance in which a solicitor who did not ask for an oral hearing before the adjudicator or appeal panel could complain that no oral hearing was held. In my judgment, the claimant's failure to ask for an oral hearing in Mr Rattigan's case is fatal to his argument at common law. c

[48] Mrs Anderson's case is somewhat different because, of course, the claimant did ask for an oral hearing before the adjudication panel. However, the Law Society was in my judgment entitled to leave it to the panel to decide whether to accede to an application for an oral hearing. In reaching its conclusion the panel or (in a case where an application is made to the adjudicator) the adjudicator must of course act fairly. However, the documents show that the adjudication panel gave careful consideration to the application for an oral hearing and gave reasons for its refusal of it. It seems to me to be clear that, although its decision was made long before the decision in *Smith's* case, the adjudication panel essentially applied the test approved there. As stated above, it decided that a hearing was not necessary because the matter was not one of such complexity as to warrant an oral hearing and the written evidence was sufficiently detailed. It plainly considered that fairness did not require an oral hearing and that the issues could fairly be resolved on the documents. d
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[49] In *Smith's* case the court emphasised in that context the principles applied by the House of Lords in *Dood v Secretary of State for the Home Dept* [1993] 3 All ER 92 at 106, [1994] 1 AC 531 at 560–561 per Lord Mustill, which was concerned with the case where an Act of Parliament has conferred an administrative power. It seems to me that similar principles apply here. In particular, for present purposes I should I think refer to an important principle in Lord Mustill's speech which was followed in *Smith's* case. He expressed it thus: f

'... the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision-maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament had entrusted not only the making of the decision but also the choice as to how the decision is made.' g
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[50] In my opinion, that approach applies equally to the challenge in this case. To succeed the claimant would have to show that the procedure adopted was unfair. In this case, the only question before this court at common law is, as I see it, whether he can show, in the case of each decision impugned, that it was unfair to make it on the documents without any form of oral hearing. j

[51] I have reached the clear conclusion that he cannot. In Mr Rattigan's case, where no request was made for an oral hearing or for oral evidence to be heard, I can see no sensible basis for such a decision. As already stated, my conclusion is

a that each of the complaints could be fairly determined on the documents. The same is in my opinion true in Mrs Anderson's case. As explained earlier, whatever view the claimant may hold (or have held), he was not being accused of dishonesty. It was to my mind an entirely sensible decision to determine the complaints on the documents, of which there were many. There was no need for an oral hearing or oral evidence. Moreover, the adjudication panel applied the correct test in refusing the claimant's application and in any event the decision cannot be impugned as unfair or unlawful by whatever test is adopted. That is for the simple reason (as I see it) that there was no disputed issue of fact which was central to the adjudication panel's assessment in her case *and which could not fairly be resolved without hearing oral evidence and without an oral hearing* (my emphasis).

c [52] It follows that I would refuse the application for judicial review in so far as it depends upon the principles of the common law. I therefore turn to the remaining two questions, namely whether art 6(1) applies and, if so, whether there has been any infringement of the claimant's rights under it.

d ARTICLE 6

[53] Article 6 provides, so far as potentially relevant:

'(1) In the determination of his civil rights and obligations or of any criminal charges against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

(3) Everyone charged with a criminal offence has the following minimum rights ... (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him ...'

f [54] It is important to note that this application is not concerned with a person charged with a criminal offence so that the claimant does not have the rights conferred on such a person by art 6, including those in art 6(3)(d). For that reason decisions in criminal cases are not in my opinion of any real assistance.

g [55] The claimant's case under this head is that the decisions in both the Rattigan and the Anderson cases involved the determination of his civil rights and obligations and that it follows that he was entitled to a fair and public hearing of the complaints at each stage. The Law Society's case is that none of the decisions at first instance or on appeal to the adjudication panel involved the determination of the claimant's civil rights or obligations but in any event that the authorities show that the procedures must be considered as a whole and, so considered, there has been no infringement of the claimant's rights under art 6 in any of the respects alleged.

j [56] In these circumstances I shall first consider the correct approach to art 6(1) in the light of the authorities and of the Strasbourg jurisprudence and shall then consider each of the respects in which it is said that there has been an infringement of the claimant's rights under the article. Since different considerations may apply to the different decisions made it is necessary to consider them one by one. For example, it is not I think said that the finding that a solicitor is guilty of IPS is itself a determination of his civil rights or obligations. The argument has focused on each of the penalties imposed by the committees, the adjudicator or the adjudication panel as the case might be. It is convenient to

consider them under these headings: reprimand and severe reprimand, vesting of a discretion, reference to the SDT, compensation and costs. a

The correct approach

[57] Logic might suggest that the question whether there has been a breach of art 6(1) should be approached by asking first whether there has been a determination of the claimant's civil rights and obligations and then by asking whether, if there has, there has been a breach of them. It is of course relevant to consider those questions but both the English authorities and the Strasbourg jurisprudence show that those questions cannot be treated entirely separately and that the question whether there has been a breach of art 6(1) should be answered by considering all the circumstances of the case and having regard to all the legal processes available to the claimant. Those processes include any avenues of appeal or review available to the claimant and are not limited to the process at first instance. b
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[58] The courts have considered the application of art 6(1) in many different contexts and the correct approach in any particular case is likely to vary depending on the context. Thus in some cases compliance with it will require a full public and oral hearing at first instance with a full opportunity to cross-examine the relevant witnesses. In other cases, there will be compliance even though there was no public or oral hearing and no cross-examination of witnesses at first instance, provided that, when the process is considered as a whole there has been a fair and public hearing. d
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[59] The general principle was stated thus by Lord Bingham in *Runa Begum v Tower Hamlets London BC* [2003] UKHL 5 at [5], [2003] 1 All ER 731 at [5], [2003] 2 AC 430:

'The importance of this case is that it exposes, more clearly than any earlier case has done, the interrelation between the art 6(1) concept of "civil rights" on the one hand and the art 6(1) requirement of "an independent and impartial tribunal" on the other. The narrower the interpretation given to "civil rights", the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to "civil rights", the more flexible must be the approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided. Once it is accepted that "full jurisdiction" means "full jurisdiction to deal with the case as the nature of the decision requires" (see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23 at [87], [2001] 2 All ER 929 at [87], [2001] 2 WLR 1389), it must also be accepted that the decisions whether a right recognised in domestic law is also a "civil right" and whether the procedure provided to determine that right meets the requirements of art 6 are very closely bound up with each other. It is not entirely easy, in a case such as the present, to apply clear rules derived from the Strasbourg case law since, in a way that any common lawyer would recognise and respect, the case law has developed and evolved as new cases have fallen for decision, testing the bounds set by those already decided.'

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a [60] There have now been a series of cases in which the courts have indorsed the proposition that, where art 6(1) is in principle applicable or, as it is sometimes put, engaged, there is no infringement of the right to a fair and public trial so long as the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires. An important example of this principle can be seen in *R (on the application of Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] EWCA Civ 735, [2002] 1 WLR 2515, in the context of the requirement in art 6(1) of a fair and public hearing, albeit in a case about planning permission. This court asked itself whether the appellants' entitlement to 'a fair and public hearing' by 'an independent and impartial tribunal' was satisfied by the English planning system which, in the case of objectors, allows the local planning authority to grant planning permission without having afforded them any opportunity of an oral hearing subject only and always to this court's supervisory jurisdiction on a judicial review application.

b [61] It was a case in which it was not in dispute that the appellants' civil rights had been determined and that the local planning authority was not itself to be regarded as an independent and impartial tribunal for the purposes of art 6. Yet the court answered the above question in the affirmative. It held that the rights of objectors to planning applications are not violated if a planning authority refuses to accord them a public hearing, or indeed any form of oral hearing because, as Dyson LJ put it (at [46]), 'a combination of the authority's initial decision-making process and judicial review by the High Court is sufficient to ensure compliance with article 6'.

c [62] In his judgment in that case Simon Brown LJ, with whom Mummery and Dyson LJ agreed, approved the following statement of Sullivan J in *R (on the application of Vetterlein) v Hampshire CC* [2001] EWHC Admin 560 at [68], [2002] 1 P & CR 404 at [68], albeit again in the context of a planning application:

d 'The special meeting was held in public. The agenda was available to members and to the public beforehand. In deciding whether there has been a breach of Article 6(1) the procedures have to be looked at in their entirety, including the earlier opportunities to make representations during the consultative process and the subsequent right to seek relief by way of judicial review if the Council errs in law. A "fair" hearing does not necessarily require an oral hearing, much less does it require that there should be an opportunity to cross-examine. Whether a particular procedure is "fair" will depend upon all the circumstances, including the nature of the claimant's interest, the seriousness of the matter for him and the nature of any matters in dispute.'

e Those principles seem to me to accord entirely with the approach of the common law set out above.

f [63] In the course of his judgment Simon Brown LJ considered a number of English cases involving administrative decisions and two decisions of the European Court of Human Rights, namely *Fredin v Sweden* (No 2) [1994] ECHR 18928/91 and *Jacobsson v Sweden* (No 2) (1998) 32 EHRR 463. He noted (at [28]) that in *Fredin v Sweden* (No 2) the court clearly stated under its existing case law that 'in proceedings before a court of first and only instance' the right to 'a public hearing' entailed an entitlement to an 'oral hearing'. As Simon Brown LJ put it, the critical question in that case was whether the fact that the applicant was denied an opportunity to present oral argument before the Supreme

Administrative Court, which was the first and only tribunal seized of the applicant's challenge to the underlying administrative decision, breached art 6(1). The court held that it did because he had been guaranteed a right to an oral hearing and had had none. a

[64] In *Adlard's* case ([2002] 1 WLR 2515) Simon Brown LJ contrasted (at [29]) the decision in *Jacobsson v Sweden* (No 2), where the Court of Human Rights applied the same principles but held on the facts that, although it acted as the first and only judicial instance, given the limited nature of the issues before it, the Supreme Administrative Court was dispensed from its normal obligation to hold an oral hearing. To my mind those decisions of the Court of Human Rights illustrate the importance of the circumstances of the case and show that the resolution of questions of this kind is very fact sensitive. b

[65] Finally, Simon Brown LJ noted (at [30]) that an applicant for judicial review is entitled to an oral hearing of his application for judicial review and added (at [32]): c

'The remedy of judicial review, in my judgment, amply enables the court to correct any injustice it perceives in an individual case. If, in short, the court were satisfied that exceptionally, on the facts of a particular case, the local planning authority had acted unfairly or unreasonably in denying an objector any or any sufficient oral hearing, the court would quash the decision and require such a hearing to be given. This presents no difficulties: [counsel] disputes neither the authority's power to conduct such a hearing nor the court's power to order it.' d

[66] A striking exercise of the court's powers on an application for judicial review is the decision of this court, comprising Simon Brown, Brooke and Hale LJJ, in *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419, which was indeed relied upon by Mr Engelman. In that case the court held that on an application for judicial review of a decision to administer medical treatment to a mental patient without his consent the court was entitled to reach its own view as to whether the treatment infringed the patient's human rights. The court further held that what was or would be required on a substantive challenge would be a full merits review of the propriety of the treatment proposed and, for that purpose, cross-examination of the specialists. e

[67] That was undoubtedly an exceptional case but it shows that the court has wide powers on an application for judicial review to correct any perceived injustice, which include (if necessary) the cross-examination of witnesses. More conventionally, as Simon Brown LJ observed in *Adlard's* case [2002] 1 WLR 2515 at [32], quoted above, it has a power which it regularly exercises to quash the decision complained of and to order an appropriate rehearing, if necessary an oral hearing in public with cross-examination of witnesses. Whether it is appropriate for it to exercise it in any particular case of course depends upon the circumstances of the case. f

[68] I recognise that many of the recent cases have involved administrative decisions including determination of planning applications but it seems to me that the same underlying principles apply to a case which involves findings of fact. It may be that on particular facts it would be necessary for a first instance tribunal itself to hold a public hearing and to allow oral representations and indeed cross-examination of witnesses and that, if it did not, the court would so order on g

a an application for judicial review. I will return below to the question whether this is such a case.

[69] The key point as a matter of principle is that the question whether the procedure satisfies art 6(1), where there is a determination of civil rights and obligations, must be answered by reference to the whole process. The question in each case is whether the process involves a court or courts having 'full jurisdiction to deal with the case as the nature of the decision requires'. There may be cases in which a public and oral hearing is required at first instance and other cases where it is not, just as there may be cases in which the potential availability of judicial review will not be sufficient to avoid a breach of art 6(1).

[70] That is to my mind demonstrated not only by the English authorities but also by the Strasbourg jurisprudence. I have already referred to the cases of *Fredin v Sweden* (No 2) and *Jacobsson v Sweden* (No 2). The same approach was adopted in *Bryan v UK* (1996) 21 EHRR 342, which was another planning case, and indeed in *X v Austria* App No 5362/72 (14 December 1972, unreported), relied upon by the claimant. In that case the applicant's goods had been seized by way of execution and he sought to stop the execution process. To that end he wanted to call some witnesses and have an oral hearing. The Commission recalled that it had previously held that the refusal of a court to allow a party in a civil action to call a witness or to cross-examine a witness might be an infringement of his right to a fair hearing but then said this:

e 'The Commission observes that the Regional Court carefully considered the benefit of complying with the applicant's request to call Dr A and to arrange a confrontation with the parties. The Court reached the conclusion that the evidence which Dr A could give would not be relevant and also that the desired confrontation would be of no assistance in determining any of the matters in dispute in the case. The Commission notes the Regional Court's reasons for refusing the applicant's requests and, for the same reasons, f it does not find that in the circumstances the refusal to call the witness concerned was inconsistent with the provisions of art 6(1) of the convention.'

For those reasons the Commission declared the application inadmissible. It had approached a similar problem in much the same way in *X v Germany* App N 852/60 (19 September 1961, unreported), a case also referred to by Mr Engelman.

[71] On the other hand there have been cases where the Court of Human Rights Court has held that neither the tribunal of first instance nor the reviewing court has provided a fair and public hearing within the meaning of art 6(1) (see eg *W v UK* (1988) 10 EHRR 29 at 58 (para 82), *Obermeier v Austria* (1990) 13 EHRR 290 at paras 34, 35 and *Diennet v France* (1996) 21 EHRR 554).

[72] In the context of a case like the present, the position was well put by Lord Mackay of Drumadoon in the Court of Session in *Tehrani v UK Central Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208 at 217 (para 55), 2001 SLT 879 at 890 (para 55), which is discussed in more detail below. He summarised the position referable to disciplinary tribunals in this way:

j 'In my opinion, cases such as *Le Compte, Van Leuven and De Meyere* ((1982) 4 EHRR 1), *Albert and Le Compte* ((1983) 13 EHRR 415) and *Bryan* ((1996) 21 EHRR 342) establish that, as far such tribunals are concerned, no breach of the Convention arises if the tribunal is subject to control by a court that has full jurisdiction and itself complies with the requirements of Article 6(1).

In other words, when dealing with a disciplinary tribunal, such as the PCC, a right of appeal to a court of full jurisdiction does not purge a breach of the Convention. It prevents such a breach from occurring in the first place.'

I entirely agree. I shall refer to the *Le Compte* cases below.

[73] We were also referred to statements in some textbooks but to my mind none of them carries the matter any further. In short, all depends upon the circumstances.

[74] Finally, I should refer back to *R (on the application of Smith) v Parole Board* [2003] EWCA Civ 1269, [2004] 1 WLR 421, where this court held that there had been no determination of the applicant's civil rights and obligations but, if there had been, art 6(1) did not confer a right to an oral hearing. Kennedy LJ said (at [34]) that even if the Parole Board was determining the applicant's civil rights and obligations—

'I would not, in this case, say that the claimant was entitled to an oral hearing. He did not request it. He did not raise any issue which seemed to call for it. The important primary facts were not in dispute. The points which he wished to make were clearly made for him in writing, and all that remained was for the Parole Board to make its evaluation.'

[75] That approach seems to me to be entirely consistent with the principles discussed above, although it should perhaps be noted that the question in *Smith's* case was whether there should have been an oral hearing, not whether there should have been a public hearing. Counsel for the applicant had indicated that he was not saying that there should have been public hearing, which is not of course quite the same thing as an oral hearing. The same is, I think, true here because the thrust of the claimant's case is not so much that there should have been a public hearing but that there should have been an oral hearing at which oral evidence could be given. It seems to me that that is essentially a feature of the fairness of the process.

[76] I turn to consider each of the decisions made in the light of the approach just discussed. In each case it is appropriate to consider whether there was a determination of the claimant's civil rights and, if so, where there was any breach of his rights under art 6(1). That involves in each case a consideration of the whole process.

Reprimand and severe reprimand

[77] It is convenient to consider this question first because it highlights the different approaches of the claimant on the one hand and the Law Society on the other. The civil right which the claimant identifies is the right to practise his profession as a solicitor. The Law Society, on the other hand, submits that the claimant's right to practise has not been determined or interfered with in any way by any of the decisions made by the committees, adjudicator or adjudication panel in either case. Both parties rely in this regard on two decisions of the European Court of Human Rights involving the same person, a Monsieur *Le Compte*. They are *Le Compte v Belgium* (1982) 4 EHRR 1 and *Albert v Belgium* (1983) 13 EHRR 415.

[78] The applicants were found guilty of professional misconduct and suspended from practising medicine by a disciplinary tribunal in Belgium. One of the questions before the court in the earlier case was whether their rights

a under art 6(1) had been infringed. The conclusions reached by the court may be summarised as follows. (i) Disciplinary proceedings do not normally lead to a *contestation* (or dispute) over 'civil rights and obligations' or, in terms of the English text, a determination of civil rights and obligations, but may do so in certain circumstances (see *Le Compte v Belgium* (1982) 4 EHRR 1 at 15 (para 42)). (ii) In order for there to be such a determination the result of the proceedings must be (at 17 (para 47)) 'directly decisive for such a right'. (iii) A decision to suspend a doctor from practising medicine is a decision which is directly decisive of his right to practice, whereas a warning, censure or reprimand is not (at 17 (para 47) and 18 (para 49)). The court said (at 18 (para 49)):

c 'Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand—see para 32 above), the suspension of which they complained undoubtedly constituted a direct and material interference with the right to continue to exercise the medical profession. The fact that the suspension was temporary did not prevent its impairing that right; in the "*contestations*" (disputes) contemplated by Article 6(1) the actual existence of a "civil" right may, of course be at stake but so may the scope of such a right or the manner in which the beneficiary may avail himself thereof.'

[79] In *Albert v Belgium* (1983) 13 EHRR 415 the court followed its decision in *Le Compte v Belgium*. So did the Commission in *App No 10331/83 v UK* (1984) 6 EHRR 583, where a barrister was reprimanded by the Disciplinary Tribunal of the Senate of the Bar in England for professional misconduct. The Commission rejected the complaint as manifestly unfounded, saying that it was the imposition of sanctions such as preventing a doctor from running a clinic or suspending a doctor from practising his profession which 'extended the normal realms of disciplinary proceedings into that of determination of civil rights'. It followed that the reprimand of a barrister 'did not overstep the bounds of disciplinary matters and did not determine any of his civil rights and obligations'. Tucker J followed that decision in *R (on the application of Nicolaidis) v General Medical Council* [2001] EWHC Admin 625, [2001] All ER (D) 390 (Jul) in the case of a consultant in obstetrics who had been given what was described as the severest of reprimands for serious professional misconduct.

[80] Some reliance was placed on the decision of the Court of Human Rights in *Gautrin v France* (1999) 28 EHRR 196, where 99 doctors were suspended for a breach of their code of conduct and the remaining six were reprimanded. It was conceded that there had been a determination of the doctors' civil rights, no doubt because the vast majority had been suspended, and the court said (at 210 (para 33)) that what was 'at stake' was the right to continue to practise medicine. As I see it, that is the distinction between the kind of case in which there is, say, a reprimand and the kind of case in which there is a suspension of the right to practise. It is only in the latter class of case that it can be said that the right to continue practise is at stake so as to cross the line between a disciplinary process and a process which determines civil rights and obligations.

[81] The court held that the applicants' rights were infringed because the proceedings were not in public and, as it put it (at 212 (para 42)), the holding of court hearings in public constitutes a fundamental principle enshrined in art 6(1). It was argued that there was no infringement because a hearing before the Conseil d'Etat would have been in public. That argument was rejected, although

it is to my mind clear from para 42 that the court held that the fact that the applicants would have had a hearing in public if they had appealed to the Conseil d'État was irrelevant only for the reasons set out (at 211 (para 38)) as follows:

'... it was the *Conseil d'État's* settled case law that the provisions of Article 6(1) of the Convention were inapplicable to proceedings before those bodies. In those circumstances, an appeal on points of law based on that complaint would not have been an "adequate" and "effective" remedy.'

[82] There are two decisions of the Court of Human Rights which applied the above principles to lawyers. They are *H v Belgium* (1988) 10 EHRR 339 and *WR v Austria* [1999] ECHR 26602/95. In the latter case the court recalled its earlier case law to the effect that disciplinary proceedings give rise to disputes over civil rights if what is at stake is the right to continue to exercise a profession.

[83] There is a valuable contribution to this debate by Lord Mackay of Drumadoon in the Court of Session in *Tehrani v UK Central Council for Nursing Midwifery and Health Visiting* [2001] IRLR 208, 2001 SLT 879, where a nurse sought an injunction (or interdict) to restrain the respondents from proceeding with a disciplinary charge against her by their Professional Conduct Committee (PCC) on the ground that the PCC was not an independent and impartial tribunal. Unusually in this case, unlike the others, relief was sought in advance. Lord Mackay held ([2001] IRLR 208 at 214 (para 33), 2001 SLT 879 at 886 (para 33)) that, if the petitioner could establish that the disciplinary proceedings could result in a finding that would constitute a determination of her civil rights and obligations, the decision to initiate those disciplinary proceedings was open to challenge as being incompatible with her convention rights. Lord Mackay then considered the Strasbourg jurisprudence in some detail and held ([2001] IRLR 208 at 214 (paras 42–44), 2001 SLT 879 at 888 (paras 42–44)) that if the petitioner were to have her name removed from the register following a finding of misconduct against her, such a determination would exclude her from certain nursing posts as a matter of law and would amount to a determination of her civil rights.

[84] Those conclusions are entirely consistent with the decisions of the Court of Human Rights to which I have referred. It is true that Lord Mackay left open the question what the position would be if the PCC simply cautioned the petitioner as to her future conduct. However, in my opinion the decisions of the Court of Human Rights are clear on the point. At any rate in a case where the court is considering the position after the tribunal had made its decision, as in the instant case, a decision to reprimand or severely to reprimand the person concerned (here the claimant) does not amount to a determination of his civil rights because the right to continue to practise his profession is not at stake.

[85] It follows from the above analysis that, subject to a particular point taken by Mr Engelman on the facts of this case, neither the decision severely to reprimand the claimant nor the decision to reprimand him was a determination of his civil rights. The particular point is that it is said that the effect of the reprimand is likely to make it difficult or impossible for the claimant to obtain professional indemnity insurance and thus to continue to practise as a solicitor. It is said, as is no doubt the case, that pursuant to his duty to disclose all material facts to prospective insurers he would have to inform them of the reprimand and indeed the other penalties imposed upon him.

a [86] There are however to my mind two particular problems which this argument faces before us. The first is that it is difficult to see that this is the kind of decision which is directly decisive of his right to practise identified in the Strasbourg jurisprudence to which I have referred. There is no hint in that jurisprudence that this is the kind of consequence which the court had in mind as crossing the line between a disciplinary process and a process which determines civil rights.

b [87] The second problem is related to the first and arises from the nature of the evidence which has been put before us. It is necessary to refer to only one piece of evidence in this regard. In a letter from Mr White of Keith H White Associates Ltd, who provide specialist insurance consultancy services, dated 27 January 2004, he says that he has no doubt that the reprimand is a material fact but that he has no reason to suppose that the insurance market in which cover would potentially be placed would be restricted as a result. He assumes (so far as I am aware correctly) that previous insurers were not called on to provide an indemnity and concludes that some insurers might construe the claimant's record as clean whereas others might apply a 'modest load' for between three and c five years.

d [88] In these circumstances the highest that it could be put is that the effect of the reprimand might well be to increase the cost of professional indemnity insurance. In my opinion, a penalty which has that effect cannot fairly be said to put the claimant's right to continue to practise his profession as a solicitor at stake. It follows that I would hold that neither the decision severely to reprimand e the claimant nor the substituted decision to reprimand him amounted to a determination of his civil rights or obligations within art 6(1) of the convention.

Vesting of a discretion

f [89] As I understand it, a solicitor who wishes to practise as a solicitor must have a practising certificate which he has to renew in November each year by application to the Law Society. One of the methods by which the Law Society regulates solicitors is to impose conditions on a solicitor's practising certificate. Examples would be to require a solicitor to work in employment approved by the Law Society or to restrict the solicitor from holding client funds.

g [90] Section 12 of the 1974 Act confers a discretion on the Law Society to impose such conditions in certain defined circumstances. One of those circumstances is defined in s 12(1)(e):

h 'after he has been invited by the Society to give an explanation in respect of any matter relating to his conduct and has failed to give an explanation in respect of that matter which the Council regard as sufficient and satisfactory, and has been notified in writing that he has so failed ...'

j The expression 'vesting a discretion' simply means that the solicitor has been notified as provided in s 12(1)(e) which permits the Law Society to consider whether to impose a condition at the next renewal of the practising certificate.

[91] The decision to 'vest the discretion' does not therefore itself determine any of the solicitor's legal rights. Moreover, if the Law Society should subsequently impose a condition on the certificate, the solicitor has a right of appeal to the Master of the Rolls under s 13A(6) of the 1974 Act. The Master of the Rolls conducts such appeals under the Master of the Rolls (Applications and

Appeals) Regulations 2001, which provide (subject to very limited exceptions) that the hearings of such appeals shall be in public. So far as I can see, those rules are entirely compatible with art 6(1) of the convention. a

[92] In these circumstances it is to my mind clear that the decision to 'vest a discretion' was not a determination of the claimant's civil rights and, in any event, viewed as a whole, the process does not infringe his convention rights in this regard. b

Reference to the SDT

[93] The same is plainly true of the decision in the Rattigan case to refer the claimant to the SDT. I do not see how that could possibly be a determination of any of the claimant's civil rights. On the contrary it was a reference to the SDT for it to determine those rights and, as indicated earlier, it is not in dispute that the processes of the SDT are compatible with the convention. c

Compensation

[94] On the face of it, it might be thought that a direction to pay compensation, which is the form in which the reports of the committees, adjudicators and adjudication panels are written, is a determination of the solicitor's civil obligations, namely to pay compensation to the client. However, it is submitted by Mr Dutton on behalf of the Law Society that that is not so because of the structure of Sch 1A to the 1974 Act which is set out above. d

[95] His submissions may be summarised in this way. The power set out in s 37A of and para 1(1) of Sch 1A to the 1974 Act is to take certain steps which are identified in para 2(1) of the Schedule. The steps involve certain specific 'directions', one of which is a direction to pay 'such compensation ... as the Council sees fit to specify in the direction'. The crucial provision is para 5(1), which contains two parts. The first is that, if a solicitor fails to comply with a direction, any person may make a complaint in respect of that failure to the SDT and the second is that no other proceedings whatever shall be brought in respect of the failure. The effect of the paragraph is thus that the direction to pay compensation has no legal effect until the SDT has determined the complaint and made such order as it thinks appropriate in respect of it. Since by para 5(1) the only proceedings which can be brought to enforce the direction are by way of complaint before the SDT, it follows that the direction cannot itself have legal effect and cannot therefore amount to a determination of the civil rights or obligations of the solicitor concerned. e

[96] Mr Engelman submits in response that that is to approach the problem in too technical a way and is contrary to the approach of the European Court of Human Rights, which focuses on the substantial merits of the matter untrammelled by legal technicalities. He further submits that the directions in practice have effect because they require the solicitor to pay compensation as a matter of professional obligation, even if not in law. Moreover, he says that para 5(1) empowers the SDT only to determine a complaint that the solicitor has not complied with the direction and not to permit the solicitor to reopen the merits of the direction. This last submission is supported by a decision of the SDT as recently as 5 February 2004 which has properly been brought to our attention by Mr Dutton. In *FitzPatrick (Thomas Patrick)* 8845/2003 (5 February 2004, unreported) the SDT held that it had no jurisdiction to look into the f
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a reasonableness of the direction, although they did state that they considered the decision in question to be fair.

[97] The provisions of Sch 1A to the 1974 Act are in some respects somewhat curious and might perhaps be reconsidered in the light of the argument in this case but, on balance, I have reached the conclusion that the Law Society's submissions are to be preferred. The cases before the Court of Human Rights b show that the court will only hold that there has been a determination of a professional person's civil rights and obligations where the line has been crossed between a disciplinary process and such a determination, since the court's basic approach is that disciplinary proceedings do not normally lead to a *contestation* (or dispute) over 'civil rights and obligations'.

c [98] Despite that general approach, if it were not for para 5(1) of Sch 1A, I would hold that the direction does determine the solicitor's civil obligations but as I see it the purpose of that paragraph is to avoid that effect. It is intended that only once the SDT has determined that the direction is to be enforced is it to have legal effect. The only order with legal effect would then be the order of the SDT and not the direction of the Law Society or (if different) of the adjudicator or the d adjudication panel. Until the complaint is made to the SDT and an order made, the effect of the second part of para 5(1) seems to me to be that the direction has no legal effect because no proceedings can be taken for its enforcement. I can see no other sensible explanation for the second part of para 5(1).

e [99] I reach this conclusion on the basis that the decision of the SDT in the recent *FitzPatrick's* case is wrong. It would make no sense to construe the paragraph as set out above if it were the case that, on a complaint to the SDT, the tribunal had no jurisdiction to review the direction made by the adjudicator or the panel. In the course of the oral argument Mr Dutton submitted that it is the view of the Law Society that the SDT has full powers to review the direction both as to the law and as to the facts. I would so construe the paragraph, if necessary in the light of f s 3 of the 1998 Act.

[100] For these reasons I would hold that the direction that the claimant pay compensation did not determine his civil rights or obligations. However, if that were held to be wrong, it appears to me that, given the provisions of para 5(1) and the powers of the SDT (as construed above), the whole process complies with the claimant's rights under art 6(1). On that basis, the obligation to pay g compensation has no legal effect until confirmed by the SDT on a complaint, the SDT has full powers of review and itself sits in public, has oral hearings and hears oral evidence. In addition the decisions of the adjudicator, the adjudication panel and the SDT itself are susceptible to judicial review.

h [101] Finally Mr Engelman submitted in this regard that we should either hear evidence, as was contemplated in the *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2002] 1 WLR 419, or quash the decisions and remit them for oral hearing and, indeed, oral evidence. However, I do not think that it is appropriate to do so in either case. It appears to me that the requirement of a public hearing is amply met by the fact that both the SDT (if j a complaint is made) and this court sit in public. As indicated earlier, no one suggested that there should be a public, as opposed to an oral, hearing. The question whether there should be an oral hearing is essentially a question of fairness and depends upon all the circumstances of the case (see eg *R (on the application of Smith) v Parole Board* [2004] 1 WLR 421, above). I have already expressed my view that, especially given the fact the Law Society had made and

makes no allegations of dishonesty against the claimant, there was no need for oral evidence or an oral hearing and nothing unfair about a determination on the documents. a

Costs

[102] The position on costs is somewhat different from that with regard to compensation because of the scheme of Sch 1A to the 1974 Act. By para 2(1)(a) the Schedule describes 'the steps' as determining that the costs are to be limited and directing the solicitor to comply with the 'permitted requirements', which are that costs paid be refunded or that the whole or part of the costs be remitted or that the right to recover costs be waived. By para 4, where the Law Society has given a direction under para 2(1)(a), the direction appears to have immediate legal effect in a number of respects. It is on this basis that Mr Engelman submits that, whatever may be the position in respect of other directions given under the Schedule, a determination as to costs under para 2(1)(a) has immediate effect and thus involves a determination of the rights and obligations of the solicitor because it has immediate legal effect as between the solicitor and his client. b c

[103] There is undoubted force in that submission. Since the end of the oral argument we have received further written submissions from both sides analysing the costs position so far as the claimant is concerned. As ever in this regard, the position is undeniably complicated (or at least seems so to me). d

[104] The claimant relies upon art 1 of the First Protocol, which provides:

'Every natural or legal person shall be entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' e

The claimant's case is that he had an accrued right to the payment of fees of which he was deprived in the Rattigan case by the determination that he should not be entitled to any costs but should refund any costs he had received from the legal aid board to the Legal Services Commission. f

[105] The claimant says that that accrued right is a possession within the meaning of art 1 of the First Protocol and that the determination of the relevant committee and the adjudication panel, which had immediate effect by reason of para 4 of Sch 1A, deprived him of that possession which he says has been unlawfully interfered with. The position on the facts seems to me to be somewhat obscure. However, if the claimant had an accrued right to recover costs from the legal aid board (or indeed his client) at the time of the relevant determination, I would for my part hold that that was a possession within the meaning of art 1 of the First Protocol. That seems to me to be consistent with the decisions in *Ambrosi v Italy* (2002) 35 EHRR 125 and *Göç v Turkey* [2002] ECHR 36590/97. g h

[106] I am far from satisfied on the evidence that the claimant had any accrued right against the legal aid board or the Legal Services Commission for fees in the case of Mr Rattigan but, assuming that he did, the question arises whether he was deprived of that possession in the public interest and subject to provisions provided for by law. The relevant law is set out in s 37A and Sch 1A of the 1974 Act. It provides that the Law Society may in appropriate circumstances make a determination and direction which, by para 4, may have an immediate effect upon the civil obligations of the solicitor. j

a [107] Assuming for present purposes that the claimant was deprived of a possession and thus had a civil right determined by the determination as to costs described above, the question whether his rights under the convention were infringed seems to me to depend upon whether there was an infringement of his rights under art 6(1) because, if there was not, he was not deprived of his possession (his accrued right to fees) except as provided by law. For the reasons stated earlier, b the answer to that question depends upon a consideration of the process viewed as a whole.

[108] The process was considered by Lightman J in *White v Office for the Supervision of Solicitors* [2001] EWHC Admin 1149, where he gave an admirable account of the system. He described each stage of the process, the fourth stage c being after the decision of the adjudication panel. He held (at [21]) that the solicitor is not entitled to invoke para 5(1) of the Schedule by, as it were, appealing to the SDT. I agree with that conclusion, although I am bound to say that it is difficult to see why not, if (as in my opinion is the case) a determination as to costs has or may have immediate legal effect. However, Lightman J made d it clear that all parties, including the solicitor, could apply for judicial review in order to challenge the decision of the adjudication panel.

[109] On the facts of that case he rejected the application for judicial review. He gave these reasons (at [26]):

e 'The solicitors thirdly complained that they were entitled before the adjudicator and appeals committee as a matter of procedural fairness to an oral hearing but did not obtain it. Whilst the solicitors were entitled to a fair hearing, procedural fairness does not require an oral hearing in all cases. Whether an oral hearing is required must depend on all the circumstances and in particular whether an issue of fact critical to the decision-making can only satisfactorily be resolved in this manner (see *R v Solicitors Complaints f Bureau, ex p Curtin* (1993) 6 Admin LR 657 at 668 per Steyn LJ). In my view the complaint of the absence of an oral hearing should be rejected for two reasons: the first is because there was no such issue in this case; and the second is because the solicitors never asked for an oral hearing. When a party is well informed as to his rights (as the solicitors must be presumed to g have been in this case) or legally represented, rarely (if ever) can it be incumbent on the tribunal to prompt a request for an oral hearing if neither party requests it.'

[110] I entirely agree with those conclusions, which (as I understand them) h were reached on the basis of the common law. They are consistent with the conclusions which I set out above. However, to my mind they also apply to complaints of unfairness under art 6(1), as indicated above with particular reference to the decision in *Smith's* case. In my opinion, on the facts of this case, the claimant's right to a fair and public hearing was protected by the combination of the processes before the relevant committee and the adjudication panel and by j the opportunity to apply for judicial review, which of course took place in public.

[111] On the facts here, even after the committee had made a determination on costs, the claimant did not ask for an oral hearing before the adjudication panel in the Rattigan case. The most likely reason for that was that he did not think that there was any need for any such hearing. For my part I can think of no good reason why the claimant should have asked for such a hearing with regard to the

costs and in all the circumstances I would hold that the claimant's rights under the convention were not infringed.

CONCLUSION

[112] For all these reasons I would refuse the claimant's applications for judicial review. I am satisfied that he had a fair hearing at each stage and that there is no basis upon which the court could properly hold that he should have been afforded an oral hearing at any stage. I would only add that I am very grateful to Mr Engelman for all the work he has put in to advance the claimant's case throughout the applications before us.

[113] Finally, I would reiterate the suggestion made earlier (echoing those of Lightman J in *White's* case) that the Law Society reconsider their procedures in the light of the problems which have arisen here. It might in particular consider whether solicitors should be given rights of appeal to the SDT.

JACOB LJ.

[114] I agree.

KENNEDY LJ.

[115] I also agree.

Applications dismissed.

Dilys Tausz Barrister.

Customs & Excise Commissioners v Zielinski Baker & Partners Ltd

[2004] UKHL 7

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

28 JANUARY, 26 FEBRUARY 2004

Value added tax – Zero-rating – Protected building – Supply of services in the course of alterations to outbuilding within curtilage of protected main building – Protected main building a dwelling – Whether supply of services zero-rated – Value Added Tax Act 1994, Sch 8, Group 6, item 2, note (1).

The taxpayer, a firm of planning consultants, surveyors and project managers acted for the owners of a dwelling house, which was listed under the Planning (Listed Buildings and Conservation Areas) Act 1990 and which had an outbuilding within its curtilage. Listed building consent was obtained for the construction of an indoor swimming pool and conversion of the outbuilding into changing and games facilities and the necessary works were carried out. The Commissioners of Customs and Excise raised an assessment to value added tax (VAT). The taxpayer disputed the assessment on the basis that part of the works relating to the outbuilding consisted of an 'approved alteration of a protected building' within item 2^a of Group 6 of Sch 8 to the Value Added Tax Act 1994 so as to qualify for zero-rating. Note (1)^b to Group 6 defined 'protected building' as, inter alia, a building which was designed to remain as or become a dwelling and was a listed building within the meaning of the 1990 Act. Under s 1(5)(b)^c of the 1990 Act any structure within the curtilage of a listed building which inter alia formed part of the land was to be treated as part of the listed building. The taxpayer's appeal to the Value Added Tax and Duties Tribunal was allowed and the commissioners appealed. The judge allowed the commissioners' appeal and the taxpayer appealed to the Court of Appeal. The majority of the Court of Appeal allowed the appeal, holding that the concept and definition of 'an approved alteration of a protected building' in Group 6 supported the view it was the main house, and not the outbuilding, which had to remain as or become a dwelling in order to fall within the definition in note (1). The commissioners appealed to the House of Lords.

Held – (Lord Nicholls dissenting) The requirements in note (1) to Group 6 of Sch 8 to the 1994 Act by which a 'protected building' was defined were cumulative. First, it had to be a building which was designed to remain as or become a dwelling house. Secondly, it had to be a listed building. In the instant case the actual outbuilding to which the alterations had been made was not designed to remain as or become a dwelling house and therefore it did not satisfy the first part of the definition. The services supplied had therefore not been in the course of an

^a Item 2, so far as material, is set out at [31], below

^b Note (1), so far as material, is set out at [23], below

^c Section 1, so far as material, is set out at [23], below

approved alteration of a protected building and did not qualify for zero-rating. The appeal would, accordingly, be allowed (see [9], [10], [13], [14], [16], [21], [40], [41], [62], [63], below). a

Notes

For zero-rating of approved alterations to protected buildings, see 49(1) *Halsbury's Laws* (4th edn reissue) para 165.

For the Value Added Tax Act 1994, Sch 8, Group 6, item 2, note (1), see 50 *Halsbury's Statutes* (4th edn) (2003 reissue) 276. b

Cases referred to in opinions

Customs and Excise Comrs v Viva Gas Appliances Ltd [1984] 1 All ER 112, [1983] 1 WLR 1445, HL. c

Debenhams plc v Westminster City Council [1987] 1 All ER 51, [1987] AC 396, [1986] 3 WLR 1063, HL.

EC Commission v UK Case 416/85 [1989] 1 All ER 364, [1990] 2 QB 130, [1988] 3 WLR 1261, [1988] ECR 3127, ECJ.

Shimizu (UK) Ltd v Westminster City Council [1997] 1 All ER 481, [1997] 1 WLR 168, HL. d

Skerrits of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2) [2001] QB 59, [2000] 3 WLR 511, CA.

Cases also cited in list of authorities

European Commission v French Republic (Republic of Finland intervening) Case C-481/98 [2001] STC 919, [2001] ECR I-3369, ECJ. e

European Commission v UK Case C-340/96 [1999] ECR I-2023, ECJ.

Idéal Tourisme SA v Belgian State Case C-36/99 [2001] STC 1386, [2000] ECR I-6049, ECJ.

Institute of the Motor Industry v Customs and Excise Comrs Case C-149/97 [1998] STC 1219, [1998] ECR I-7053, ECJ. f

Litster v Forth Dry Dock and Engineering Co Ltd [1989] 1 All ER 1134, [1990] 1 AC 546, [1989] 2 WLR 634, HL.

Marleasing SA v La Comercial Internacional de Alimentación SA Case C-106/89 [1990] ECR I-4135, ECJ.

Marshall (Inspector of Taxes) v Kerr [1993] STC 360, CA; *rvsd* [1994] 3 All ER 106, [1995] 1 AC 148, [1994] 3 WLR 299, HL. g

Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) Case 152/84 [1986] 2 All ER 584, [1986] QB 401, [1986] 2 WLR 780, [1986] ECR 723, ECJ.

Stichting Uitvoering Financiële Acties v Staatssecretaris van Financiën Case 348/87 [1989] ECR 1737, ECJ. h

Von Colson v Land Nordrhein-Westfalen Case 14/83 [1984] ECR 1891, ECJ.

Wyre Forest DC v Secretary of State for the Environment [1990] 1 All ER 780, [1990] 2 AC 357, [1990] 2 WLR 517, HL.

Appeal

The Commissioners of Customs and Excise appealed, with permission of the Appeal Committee of the House of Lords given on 2 April 2003, from the decision of the Court of Appeal (Tuckey and Rix LJ, Aldous LJ dissenting) on 17 May 2002 ([2002] EWCA Civ 692, [2002] STC 829) allowing the appeal of Zielinski Baker & Partners Ltd (the taxpayer) from the decision of Etherton J on 15 March 2001 ([2001] STC 585) allowing the commissioners' appeal from a decision of the j

- a Birmingham Value Added Tax and Duties Tribunal (Chair: JC Mitting) released on 4 July 2000 ((2000) VAT Decision 16722) allowing the taxpayer's appeal against an assessment to value added tax at the standard rate in respect of alterations to an outbuilding within the curtilage of a protected building on the ground that they fell to be regarded as 'approved alterations' to a protected building and so qualified for zero-rating pursuant to item 2 of Group 6 of Sch 8 to the Value Added Tax Act 1994. The facts are set out in the opinion of Lord Walker of Gestingthorpe.

Paul Lasok QC and Paul Harris (instructed by the *Solicitor for the Customs and Excise*) for the commissioners.

- c *John Walters QC and Philip Brunt* (instructed by *Wallace and Partners*) for the taxpayer.

Their Lordships took time for consideration.

26 February 2004. The following opinions were delivered.

- d **LORD NICHOLLS OF BIRKENHEAD.**

- [1] My Lords, I have the misfortune to have reached a different conclusion from your Lordships. So I will set out my own views as shortly as possible. I agree that if the relevant statutory provisions are read literally, the commissioners' case is unanswerable. Among the supplies zero-rated by the Value Added Tax Act 1994 as amended is the supply of services in the course of an approved alteration of a protected building. A 'protected building' means (a) 'a building' which (b) is 'designed to remain as or become a dwelling or number of dwellings' and which, additionally, (c) is 'a listed building' within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990: see f item 2 and note (1) in Group 6 in Sch 8 to the 1994 Act. To satisfy condition (b), as I have labelled it, each dwelling must consist of 'self-contained living accommodation' and meet the other conditions set out in note (2).

[2] Section 1(5)(b) of the 1990 Act provides that a listed building is a building included in a list compiled or maintained by the Secretary of State and that—

- g 'any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall be treated as part of the building.'

- h [3] In the present case the approved alterations comprised alterations, not to the main house, which is a listed building, but to an adjacent outbuilding within the curtilage of the main building. The outbuilding is five yards away from the main building. The two buildings are not linked structurally, although they are linked by a substantial stone wall. Thus, and this is accepted on all sides, although the outbuilding is a separate building, for listed building purposes it is to be treated as part of the listed building.

- j [4] The works in dispute comprised conversion of the outbuilding into games and changing facilities and the construction of an adjoining indoor swimming pool. Thus the alterations satisfied condition (c), as I have labelled it. But if the statutory provisions in the 1994 Act are read literally, the alterations did not satisfy condition (b). The outbuilding was not designed to become a dwelling.

[5] The difficulty I have with this interpretation of the legislation is that it produces startling results which make no sense. If the games room and the

indoor swimming pool were installed on the ground floor of the main house the works would be zero-rated. But, so it is said, there is a world of difference if the games room and the indoor swimming pool are installed in a separate existing building a few feet away. It makes a world of difference even though for listed building purposes the outbuilding is treated as part of the main house.

[6] The matter does not rest there. Perhaps even more oddly, if additional bedroom or living accommodation were added to the main building that work would be zero-rated. But not so, according to the commissioners' argument, if an adjacent barn existing before 1 July 1948 were converted in the same way. Even if the enlarged living accommodation were self-contained by being used exclusively as one unit of living accommodation with the main house, that would not be zero-rated. It would be outside the zero-rating exception because the accommodation would be split between two buildings.

[7] No one has been able to suggest a reason why these differences should matter. The social purpose of Group 6 in Sch 8 to the 1994 Act was to alleviate the financial burden on the owners of listed buildings. This alleviation is confined to alterations, which in practice means improvements, as distinct from repairs or maintenance. The introduction of condition (b), as I have labelled it, added the 'separate dwelling' requirement in 1989. But no one has been able to put forward any suggestion why it should matter if the alterations carried out to improve the dwelling house amenities are made to an existing outbuilding as distinct from the main building itself.

[8] I decline to attribute to Parliament such a strange intention as is involved in the commissioners' case. A meaningful, purposeful interpretation is to be preferred. I agree with the approach of the Birmingham Value Added Tax tribunal. The key lies in recognising that the reference to 'a building' in the singular in the definition of protected building in note (1) ("protected building" means a building) includes the plural 'buildings' where appropriate. If the accommodation comprises self-contained living accommodation it matters not that, structurally, part of it is located in one building and part in another, so long as both buildings fall within the statutory definition of a listed building. I would dismiss this appeal.

LORD HOFFMANN.

[9] Lords, I gratefully adopt the recital of the facts of this case in the speech to be delivered by my noble and learned friend Lord Walker of Gestingthorpe. It raises a point of statutory construction on which I must confess that I cannot feel the slightest doubt. To qualify for zero-rating under Group 6, item 2 of Sch 8 to the Value Added Tax Act 1994, the outbuilding to which alterations were made must have been a 'protected building'. Leaving aside immaterial matter, note (1) defines a protected building by reference to two propositions, both of which must be true. First, it must be 'a building which is designed to remain as or become a dwelling house.' Secondly, it must be a 'listed building, within the meaning of the Planning (Listed Buildings and Conservation Areas) Act 1990'. These two requirements are cumulative, being separated by the word 'and'.

[10] The actual outbuilding to which the alterations in this case were made was not designed to remain as or become a dwelling house. It was designed to be a games room, changing room and swimming pool. It therefore did not satisfy the first part of the definition. 'Listed building', on the other hand, is a statutory concept, a notional building which by virtue of s 1(5) of the 1990 Act is deemed to include structures within the curtilage of the building described in the list. So

a the outbuilding may well have counted as a listed building, although it would probably be more accurate to describe it as part of a notional listed building. Whether that is good enough to satisfy the second part of the definition does not arise. The claim to zero-rating fails at the first hurdle.

[11] The majority of the Court of Appeal ([2002] EWCA Civ 692, [2002] STC 829) treated the first part as satisfied by deeming the outhouse and the principal house (which was a dwelling house) to be a single building to which the alterations had been made. The only justification given for this heroic piece of deeming was an analogy with the definition of a 'listed building' in the 1990 Act. The importation of this concept into the first part of the definition was described by the majority as 'suffusive' or 'holistic'. It seems rather to have involved some process of osmosis by which the artificial definition of a 'listed building' in the 1990 Act, to which reference was made in the second part of the definition, passed through the membrane of the word 'and' and infected the meaning of the ordinary word 'building' in the first part. In my opinion there is no ground for attributing such an intention to Parliament. The meaning of the first part of the definition is perfectly clear and I see no reason not to give 'building' the ordinary meaning of the actual building to which the alterations are made.

[12] A good deal of the argument was spent in examining other provisions of the 1994 Act, other statutes and other hypothetical facts to discover clues which might support or undermine the opposing constructions. But in my opinion the language is too clear to admit contradiction or need support from such tenuous inferences. The reasons why Parliament may have wished to narrow the scope of zero-rating to buildings actually used as dwelling houses are convincingly explained by Etherton J ([2001] STC 585) in a judgment to which I would pay tribute for its clarity and comprehensiveness.

[13] I would allow the appeal and restore the judge's order.

f **LORD HOPE OF CRAIGHEAD.**

[14] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. I agree with it, and for the reasons which he has given I too would allow the appeal. But, as we are not unanimous and as we are differing from the majority in the Court of Appeal, I wish to add these brief observations.

[15] The issue in this case is one of statutory construction. At the centre of the dispute is the question how the expression 'protected building' as defined for the purposes of Group 6 in Sch 8 to the Value Added Tax Act 1994 in note (1) to the group is to be applied in a case where works of reconstruction or alteration are being carried out to a building (the outbuilding) which lies within the curtilage of a listed building (the house) but has not itself been listed in its own right. The effect of the definition of the expression 'listed building' in s 1(5) of the Planning (Listed Buildings and Conservation Areas) Act 1990 is that the outbuilding must be treated as part of the house for the purposes of that Act. So it is subject to the controls set out in Ch II of Pt I of that Act, which prohibit the carrying out of any works of alteration which may affect its character as a building of special architectural or historical interest unless they have been authorised. The taxpayers' argument is that the fact that the outbuilding is to be treated as part of the house for the purposes of the 1990 Act is sufficient to entitle it to be treated as part of the house for the purposes of the definition of the expression 'protected building' in Group 6.

[16] There is, as I see it, a simple answer to this argument. The definition in note (1) to the Group does not say that a building which is a listed building within the meaning of the 1990 Act is a protected building. What it says is that a protected building is a building which has certain characteristics *and* is a listed building within the meaning of the 1990 Act or a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979. This is a different drafting technique from that which would lead directly to the result that the taxpayers are contending for.

[17] In *Debenhams plc v Westminster City Council* [1987] 1 All ER 51, [1987] AC 396 it was held that the extended definition of 'listed building' in s 54(9) of the Town and Country Planning Act 1971 (from which s 1(5) of the 1990 Act is derived) applied equally for the purposes of para 2(c) of Sch 1 to the General Rate Act 1967. The technique which was used in that case was to say that no rates were to be payable in respect of a hereditament for any period during which it (the hereditament) was included in a list compiled or approved under s 54 of the 1971 Act. It was in that context that Lord Keith of Kinkel ([1987] 1 All ER 51 at 56, [1987] AC 396 at 404) said that it would be an absurd result, such as could not have been intended by Parliament, if a structure subject to building control by the 1971 Act were to be treated as not so subjected for the purpose of some other Act dealing with the consequences of listing.

[18] The same could have been said if the definition with which we are concerned had provided that a building which was subject to building control as a listed building was a protected building. That would have amounted to a clear declaration that its treatment as a protected building was a consequence of listing. But the technique which the draftsman has used in note (1) is to direct the reader's attention instead to the building itself in the first instance. The context is that of the supply of goods and services, and the question is whether the supply attracts zero-rating for the purposes of value added tax (VAT). The first step is to identify the building in connection with which the supply is made. There is no room for doubt as to how one must go about this exercise. It is the building which is being reconstructed or altered (or each building; if the supply is made in connection with more than one building) that attracts the provisions for zero-rating in Group 6. That building must also be a listed building or a scheduled monument. But this is only one of several requirements that must be satisfied before it can be said that the building is a protected building. Listing is a prerequisite if the building is to be treated as a protected building. But there are other requirements too—that it is designed to remain as a dwelling, and so on—that must be satisfied.

[19] The difference between these two approaches can be seen perhaps even more clearly when one considers the treatment which is given by the definition in note (1) to Group 6 to scheduled monuments. Section 1(11) of the 1979 Act provides that in that Act 'scheduled monument' means any monument which is for the time being included in the Schedule. Section 61(7) provides:

"Monument" means (subject to subsection (8) below)—(a) any building, structure or work, whether above or below the surface of the land, and any cave or excavation; (b) any site comprising the remains of any such building, structure or work or of any cave or excavation; and (c) any site comprising, or comprising the remains of, any vehicle, vessel, aircraft or other movable structure or part thereof which neither constitutes nor forms part of any work which is a monument within paragraph (a) above; and any machinery

- a attached to a monument shall be regarded as part of the monument if it could not be detached without being dismantled.'

Section 61(10) provides that references in the Act to a monument include references to the site of the monument and to a group of monuments or any part of a monument or group of monuments.

- b [20] It is plain that the definition of 'scheduled monuments' in the 1979 Act is capable of extending to things that do not fall within the ordinary meaning of the word 'building'. It is plain, too, that it is capable of extending to things that could not possibly be said to be 'designed to remain as or become a dwelling or a number of dwellings' or to be 'intended for use solely for a relevant residential purpose or a relevant charitable purpose' (see the definition of these expressions in notes (4) and (6) to Group 5 which are applied to Group 6 by note (3) to that Group). Here again it cannot be said that the definition of 'protected building' in note (1) is dealing simply, in the case of scheduled monuments, with the consequences of the monument having been included in the schedule. The structure that is being reconstructed or altered must first be identified and the ordinary meaning of the word 'building' must then be satisfied. It is only if it is satisfied and the other requirements in the definition are met that the question needs to be addressed as to whether the building in question is a scheduled monument.

- e [21] The consequences of this approach to the definition may be to produce results which appear odd and unreasonable. The facts of the present case can perhaps be said to fall into that category. The house and the outbuilding are in the same occupation, they are occupied together as a single dwelling and both buildings fall within the definition of a listed building for the purposes of the 1990 Act. Prior to the abolition of the rating system for domestic properties by the Local Government Finance Act 1988 they would have been entered in the valuation list as a single hereditament. But there is no getting away from the fact that it is only the outbuilding and not the house that is being altered, and it is the house and not the outbuilding that has been listed. We must take the definition in note (1) as it stands, and we must construe it as we find it. In my opinion the ordinary meaning of the words used, taken in the order in which they are set out in the definition, leads inevitably to the result contended for by the commissioners.

LORD WALKER OF GESTINGTHORPE.

- h [22] My Lords, this appeal raises a single issue of statutory construction on the legislation relating to zero-rating, for value added tax (VAT) purposes, of alterations to listed buildings. The issue is whether the expression 'protected building' in item 2 of Group 6 in Sch 8 to the Value Added Tax Act 1994 includes an outbuilding which is not itself listed under the Planning (Listed Buildings and Conservation Areas) Act 1990, but is protected under that Act because it is (and has been since the inception of the modern system of planning control in 1948) a structure within the curtilage of a listed building.

- j [23] The issue arises because in the 1994 Act Parliament has defined 'protected building' by reference to (among other requirements) the definition of 'listed building' in s 1(5) of the 1990 Act. Note (1) to Group 6 is as follows:

"Protected building" means a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note (2) below) or is intended for use solely for a relevant residential purpose or a relevant

charitable purpose after the reconstruction or alteration and which, in either case, is—(a) a listed building, within the meaning of—(i) the Planning (Listed Buildings and Conservation Areas) Act 1990 ...’ a

In s 1(5) of the 1990 Act, Parliament has added words so as to extend the basic meaning of what is being defined:

‘In this Act “listed building” means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act— b

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, c

shall be treated as part of the building.’

Your Lordships are therefore faced with one definition (that in the 1990 Act) which (at any rate in para (b) of the tailpiece) introduces what the taxpayers acknowledge to be a statutory fiction; and a second definition (that in the 1994 Act) which operates by reference to another statute dealing, not with any form of taxation, but with planning control. d

[24] The listed building to which the appeal relates is a dwelling-house known as The Mere at Little Houghton, Northamptonshire. The house and its immediate surroundings are described in some detail in the decision of the Birmingham VAT and Duties Tribunal (Chairman: Mrs JC Mitting) ((2000) VAT Decision 16722). The description was repeated in the judgment of Etherton J on appeal ([2001] STC 585 at 587–589 (para 3)) and in the judgment of Aldous LJ on further appeal to the Court of Appeal ([2002] EWCA Civ 692 at [3], [2002] STC 829 at [3]). At the outset of the litigation the details were important because there was an issue as to whether the house and the outbuilding were indeed physically separate (they are linked by a sandstone wall). But that issue is now gone. It is sufficient to say that the main house is a handsome residence, built in about 1830 and constructed partly of brick covered in stucco and partly of sandstone. The outbuilding (sometimes referred to in the course of the appeal as a barn) was built of sandstone at the same time as the house. It has over the years been put to a variety of uses. Initially it was a stable, carriage shed and tack room; latterly it had been used as a garage and laundry and to store a deep freeze. e

[25] On 30 August 1995 listed building consent was given for— f

‘construction of indoor swimming pool and conversion of existing barn into changing and games facilities together with detached garage at The Mere, Bedford Road, Little Houghton.’ g

It has at all times been common ground that the cost of some of these works must attract VAT at the standard rate. The issue is whether any part of the works qualifies for zero-rating. This depends on whether part of the works consists of ‘an approved alteration of a protected building’ within item 2 of Group 6 of Sch 8 to the 1994 Act. Different views have been taken at different stages of the appeal process. The tribunal’s decision (released on 4 July 2000) was in favour of the taxpayer, Zielinski Baker & Partners Ltd (a firm of planning and development consultants, building surveyors and project managers who act for the owners of the house, Mr and Mrs Dutton). On 15 March 2001 Etherton J allowed the appeal of the Commissioners of Customs and Excise. On 17 May 2002 the Court of h

a Appeal by a majority (Tuckey and Rix LJ, Aldous LJ dissenting) allowed the consultants' appeal. The commissioners appeal with leave granted by your Lordships' House on 2 April 2003.

[26] The commissioners' printed case contains a mild complaint that in his judgment Rix LJ went into the history and development of this part of the VAT legislation even though the Court of Appeal had indicated during the hearing that it would not be helpful. To my mind the background history, even if it were not directly relevant as an aid to construction, would be almost indispensable as an aid to comprehension. In any case I think it does assist as to the general legislative aim (and justification in Community law) of this part of the VAT legislation.

[27] The imposition of VAT in the United Kingdom is required by European Union legislation which has from the first aimed at the progressive harmonisation of member states' legislation on turnover taxes. There is a useful summary in the opinion of Advocate General Darmon in *EC Commission v UK* Case 416/85 [1989] 1 All ER 364 at 372–373, [1990] 2 QB 130 at 135–136, [1988] ECR 3127 at 3138–3139 (paras 1–4). European Community Council Directives recognised that harmonisation would have to be a gradual process. In particular, art 28(2) of Council Directive (EEC) 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment) (OJ 1977 L145 p 1) (the Sixth Directive) as amended by Council Directive (EC) 92/77 (supplementing the common system of value added tax and amending Directive 77/388) (OJ 1992 L316 p 1) permitted 'exemptions with refund of the tax paid' (to which zero-rating was accepted as broadly equivalent) on a transitional basis for measures which were in force on 1 January 1991, were in accordance with Community law, and fell within the final indent of art 17 of Council Directive (EEC) 67/228 (on the harmonisation of legislation of member states concerning turnover taxes—structure and procedure for application of the common system of value added tax) (OJ 1967 L71 p 1303) (the Second Directive). That permitted such measures to be taken only 'for clearly defined social reasons and for the benefit of the final consumer'.

[28] The European background helps to explain the evolution of the VAT treatment of building works under domestic legislation. Under the Finance Act 1972, which introduced VAT into the United Kingdom, all construction and alteration of buildings (of any sort) was zero-rated. In 1981 the Commission of the European Communities questioned the legality of the width of this measure (and of some other zero-rating provisions then in force). Discussions ensued and there were some changes of position. In particular, by the Finance Act 1984, the scope of the zero-rating of building works (then in Group 8 of Sch 5 to the Value Added Tax Act 1983) was cut down by excluding almost all works of alteration (as opposed to construction). But a new Group 8A (the predecessor of the current Group 6) was introduced covering the reconstruction or alteration of a building which was a listed building or a scheduled monument. The Commission dropped some of its objections but maintained its objection to the zero-rating of construction works 'in so far as the zero rate is not restricted to buildings by and for the final consumer within a social policy'.

[29] This difference of opinion came before the Court of Justice of the European Communities (the ECJ) in the proceedings already mentioned. On 21 June 1988 the ECJ upheld the Commission's objections, but only as regards industrial and commercial buildings and civil engineering works (see [1989] 1 All ER 364 at 383, [1990] 2 QB 130 at 149–150, [1988] ECR 3127 at 3157 (paras 36–39)). The ECJ stated (para 36):

'With regard to buildings intended for housing, the Commission's arguments cannot be upheld. The measures adopted by the United Kingdom in order to implement its social policy in housing matters, that is to say facilitating home ownership for the whole population, fall within the purview of "social reasons" for the purposes of the last indent of art 17 [of the Second Directive].'

The outcome was that by the Finance Act 1989 the domestic legislation was reshaped so as to focus zero-rating of building works more directly on social objectives: that is housing, residential communities of various sorts (such as children's homes, old people's homes and hospices) and premises used by charities for non-commercial purposes (or as a village hall). These social objectives were spelled out both in the amended Group 8 ('Construction of Dwellings, etc') and in the amended Group 8A ('Protected Buildings').

[30] Between 1984 and 1989 the provisions of Group 8 contained an expanded note (2) which introduced the concept of a 'secondary building' constructed in the garden or grounds of a main building. This disappeared in 1989. Since then the legislation has been consolidated in the 1994 Act, and some relatively minor amendments have been made, notably by the Value Added Tax (Protected Buildings) Order 1995, SI 1995/283, (which substituted a new text for Group 6 but made few changes of substance).

[31] I have already set out note (2) to Group 6 in Sch 8 to the 1994 Act. I must now put it in its context by setting out all the relevant parts of Group 6:

'GROUP 6—PROTECTED BUILDINGS

Item No

1 The first grant by a person substantially reconstructing a protected building, of a major interest in, or in any part of, the building or its site.

2 The supply, in the course of an approved alteration of a protected building, of any services other than the services of an architect, surveyor or any person acting as consultant or in a supervisory capacity.

3 The supply of building materials to a person to whom the supplier is supplying services within item 2 of this Group which include the incorporation of the materials into the building (or its site) in question.

Notes

(1) "Protected building" means a building which is designed to remain as or become a dwelling or number of dwellings (as defined in Note (2) below) or is intended for use solely for a relevant residential purpose or a relevant charitable purpose after the reconstruction or alteration and which, in either case, is—(a) a listed building, within the meaning of—(i) the Planning (Listed Buildings and Conservation Areas) Act 1990 ... or (b) a scheduled monument, within the meaning of—(i) the Ancient Monuments and Archaeological Areas Act 1979 ...

(2) A building is designed to remain as or become a dwelling or number of dwellings where in relation to each dwelling the following conditions are satisfied—(a) the dwelling consists of self-contained living accommodation; (b) there is no provision for direct internal access from the dwelling to any other dwelling or part of a dwelling; (c) the separate use, or disposal of the dwelling is not prohibited by the terms of any covenant, statutory planning consent or similar provision, and includes a garage (occupied together with a dwelling) either constructed at the same time as the building or where the

a building has been substantially reconstructed at the same time as that reconstruction.

(3) Notes (1), (4), (6), (12) to (14) and (22) to (24) of Group 5 apply in relation to this Group as they apply in relation to that Group but subject to any appropriate modifications

b (6) "Approved alteration" means ... (c) in any other case, works of alteration which may not, or but for the existence of a Crown interest or Duchy interest could not, be carried out unless authorised under, or under any provision of—(i) Part I of the Planning (Listed Buildings and Conservation Areas) Act 1990 ... and for which, except in the case of a Crown interest or a Duchy interest, consent has been obtained under any provision of that Part, but does not include any works of repair or maintenance, or any incidental alteration to the fabric of a building which results from the carrying out of repairs, or maintenance work

c (10) For the purposes of item 2 the construction of a building separate from, but in the curtilage of, a protected building does not constitute an alteration of the protected building.'

d [32] During the course of the appeal process both sides' arguments have to some extent changed. There is therefore no discourtesy to the careful decision of the tribunal chairman, or to the full and clear judgment of Etherton J, if I proceed at once to the judgments in the Court of Appeal. Aldous LJ began with the commissioners' cross-appeal against the judge's rejection of their argument that the tailpiece to s 1(5) of the 1990 Act is not carried over into the VAT legislation. Aldous LJ dismissed this argument ([2002] STC 829 at [14]) for the same brief reasons as the judge had dismissed it at [2001] STC 585 at 604 (para 35):

e 'Note (1)(a) of Group 6 provides that an essential feature of a protected building is that it is a listed building "within the meaning of" the 1990 Act. A listed building "within the meaning of" the 1990 Act is a building which falls within the extended definition in s 1(5) of the 1990 Act.'

f Rix LJ agreed ([2002] STC 829 at [45]), relying on note (10) (to which it will be necessary to return); and Tuckey LJ (at [29]) agreed with the whole of Rix LJ's reasoning. This point is therefore one of the few points on which there has been judicial unanimity. Nevertheless the commissioners raise it again in your Lordships' House.

g [33] If the commissioners succeed on this point (which I will call the s 1(5) point) the other issues fall away. If the commissioners do not succeed on it, your Lordships have to resolve the difference of opinion between Aldous LJ (on the one hand) and Rix and Tuckey LJ (on the other hand). Aldous LJ (at [20]) expressed his view shortly and simply:

h 'In the present case the approved alterations were made to a building, namely the outbuilding, not the house. The outbuilding was a listed building within the meaning of the 1990 Act. But it was not a dwelling nor was it to be used for residential purposes. It was therefore not within the definition of "protected building" in note (1) and therefore the supplies were not zero-rated. There is nothing in item 2 or note (1) which imports the idea that alterations to the outbuilding should be deemed to be alterations to the house.'

When Aldous LJ said that the outbuilding was a listed building within the meaning of the 1990 Act he must have meant that it was, under the tailpiece to s 1(5) of that Act, to be treated as part of a listed building. a

[34] The reasoning of Rix LJ was more complex and was developed at greater length. It cannot be summarised briefly without over-simplification. But the salient points included Rix LJ's 'holistic' (as opposed to 'step-by-step') approach to the issue of construction (at [34], [35] and [37] and *passim*); his view (at [36]) as to the right starting point being the essential concept of the protected building; his analysis of the significance of the reference to a garage in note (2) (at [44]) and of note (10) (at [49]–[51]); and his view (in agreement with Aldous LJ) that the European dimension did not throw light on the issue of construction (at [53]). Rix LJ's own summary of his reasoning is at [54]: b

'Once the holistic approach is adopted, the temptation is avoided of rejecting the appeal on the simple ground that it is the outbuilding that must qualify as the protected building and must therefore be a dwelling in itself. The concept of "an approved alteration of a protected building" supports the view that the building with which the court is concerned is the main building, not the secondary building. So does note (10), which is otherwise turned into a nonsense. The items and notes under Group 6 are careful to deal expressly with all or at any rate most of the essential questions which would clearly arise for the reader. The concept of a protected building is defined. The concept of substantial reconstruction (see item 1) is defined in note (4). An approved alteration is defined. Mere repair and maintenance is put on one side. Can there be apportionment where services are supplied in part for an approved alteration and in part for other purposes? Yes, see note (9). A definition of listed buildings is adopted which renders separate outbuildings part of the listed buildings themselves. In such circumstances, if the draftsman wished again to separate such outbuildings from the listed building for the purpose of requiring that each such outbuilding had to qualify as a dwelling by itself, when it never had to qualify as a listed building by itself but was an integral part of a listed building for all that it was physically separate, then I would have expected the notes to deal expressly with that requirement, just as they had at one time, albeit for different reasons not connected with the s 1(5)(b) definition, made distinctions between main buildings and secondary buildings in the grounds of the former. There is nothing in the rationale of the European jurisprudence nor of Group 6 to require the commissioners' approach.' c

[35] Since the s 1(5) point is potentially determinative of the whole appeal, it is tempting to consider it first, separately from the other arguments about the correct construction of item 2 in Group 6. That temptation is reinforced since before your Lordships Mr Walters QC (for the taxpayers) has relied on a decision of your Lordships' House, not cited below, which is said to be decisive against the commissioners on this point. But there is essentially a single question of construction, even though it is for purposes of discussion necessary to try to identify its main elements. In my view it is better not to sever one part of the issue of construction and decide it in isolation. d

[36] The definition of 'protected building' in note (1) to Group 6 refers to two statutory codes enacted (in varying forms applicable in England and Wales, Scotland and Northern Ireland respectively) for the protection of two categories of structure which form part of the national heritage: that is, listed buildings and e

a scheduled monuments. These categories are defined in a way which in theory permits a wide overlap. Every listed building must be a building. 'Monument' is more widely defined (in England and Wales, in s 61(7) of the Ancient Monuments and Archaeological Areas Act 1979) and includes 'any building, structure or work, whether above or below the surface of the land, and any cave or excavation' and also various types of site. The explanation for this rather untidy scheme is largely
b historical. The protection of ancient monuments goes back at least to the beginning of the last century (the first Royal Commission on the Historical Monuments of England was appointed in 1908) whereas listed building control was introduced by the Town and Country Planning Act 1947. Under that Act and its successors (now, in relation to listed buildings, the 1990 Act) the Secretary of State may either compile lists of buildings or approve lists previously prepared by
c the Royal Commission (or its successors).

[37] It is unnecessary to go much further into the details of these codes. What is important for present purposes is that both statutory regimes prohibit unauthorised destruction or alteration of the listed or scheduled property, the prohibition being backed by criminal sanctions; and both contain provisions (that
d is the tailpiece to s 1(5) of the 1990 Act, and s 61(9) and (10) of the 1979 Act) which extend the scope of the prohibition beyond the actual listed building or scheduled building, structure or site. The general legislative purpose of both regimes is the protection of the national heritage, and the particular purpose of the extending provisions is to ensure that not only the heritage property itself, but also its fixtures and its environment, are protected. In *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* (No 2) [2001] QB 59,
e [2000] 3 WLR 511, for instance, s 1(5)(b) prevented the installation of plastic-framed double glazing in a converted stable block which was not itself listed, but was within the curtilage of a mansion which Norman Shaw had built for WS Gilbert.

f [38] I return to the difference of opinion between Aldous and Rix LJ. If the outcome of this appeal were to depend on a simple choice between a 'step-by-step' approach and a 'holistic' approach to statutory construction, it would be easily resolved in favour of the latter. A step-by-step approach sounds pedestrian and mechanistic ('ticking boxes' is, no doubt rightly, a fashionable
g term of disparagement) whereas a holistic approach would seem to accord with the universally acknowledged need to construe a statute as a whole.

[39] But in my opinion your Lordships are not here faced with such a stark or simple choice. Undoubtedly, the relevant provisions of the 1994 Act must be construed as a whole, but they amount to a text of some complexity. In practice the reader has to assimilate the text piece by piece (or in the language of patent
h law, integer by integer), forming a provisional view as to the meaning and effect both of each constituent part and of the emerging whole. The reader's provisional view may have to be modified more than once, especially as prolonged study may increase (rather than dispel) the difficulties of the text (the written and oral submissions to your Lordships on note (10) to Group 6 present
j a good example of this). Sometimes the final conclusion may be no more than the least satisfactory resolution of the difficulties (although in the end I have no doubt as to how this appeal should be resolved).

[40] In this case the key part of the text is the definition of 'protected building' in note (1). So far as relevant, it can be divided into three integers. A 'protected building' means (1) a building (2) which is designed to remain as or become a dwelling (as defined in note (2)) after the alteration (3) and which is a listed

building within the meaning of the 1990 Act. On the provisional assumption that the courts below were right on the s 1(5) point, 'listed building' in the third integer must be taken as including, as part of the listed building, a separate structure (built before 1 July 1948) within the curtilage of a listed building. But it is accepted that the outbuilding at The Mere was not designed to become a dwelling after the alteration. So the extended definition (or statutory fiction) in s 1(5)(b) of the 1990 Act cannot assist the taxpayers unless it is to be reflected back onto the first integer ('a building') so as to extend (and extend in an unusual and awkward fashion) the natural meaning of that simple expression.

[41] I can see no good reason for such an unnatural construction. I can readily accept Rix LJ's view ([2002] STC 829 at [37]) that—

'the whole concept of a "protected building" is suffused with the inherent idea that the building in question is either listed or scheduled.'

But the requirements that the subject matter of the 'approved alteration' should be (1) a building and (2) designed to become a dwelling, indicate that Parliament intended to give the benefit of item 2 of Group 6, not to the whole set of listed buildings and scheduled monuments (and structures or sites deemed to form part of them) but only to a subset (that is those which are buildings to be used for residential purposes).

[42] That construction is to my mind much the most natural construction of the language of the statute. It is reinforced by considerations of legislative purpose. The Court of Appeal derived little assistance from the European dimension, but at least it shows that the example of an orangery (within the curtilage of a listed country house) altered so as to be used for commercial catering (which Rix LJ accepted, at [52], with equanimity) is hard to reconcile with the social policy of promoting home ownership which the ECJ recognised in *EC Commission v UK* [1989] 1 All ER 364, [1990] 2 QB 130, [1988] ECR 3127. The ECJ did not have to consider the provisions about protected buildings introduced in 1984, but it is clear that the changes made in 1989 are focused on home ownership (and similar purposes) in relation to what is now Group 6 as well as in relation to what is now Group 5. The protection of the national heritage is no doubt another social objective, but it is less clearly articulated (especially as repair and maintenance, notoriously the heaviest burden on owners of listed buildings, are excluded) and it appears to be subordinate to the housing objective.

[43] Mr Lasok QC (for the appellant commissioners) accepted that although a building (including a protected building) may consist of more than one dwelling, a dwelling may not consist of more than one building (except for a detached garage which satisfies the conditions at the end of note (2)). This produces something of an anomaly. If the owner of a listed mansion obtains listed building consent to install a jacuzzi or a swimming pool in his cellar, the work of alteration will be zero-rated; but if the installation is in the old stables (a detached building), the work will attract VAT at the standard rate. Similarly he could (with listed building consent) obtain zero-rating if he turned an attic into an en suite guest room, but not if he made a similar alteration to a detached potting shed (unless it qualified as a separate dwelling with self-contained living accommodation). Mr Lasok submitted that these are the sort of grey areas which will always be found at the edges of any statutory code, but that zero-rating was a matter for Parliament (within its margin of appreciation under Community law) and that (as zero-rating is in the nature of an exemption) the language used by Parliament

a should not be stretched beyond its natural meaning. I would, with some hesitation, accept those submissions.

[44] Mr Walters placed much emphasis on note (10):

b 'For the purposes of item 2 the construction of a building separate from, but in the curtilage of, a protected building does not constitute an alteration of the protected building.'

c He submitted that this supported his reading of note (2), that on any other reading note (10) was (as the judge concluded at [2001] STC 585 at 603 (para 33)) meaningless, and that Mr Lasok's explanation of it was fantastic. I have to say that (in common with Etherton J) I find note (10) unfathomable. I agree that it would make some sort of sense, although only in a strained manner, if the taxpayers' interpretation of note (2) were correct. But I am quite unpersuaded that this uncertain straw in the wind (and the other contextual straws on which Mr Walters relied) are sufficient to justify doing violence to the reasonably straightforward language of note (2).

d [45] In these circumstances I do not find it necessary to consider whether the s 1(5) point provides a simpler route to the result for which the commissioners contend. Their contention on this point faces a formidable obstacle in the form of the decision of this House in *Debenhams plc v Westminster City Council* [1987] 1 All ER 51, [1987] AC 396, which (on unusual facts) concerned a reference in a rating statute (Sch 1, para 2(c) to the General Rate Act 1976) to s 54 of the Town and Country Planning Act 1971 (s 54(9) being the predecessor of s 1(5) of the 1990 Act). Lord Keith of Kinkel (with whom all the House concurred on this point) said:

f 'A large part of the argument for the rating authority was directed to the proposition that the words in s 54(9) "for the purposes of the provisions of this Act relating to listed buildings and building preservation notices" had the effect that the enactment which followed them was not to be taken into account for the purposes of Sch 1 to the 1967 Act. In my opinion that proposition is ill-founded. The quoted words have the effect, for the purposes of the listed building provisions of the Act, of widening the definition of "building" in s 290(1) of the 1971 Act. No other effect can properly be attributed to them. It would be an absurd result, such as cannot have been intended by Parliament, if a structure subjected to listed building control by the 1971 Act were to be treated as not so subjected for the purpose of some other Act dealing with the consequences of listing.' (See [1987] 1 All ER 51 at 56, [1987] AC 396 at 404.)

h [46] Mr Lasok submitted that the present case is distinguishable. But he did not seek to develop the submission at any length, and he was probably right not to press the point. But the decision in the *Debenhams* case (which turned on the expression 'hereditament' rather than 'building') does not in my view affect the construction of note (2) as a whole.

j [47] Beyond that it is unnecessary to express a final view on the s 1(5) point. For the reasons set out above (which are essentially the same as those more pithily expressed in the speech of Lord Hoffmann, with which I agree) I would allow this appeal and restore the order of Etherton J with costs in the Court of Appeal; but the respondents must have their costs in your Lordships' House in accordance with the terms on which leave to appeal was granted.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[48] Lords, this appeal arises out of a value added tax (VAT) assessment contested by the taxpayers on the ground that the supply in question should properly have attracted zero-rating under the Value Added Tax Act 1994 as amended. a

[49] To identify and resolve the issues now arising for decision it is necessary to refer to two buildings, one a listed building known as Mere Court (the house), the other, within the curtilage of the house but not fixed to it, an outbuilding (the outbuilding) which the taxpayers converted from a barn to a changing room and games room to be used in conjunction with an indoor swimming pool which they constructed alongside it. b

[50] The Planning (Listed Buildings and Conservation Areas) Act 1990 provides by s 1(5): c

‘In this Act “listed building” means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act—(a) any object or structure fixed to the building; (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall be treated as part of the building.’ d

[51] The outbuilding had formed part of the land since before 1 July 1948 so that it was to be treated as part of the building and so that authorisation was required (by other provisions of the 1990 Act) and duly obtained for its conversion. e

[52] Whether or not the supply of services here in question qualify for zero-rating depends upon whether it falls within item 2 of Group 6 of Sch 8 to the 1994 Act, namely as: ‘The supply [of the relevant services] in the course of an approved alteration of a protected building.’

[53] It is necessary at this stage to read the more directly relevant parts of note (1) to Group 6: f

‘(1) “Protected building” means a building which is designed to remain as or become a dwelling or number of dwellings ... and which ... is—(a) a listed building, within the meaning of—(i) [the 1990 Act] ...’

[54] Put compendiously, therefore, the question now arising is whether this supply of services was ‘in the course of an approved alteration of ... a building which is designed to remain as or become a number of dwellings ... and which ... is ... a listed building’. g

[55] There is no dispute that the works constituted an approved alteration of a building. The critical question, however, is *which* building for the purposes of item 2 was being altered: was it the house or was it the outbuilding? If, as the taxpayers contend and the majority of the Court of Appeal held, it was the house, there can be no doubt that it was to remain as a single dwelling and was a listed building. If, however, it was the outbuilding, there can equally be no doubt that it was neither to remain as nor to become a dwelling and nor, indeed, was it ‘a listed building’; rather it was at most under the 1990 Act definition ‘part of’ the building (itself a listed building) and, as this House decided in *Shimizu (UK) Ltd v Westminster City Council* [1997] 1 All ER 481, [1997] 1 WLR 168, although part of a building may be a listed building, a part of a listed building cannot itself be a listed building. (I say the outbuilding was ‘at most’ a part of a listed building. If, contrary to the conclusions reached both at first instance ([2001] STC 585) and by h
j

a each member of the Court of Appeal ([2002] EWCA Civ 692, [2002] STC 829), the commissioners' secondary argument were correct and the final limb of the 1990 Act definition is not to be imported into the 1994 Act, it would not even amount to that. To my mind, however, nothing turns on this secondary argument and I am accordingly content to assume that it is ill-founded.)

b [56] The argument in favour of the alterations being, for item 2 purposes, to the house rather than the outbuilding is essentially this. Group 6 finds its origins in Group 8A (also headed 'Protected Buildings') which was introduced into Sch 5 of the Value Added Tax Act 1983 by the Finance Act 1984. Item 2 of Group 8A zero-rated 'the supply, in the course of an approved alteration of a protected building, of any [relevant] services', and the notes defined protected building simply to mean a building which was either a listed building or a scheduled monument within the meaning of the respective legislative provisions then applying.

c [57] Before that date all alterations to all buildings had been zero-rated, an exemption which the commissioners clearly came to regard as too generous once this House in *Customs and Excise Comrs v Viva Gas Appliances Ltd* [1984] 1 All ER d 112 at 116, [1983] 1 WLR 1445 at 1451 had decided that any work on the fabric of a building constituted its alteration 'except that which is so slight or trivial as to attract the application of the de minimis rule'.

e [58] Group 8A was in turn restricted following the judgment of the Court of Justice of the European Communities in *EC Commission v UK* Case 416/85 [1989] 1 All ER 364, [1990] 2 QB 130, [1988] ECR 3127 by an amendment effected by the Finance Act 1989 to confine zero-rating in the case of protected buildings to the reconstruction and alteration of certain defined classes of residential buildings. The wording of Group 6 today derives directly from the 1989 amendment.

f [59] Such being the history of this enactment it is the taxpayers' case, accepted by the majority below, that item 2 was intended to encompass anything constituting the approved alteration of a listed building or a scheduled monument, provided only and always that such listed building or monument building was to remain or become a dwelling. Section 7 of the 1990 Act prohibits works for the alteration of a listed building 'in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised'. The authorisation of such works under the 1990 Act is provided by note (6) to Group 6 to constitute the approved alteration of the listed building. The focus of Group 6 is, it is therefore suggested, upon the listed building itself, and thus it is that the extended definition of such a building to include any outbuilding within the curtilage falls to be incorporated into Group 6 for all purposes. This is the argument reflected at [2002] STC 829 at [37] of Rix LJ's judgment below when he says of the commissioners' case, focusing as that does on the outbuilding and asking whether that itself is a protected building, that it 'ignores that the concept of a listed building has already been built into the idea, already mentioned in item 2, of "an approved alteration"', and that 'such an approach begs the very question of "which building"?'. The concept of protection', Rix LJ then points out, 'is not a value added tax (VAT) concept, it is a concept of listing or scheduling, a heritage concept'.

j [60] Paragraph [39] of Rix LJ's judgment is also important:

'Item 2 introduces the concept of an "approved alteration of a protected building". It is possible to found an important part of reasoning in favour of the commissioners on the fact that the alteration in this case was in a

practical sense to the outbuilding, not to the house ... I am concerned, however, that this is to misstate the legal position. Given that the "approved alteration" in question is an alteration which cannot be carried out unless authorised under the 1990 Act (as note (6) confirms) and that that Act is the statute which provides the definition of a listed building as one that includes (in our case) the outbuilding, it is in my judgment more natural to consider that the "approved alteration" is an alteration to the house, which is after all the building which is *listed*.' a
b

[61] This paragraph is central to the reasoning of the majority below and necessarily represents a core element of the taxpayers' argument. If, indeed, the alteration carried out in this case, although 'in a practical sense to the outbuilding', is 'more natural[ly]' to be considered an alteration to the house, then clearly it is the alteration of a protected building and so attracts zero-rating. To my mind, however, there can be no escaping the plain fact that the actual building altered here was the outbuilding and not the house. True it is that the requirement for these works to be authorised rested upon the fact that, under the extended definition of 'listed building' in s 1(5) of the 1990 Act, a listed building was being altered. That, however, appears to me an insufficient basis for ignoring the simple physical reality, namely that here it was the outbuilding itself which was being altered. It is to the actual work of alteration that item 2 is directed. Either the building which is itself being altered is a protected building as defined or it is not. Here it was not. c
d

[62] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Walker of Gestingthorpe. I agree with it. e

[63] I too would allow this appeal.

Appeal allowed.

Celia Fox Barrister.

a R (on the application of the Secretary of State for Defence) v President of the Pensions Appeal Tribunals (England and Wales) (Jones, interested party)

b [2004] EWHC 141 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

NEWMAN J

c 15 DECEMBER 2003, 4 FEBRUARY 2004

Pensions appeal tribunal – Holder of service pension applying for leave to appeal to High Court from tribunal's decision – President of Pensions Appeal Tribunals (England and Wales) setting aside tribunal's decision and ordering rehearing – Whether direction within President's power – Pensions Appeal Tribunals Act 1943, s 6(2), (2A) – Pensions Appeal Tribunal (England and Wales) Rules 1980, rr 20, 21, 37.

An ex-serviceman received a pension arising out of his army service. He applied to the Secretary of State for Defence for a clothing allowance. The Secretary of State refused his application and he appealed under the Pensions Appeal Tribunals Act 1943. The tribunal dismissed his appeal. The ex-serviceman applied to the tribunal for permission to appeal. Section 6(2)^a of the 1943 Act made provision for appeals from the tribunal to the High Court on a point of law, with leave of the tribunal or of a judge, and s 6(2A) made provision for the tribunal to be able to set aside a decision on an appeal from the decision of the Secretary of State on a joint application by the appellant and the Secretary of State where, inter alia, additional evidence came to light or the tribunal's decision was erroneous in point of law. The practice and procedure of the tribunal was governed by the Pensions Appeal Tribunals (England and Wales) Rules 1980. Rules 20^b and 21^c of the 1980 rules conferred power on the President of the Pensions Appeal Tribunals (England and Wales) to set aside a decision on an appeal only when the tribunal had made its decision in the absence of an appellant where the President considered that it was in the interests of justice to do so, and required each party to be given a reasonable opportunity to make representations. Rule 37^d provided that non-compliance with the 1980 rules was not to render proceedings on an appeal void, unless the tribunal or the President so directed, 'but the tribunal or the President may give such directions for the purpose of mitigating the consequences of the irregularity as the justice of the case may require'. The President issued a direction under r 37 of the 1980 rules purporting to set aside the tribunal's

a Section 6, so far as material, is set out at [8], below
j b Rule 20, so far as material, is set out at [17], below
c Rule 21, so far as material, provides: '(1) Where ... any appellant is unable, through physical or mental infirmity, to attend the tribunal ... the President may make ... arrangements ... (d) for the determination of the appeal in the absence of the appellant ... (2) Where an appeal has been determined under paragraph 1(d) and the appellant applies to the President, without undue delay, for the decision to be set aside, the President may ... arrange for the appeal to be re-heard before a differently constituted tribunal ...'
d Rule 37, so far as material, is set out at [22], below

decision and ordering a rehearing. The Secretary of State applied for judicial review of the President's decision. a

Held – On a proper construction of the 1943 Act and the 1980 rules no power was conferred on the President to set aside a decision on an appeal except in the circumstances provided for by s 6(2A) of the 1943 Act and rr 20 and 21. That construction did not create any procedural or substantive unfairness to a losing party, as they had a statutory right of appeal to the High Court, subject to leave being granted, against any decision taken by the tribunal, nor was it inconsistent with the statutory scheme nor the width of the discretion given to the tribunal in determining appeals. Accordingly, the application would therefore be allowed (see [34]–[36], [57], below). b

Akewushola v Secretary of State for the Home Dept [2000] 2 All ER 148 considered. c

Notes

For procedure on appeal from the Pensions Appeal Tribunal to the High Court, see 41 *Halsbury's Laws* (4th edn) para 356.

For the Pensions Appeal Tribunals Act 1943, s 6(2), (2A), see 33 *Halsbury's Statutes* (4th edn) (2003 reissue) 408. d

For the Pensions Appeal Tribunal (England and Wales) Rules 1980, rr 20, 21, 37 see 14 *Halsbury's Statutory Instruments* (2001 issue) 599, 600, 606.

Cases referred to in judgment

Akewushola v Secretary of State for the Home Dept [2000] 2 All ER 148, [2000] 1 WLR 2295, CA. e

R (on the application of the Secretary of State for the Home Dept) v Immigration Appeal Tribunal [2001] EWHC Admin 261, [2001] 4 All ER 430, [2001] QB 1224, [2001] 3 WLR 164.

Cases referred to in skeleton arguments f

Azinas v Cyprus [2002] ECHR 56679/00, ECt HR.

Boddington v British Transport Police [1998] 2 All ER 203, [1999] 2 AC 143, [1998] 2 WLR 639, HL.

Jones v Secretary of State for Social Services [1972] 1 All ER 145, [1972] AC 944, [1972] 2 WLR 210, HL. g

Kerojärvi v Finland (1995) 32 EHRR 152, [1995] ECHR 17506/90, ECt HR.

M v Home Office [1993] 3 All ER 537, [1994] 1 AC 377, [1993] 3 WLR 433, HL.

McGinley v UK (1998) 4 BHRC 421, ECt HR.

Minister of Social Security v Amalgamated Engineering Union [1967] 1 All ER 210, [1967] 1 AC 725, [1967] 2 WLR 516, HL. h

Pellegrin v France (2001) 31 EHRR 651, [1999] ECHR 28541/95, ECt HR.

R v Belgium App No 33919/96 (27 February 2001, unreported), ECt HR.

R (on the application of Nuredini) v Immigration Appeal Tribunal [2002] EWHC 1582 (Admin), [2002] All ER (D) 126 (Jul).

Taylor v Lawrence [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528, [2002] 3 WLR 640. j

Application for judicial review

The Secretary of State for Defence applied for judicial review of the decision of the President of the Pensions Appeal Tribunals (England and Wales) dated 19 June 2003 setting aside the decision of a Pensions Appeal Tribunal dated

- a 27 February 2002 dismissing the appeal of David Donald Jones, the interested party, from the Secretary of State's decision dated 20 July 2001 refusing him an allowance under art 17 of the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983 in connection with his service pension. Mr Jones was not represented at the hearing. Following the decision of the President not to be represented at the hearing, the court requested, and the
- b Solicitor General agreed to, the appointment of an advocate to the court. The facts are set out in the judgment.

Steven Kovats (instructed by the *Treasury Solicitor*) for the Secretary of State.

John Litton (instructed by the *Treasury Solicitor*) as advocate to the court.

c *Cur adv vult*

4 February 2004. The following judgment was delivered.

NEWMAN J.

- d [1] This is an application for judicial review brought by the Secretary of State for Defence concerning the decision of the President of Pensions Appeal Tribunals (England and Wales) dated 19 June 2003 to set aside, pursuant to r 37 of the Pensions Appeal Tribunal (England and Wales) Rules SI 1980/1120, the decision of a Pensions Appeal Tribunal (PAT) dated 27 February 2002. The PAT
- e had dismissed Mr Jones' appeal from the Secretary of State's decision, dated 20 July 2001, to refuse him an allowance under art 17 of the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order, SI 1983/883 in connection with his service pension. Mr Jones applied to the PAT for leave to appeal to the High Court and on 19 June 2003 the President issued a direction under r 37 of the 1980 rules purporting to set aside the PAT's decision and
- f ordered a rehearing before a differently constituted PAT.

- [2] On 22 February 1962 Mr Jones was awarded a service pension for bronchial asthma and Colles fracture of the right wrist arising from his service as a private in the army (Royal Army Ordinance Corp (RAOC)) between 26 November 1954 and 7 July 1961. On 13 July 1999 Mr Jones applied for a clothing allowance under art 17 of the 1983 order. The Secretary of State refused
- g his application. Mr Jones' appeal to the tribunal was refused on 27 February 2002.

- [3] Thereafter, on 10 March 2002, Mr Jones applied to the tribunal under r 25 of the 1980 rules for leave to appeal the tribunal's decision to the High Court. On 19 June 2003 the President of the tribunals, on his initiative, pursuant to r 37 of the 1980 rules, made/gave a direction that the tribunal's decision be set aside on
- h account of an irregularity under r 5 of the 1980 rules. The irregularity was stated as being that the Secretary of State's statement of case 'did not really meet the claimant's case about the link between his asthma and the soiling of his clothes ...' The President has produced a document setting out his observations attached to which are a number of earlier decisions in different cases reached pursuant to
- j r 37.

- [4] Following a decision by the President not to be represented at the hearing of the claim by the Secretary of State for Defence, the court requested and the Solicitor General agreed to the appointment of an advocate to the court. Mr Jones as the interested party and person directly affected by any decision of the court has also been unrepresented. Another case (CO/4669/2002) where Major Lawson was the interested party and which the court had ordered to be

heard at the same time as the present case has been settled by Secretary of State for Defence withdrawing his claim. a

[5] The Pensions Appeal Tribunals Act 1943 makes provision, inter alia, for servicemen who have had claims in respect of disablement arising out of their military service rejected, and against other decisions by the relevant minister affecting awards in respect of such claims, to appeal to the PAT. Section 1 of the 1943 Act applies to the rejection of war pension claims made by members of the naval, military or air forces and provides: b

‘(1) Where any claim in respect of the disablement of any person made under any such Royal Warrant, Order in Council or Order of His Majesty as is administered by the Minister ... is rejected by the Minister on the ground that the injury on which the claim is based—(a) is not attributable to any relevant service; and (b) does not fulfil the following conditions, namely, that it existed before or arose during any relevant service and has been and remains aggravated thereby; the Minister shall notify the claimant of his decision, specifying that it is made on that ground, and thereupon an appeal shall lie to the Pensions Appeal Tribunal constituted under this Act ... on the issue whether the claim was rightly rejected on that ground. c

(2) Where, for the purposes of any such claim as aforesaid, the injury on which the claim is based is accepted by the Minister as fulfilling the conditions specified in paragraph (b) of the last foregoing subsection but not as attributable to any relevant service, the Minister shall notify the claimant of his decision, specifying that the injury is so accepted, and thereupon an appeal shall lie to the Tribunal on the issue whether injury was attributable to such service.’ d

[6] Section 5A inserted into the 1943 Act by s 57(1) of the Child Support, Pensions and Social Security Act 2000 provides: e

‘(1) Where, in the case of any such claim as is referred to in section 1, 2 or 3 of this Act, the Minister makes a specified decision—(a) he shall notify the claimant of the decision, specifying the ground on which it is made, and (b) thereupon an appeal against the decision shall lie to the Tribunal on the issue whether the decision was rightly made on that ground. f

(2) For the purposes of subsection (1), a “specified decision” is a decision (other than a decision which is capable of being the subject of an appeal under any other provision of this Act) which is of a kind specified by the Minister in regulations made by statutory instrument. g

(3) Regulations under this section shall not be made unless a draft of the regulations has been laid before, and approved by a resolution of, each House of Parliament.’ h

[7] Pursuant to the Pensions Appeal Tribunals (Additional Rights of Appeal) Regulations 2001, SI 2001/1031, made in exercise of the power conferred on the Secretary of State for Social Security by s 5A(2) of the 1943 Act, a decision by the Secretary of State for Defence made in relation to a claim for an allowance for wear and tear of clothing under the 1983 order is a ‘specified decision’ for the purposes of s 5A of the 1943 Act (see regs 2 and 3(1)(a) and (b)(ii) of the 2001 regulations and the reference in Sch 1 to and art 17 of the 1983 order). Article 17 provides: j

a (1) A member of the armed forces who is in receipt of retired pay or a pension may be awarded an allowance in respect of wear and tear of clothing at the rate specified in paragraph 5 of Part IV ... where either—(a) ... or (b) the Secretary of State is satisfied that as a result of the disablement which gives rise to an award under this Order there is exceptional wear and tear of the member's clothing.'

b [8] Section 6 of the 1943 Act makes provision for the constitution, jurisdiction and procedure of the PAT. A number of subsections have been inserted into s 6 by various Acts since the 1943 Act was given Royal Assent. It provides:

c '(1) The provisions of the Schedule to this Act shall have effect with respect to the constitution, jurisdiction and procedure of Pensions Appeal Tribunals.

d (2) Where, in the case of an appeal to the Tribunal under sections 1, 2, 3, 4 or 5A of this Act, the appellant or the Minister is dissatisfied with the decision of the Tribunal as being erroneous in point of law, he may, with the leave of the Tribunal or of a judge of the High Court nominated for the purpose by the Lord Chancellor appeal therefrom, within such time as may be limited by rules of court to the judge so nominated and the decision of that judge shall be final and conclusive ...

e (2A) Where, in the case of such a claim as is referred to in section 1, 2, 3, 4 or 5A of this Act—(a) an appeal has been made under that section to the Tribunal and that appeal has been decided (whether with or without an appeal under subsection (2) of this section from the Tribunal's decision); but (b) subsequently, on an application for the purpose made (in like manner as an application for leave to appeal under the said subsection (2)) jointly by the appellant and the Minister, it appears to the appropriate authority (that is to say, the person to whom under rules made under the Schedule to this Act any application for directions on any matter arising in connection with the appeal to the Tribunal fell to be made) to be proper so to do—(i) by reason of the availability of additional evidence; or (except where an appeal from the Tribunal's decision has been made under the said subsection (2)), on the ground of the Tribunal's decision being erroneous in point of law, the appropriate authority may, if he thinks fit, direct that the decision on the appeal to the Tribunal be treated as set aside and the appeal from the Minister's decision (the "original decision") be heard again by the Tribunal.

f (2B) ...

h (2C) Where a direction for a rehearing is given under subsection (2A) above, the Minister may, before the expiry of two months beginning with the date of the direction, review the original decision.

j (2D) ...

(3) Subject to subsections (2) and (2A) of this section, the decision of the Tribunal on any issue on which an appeal is brought under this Act shall be final and conclusive.'

[9] The Schedule to the 1943 Act makes further provision as to the constitution, jurisdiction and procedure of PATs and provides, inter alia, for the constitution of PATs, appointment of members and the appointment of a President of the PAT by the Lord Chancellor (see paras 1, 2 and 2B). Paragraphs 3B, 3C and 5 of the Schedule provide:

'3B. The President of Pensions Appeal Tribunals for any part of the United Kingdom may give directions as to the practice and procedure to be followed by such Tribunals in that part of the United Kingdom. a

3C.—(1) The power to give directions under paragraphs ... 3B shall be exercisable in relation to a particular appeal, to a category of appeal or to appeals generally ...

(3) The power to give directions under paragraphs ... 3B above includes power to vary or revoke directions previously given ... b

5.—(1) Subject as aforesaid, the Lord Chancellor may make rules with respect to—(a) the manner of hearing of appeals by Pensions Appeal Tribunals and in particular appeals in cases where the appellant owing to illness or other cause is not present at the hearing; (b) the mode of proof and admissibility of evidence; (c) the representation of the appellant and the Minister at the hearing; (d) the recording and proof of the decisions of the Tribunals; and such other matters relating to the practice and procedure of the Tribunals as the Lord Chancellor thinks fit. c

[10] The rules made under para 5 of the Schedule to the 1943 Act are the Pensions Appeal Tribunals (England and Wales) Rules 1980, SI 1980/1120. d

[11] Rule 2 contains specific definitions including:

'(1)(b) "appeal" includes an entitlement appeal, an assessment appeal and an appeal against a specified decision ... (jj) "specified decision" has the meaning given in section 5A of the [1943] Act ...' e

[12] Rule 4 provides:

'(1) An appeal to a tribunal shall be commenced by a notice of appeal to the Secretary of State on an appropriate form ...

(2) The appropriate form of notice of appeal shall be supplied by the Secretary of State on request. f

(3) A notice of appeal shall be signed by the appellant, or as the case may be, by the person acting on behalf of the appellant, and shall bear the date on which it was signed, and shall be sent by post addressed to the Secretary of State for Defence.'

[13] Rule 5, in so far as is relevant, provides: g

'(1) Subject to the provisions of rules 6, 9 and 22, the Secretary of State shall, on receipt by him of a notice of appeal, prepare a document (to be called a "Statement of Case") containing the following information—(a) the relevant facts relating to the appellant's case as known to the Secretary of State, including the relevant medical history of the appellant; and (b) in the case of an entitlement appeal, the Secretary of State's reasons for making the decision against which the appeal is brought. h

(2) When the Statement of Case has been prepared, the Secretary of State shall send two copies to the appellant and shall inform him that he may, if he so desires, submit (on a form to be supplied by the Secretary of State) an answer to the statement indicating—(a) whether, and in what respect, the facts in the Statement of Case are disputed; (b) any further facts which, in his opinion, are relevant to the appeal; and (c) his reasons for thinking that the decision of the Secretary of State ... was wrong. j

(3) Where the appellant submits an answer disputing any of the facts in the Statement of Case or putting forward further facts, he shall attach to his

answer such documentary evidence in support of his case as is in his possession or as he can reasonably obtain.

(4) Except where the appellant is resident outside the United Kingdom, he shall send his answer, and any documents submitted therewith, to the Secretary of State within 28 days from the date on which the Statement of Case was sent to him.

(5) The Secretary of State may, if he so desires, comment in writing on the appellant's answer and, if he does so, the Secretary of State shall send a copy of his comments to the appellant.

(6) As soon as may be after receipt of the answer or, if the appellant does not send an answer, on the expiration of the said 28 days ... the Secretary of State shall, subject to the provisions of rule 9, send to the Pensions Appeal Office—(a) three copies of the Statement of Case; (b) three copies of the appellant's answer (if any); (c) any documents submitted by the appellant; and (d) three copies of any comments made by the Secretary of State on the appellant's answer.'

[14] Rule 11 relates to the representation of the appellant and Secretary of State at any appeal hearing and r 11(3) imposes a positive duty on the PAT to assist any appellant who appears to be unable to make the best of his case.

[15] Rule 14 confers on the PAT extensive powers to adjourn the hearing of an appeal for further information or evidence and r 15 empowers the PAT to take specialist medical advice where difficult medical or technical questions arise.

[16] Rules 18 and 19 relate to the announcement and recording of a PAT's decision and provide:

'18. The decision of the tribunal may, at the discretion of the tribunal, be announced by the chairman immediately after the hearing of the case, or may be communicated in writing to the appellant and the Secretary of State within seven days after the tribunal has reached its decision, and in either case the chairman shall indicate the tribunal's reasons for its decision.

19.—(1) The clerk of the tribunal shall enter, in a book to be kept by him for the purpose, a minute of every decision of the tribunal.

(2) The chairman of the tribunal shall sign a document (to be called a "Form of Decision") recording the decision on the appeal and it shall be the duty of the clerk to the tribunal to transmit the Form of Decision to the Pensions Appeal Office.

(3) Copies of the Form of Decision shall be prepared in the Pensions Appeal Office, and shall be certified under the hand of an officer authorised in that behalf by the President, and a copy so certified shall be sent to the appellant and to the Secretary of State.

(4) A copy of a Form of Decision purporting to have been certified as aforesaid shall be conclusive evidence of the decision of the tribunal on the appeal to which that Form of Decision relates and shall be available for public inspection.'

[17] Rule 20 reflects para 5(1)(a) of the Schedule to the 1943 Act and makes provision for the hearing of an appeal in the absence of the parties or their representatives. Rule 20 in so far as is material provides:

'(2) If a party fails to attend or be represented at a hearing of which he has been duly notified, the tribunal may—(a) unless it is satisfied that there is sufficient reason for such absence, hear and determine the appeal in the

party's absence; or (b) adjourn the hearing, giving written reasons for the adjournment ... a

(5) Where an appeal has been determined under paragraph (2)(a) and the appellant applies to the President, without undue delay, for the decision to be set aside, the President may, if after affording each party a reasonable opportunity to make representations he considers that the interests of justice so require, grant the application and arrange for the appeal to be reheard before a differently constituted tribunal; and he may make such further order as he thinks fit.' b

[18] A similar power to set aside a determination on application by the appellant exists under r 21(2) where the President is satisfied that an appellant through prolonged physical or mental infirmity is unlikely to be able to attend the PAT and the appeal is determined in the appellant's absence. As with r 20, the power to set aside the decision under r 21(2) is subject to the President first affording each party a reasonable opportunity to make representations. c

[19] Rule 25 sets out the procedure for applying for leave to appeal to the High Court and r 28 makes provision for the payment of an appellant's expenses of appealing or defending a decision of the PAT in the High Court (including the costs of applying for or resisting leave to appeal). Rule 29 makes provision for the payment of an appellant's costs where a joint application is made by the appellant and the Secretary of State under s 6(2A) of the 1943 Act. d

[20] Rule 32 makes provision for the making of interlocutory applications for directions and states: e

'(1) The appellant or the Secretary of State may at any time apply to the President for directions on any matter arising in connection with the appeal, or with an application to the tribunal for leave to appeal to the judge of the High Court.

(2) An application for directions shall state the matter on which the directions are required. f

(3) The President shall communicate the nature of the application to the Secretary of State or, as the case may be, to the appellant together with a statement that the Secretary of State or the appellant may comment thereon in writing, if he so desires, and before giving his directions the President shall consider any comments furnished to him. g

(4) Any directions given by the President under this rule shall be communicated to the appellant and to the Secretary of State.

(5) If an appellant fails to comply with a direction given to him by the President under this rule, the President may direct the case to be placed in the deferred list.' h

[21] Rule 33 makes provision for the PAT to extend time for the doing of any act or taking any step in connection with an appeal which power extends to the procedural requirements set out in r 5, but the power is given 'in connection with an appeal' and cannot be exercised after a decision on the appeal has been reached. However, the decision includes the 'reasons' (see r 18) and r 33 would enable time to be extended for the reasons of the PAT to be given. j

[22] Rule 37, which is at the heart of the present claim, provides:

'Non-compliance with any of these Rules shall not render the proceedings on the appeal void unless the tribunal or the President shall so direct, but the tribunal or the President may give such directions for the purpose of

a mitigating the consequences of the irregularity as the justice of the case may require.'

PAT'S DECISION OF 27 FEBRUARY 2002

b [23] The PAT's original decision taken on 27 February 2002 was to disallow Mr Jones' claim for clothing allowance. The reasons for the PAT's decision are set out in the document headed 'Mr David D Jones: NINO: ZP 45 16 12D' which states, in so far as is relevant:

c 'In the case of David Donald Jones ... The appellant was represented by the Royal British Legion. The appeal was heard in his absence. The War Pensions Agency relied on the statements by the Secretary of State. They contend that any worsening of the aggravated condition since service release cannot relate to service. The Royal British Legion on behalf of Mr Jones, drew attention to the argument he has put forward. The tribunal understands, particularly from the notes of meeting on 23 February 2000 that Mr Jones complains that his clothes are soiled because of sweats, nosebleeds, and vomiting not incontinence. Mr Jones has a current assessment for his asthma of 20%—aggravated by service. He suffers from a number of other conditions. There is no medical record to believe that any of the other conditions (listed by the orthopaedic specialist) could have caused the sweating, vomiting, or nosebleeds, other than the possibility of the aspirin taken for thrombosis could contribute to the nose bleeding. The tribunal notes that the appellant states he wears thermal underwear. This factor, though unrelated to treatment for asthma, could certainly contribute to his sweating. There is no medical support for the argument that asthma causes sweating, or vomiting, or nosebleeds, though in this last matter such could be contributed to by the wearing of oxygen masks. The tribunal sees no reason to dissent from the Secretary of State's rejection. The claim for clothing allowance is disallowed.'

PAT'S DECISION OF 19 JUNE 2003 (SETTING ASIDE ITS ORIGINAL DECISION)

g [24] The PAT's decision taken on 19 June 2003 setting aside the tribunal's original decision taken on 27 February 2002 is contained in a document signed by HMC Concannon as chairman and is headed 'Directions'. It states:

h '1. Mr Jones' appeal against the Secretary of State's decision refusing clothing allowance came before a tribunal on 27 February 2002. The tribunal's decision was to disallow the appeal.

2. Mr Jones subsequently made an application for leave to appeal to the nominated judge against the tribunal's decision on the grounds of error of law.

j 3. I am satisfied that the statement of case in question did not really meet the claimant's case about the link between his asthma and the soiling of clothes—steroids and medicine to clear his lungs led to excessive sweating and heavy coughing and nose bleeding. I am accordingly satisfied that there is an irregularity for the purposes of r 5 of the 1980 rules.

4. I consider it to be in the interests of justice to set aside the tribunal's decision under r 37 of the 1980 rules.

5. In doing so I give the following directions ...'

THE STATUTORY CONTEXT

[25] The PAT as a creature of statute derives its powers from the statute creating it. a

[26] Section 6(1) and paras 3B and 3C(3) of the schedule to the 1943 Act confer on the President of the PAT power to give directions as to the practice and procedure to be followed by the PAT including the power to vary or revoke directions previously given.

[27] Section 6(2A) of the 1943 Act expressly provides for the PAT to be able to set aside a decision on an appeal on a joint application by the appellant and the Secretary of State where additional evidence comes to light or the PAT's decision is erroneous in point of law. b

[28] Section 6(1) and para 5(1) of the schedule to the 1943 Act together with rr 20 and 21 of the 1980 rules expressly confer power on the President of the PAT to set aside a decision on an appeal determined in the absence of the appellant where the President considers that it is in the interests of justice to do so and arrange for the appeal to be reheard before a differently constituted tribunal. But, whether the power is exercised under rr 20 or 21, the President must give each party a reasonable opportunity to make representations. c

[29] Rule 37 of the 1980 rules gives the President power to give directions where there has been non-compliance with the 1980 rules for the purpose of mitigating the consequences of an irregularity but the limit in point of time of the power conferred by r 37 is the point at which a decision on the appeal is made by the PAT (see *Akewushola v Secretary of State for the Home Department* [2000] 2 All ER 148 at 153, [2000] 1 WLR 2295 at 2301 per Sedley LJ). d

[30] Except in the circumstances provided for by s 6(2A) of the 1943 Act and rr 20 and 21 of the 1980 rules, once the PAT has announced its decision it has no power to reconsider it or reopen the case subject to its decision being quashed by the High Court. See Wade and Forsyth *Administrative Law* (8th edn, 2000) p 916 and *Akewushola's* case, where Sedley LJ said: e

‘... I do not think that, slips apart, a statutory tribunal—in contrast to a superior court—ordinarily possesses any inherent power to rescind or review its own decisions. Except where the High Court’s jurisdiction is unequivocally excluded by privative legislation, it is there that the power of correction resides.’ f

And ([2000] 2 All ER 148 at 154, [2000] 1 WLR 2295 at 2301): g

‘If something has gone procedurally wrong which is capable of having affected the outcome, it is to the High Court—if necessary on a consensual application—that recourse must be had.’

[31] The relevant part of Sedley LJ’s judgment in *Akewushola's* case was relied on by Scott Baker J in *R (on the application of the Secretary of State for the Home Dept) v Immigration Appeal Tribunal* [2001] EWHC Admin 261, [2001] 4 All ER 430, [2001] QB 1224, who went on to say (at [67]): h

‘The relevant rules expressly provide for self-correction by the tribunal at any time before it reaches a decision. It matters not whether the decision was taken at a preliminary hearing or before a single chairman. Where a legislative scheme provides express powers of self-correction one does not expect to find an implied power to revoke decisions. In my judgment the law is as stated by Sedley LJ in *Akewushola's* case. What is critical is that the decision to remit the appeal to an adjudicator for adjudication is a decision j

a which disposes of the appeal to the tribunal, after which the power to cure irregularities given by the rules can no longer be exercised.'

[32] Section 6(2) of the 1943 Act confers on the appellant or Secretary of State a right of appeal to the High Court (subject to leave being granted) against a decision of the PAT. But subject to that right and the provision for the appellant and Secretary of State to make a joint application where additional evidence has come to light or the PAT's decision is erroneous in law (see s 6(2A) of the 1943 Act), the PAT's decision on any issue on which an appeal is brought under the 1943 Act is final and conclusive (see s 6(3) of the 1943 Act).

ISSUES

c [33] The claim gives rise to the following issues: Issue 1—Whether the 1980 rules properly construed give the PAT power to set aside a decision on an appeal reached by the tribunal. Issue 2—If so, whether or not in setting aside the decision reached by the PAT on Mr Jones' appeal the PAT acted in breach of natural justice. Issue 3—If there was power to set aside the decision and the PAT did not act in breach of natural justice, whether there was an irregularity which entitled d the PAT to set aside the decision.

Issue 1

[34] The 1943 Act and 1980 rules properly construed do not confer any power on the President to set aside a decision on an appeal except in the circumstances e provided for by s 6(2A) of the 1943 Act and rr 20 and 21 of the 1980 rules. A decision on an appeal is arguably made when it is announced by the PAT following the hearing of the appeal or is communicated in writing to the parties pursuant to r 18 of the 1980 rules. It is at the very latest made when the chairman of the tribunal signs the form of decision and the form of decision is certified by f the President and copies sent to the appellant and the Secretary of State pursuant to r 19(2)–(3) because at that point it becomes conclusive evidence of the PAT's decision on the appeal to which it relates (see r 19(4) of the 1980 rules).

[35] Such a construction does not create any procedural or substantive unfairness to a losing party as they have a statutory right of appeal (save in an assessment appeal), subject to leave being granted, to the High Court against any decision taken by the PAT. Moreover, if the Secretary of State and the appellant agree that additional evidence has come to light or the PAT's decision is erroneous in point of law there is also express provision for a joint application to be made by the Secretary of State and the appellant to the President which, if granted, allows the decision to be treated as having been set aside and to direct h the redetermination of the appeal. Further, in those circumstances the Secretary of State within two months of any such direction can himself review the decision which led to the appeal being made in the first place and come to a different decision (see s 6(2C) and (3) of the 1943 Act). In other words, where the PAT has made a decision on an appeal which ordinarily must be treated as being final and j conclusive in accordance with s 6(3) of the 1943 Act provision is none the less made for that decision to be revisited by the Secretary of State (as the original decision taker) and the PAT in the particular circumstances set out in s 6(2A). So, for example, if additional medical evidence not before the PAT when the appeal was heard became available which might cause an appeal against a refusal of clothing allowance to be allowed instead of refused, or if the PAT had made an accepted error of law it would be unnecessary to appeal to the High Court and

have the decision quashed before it could be redetermined by the PAT because s 6(2A) provides a short cut which allows the PAT to reconsider the appeal. a

[36] Further, rr 20 and 21 of the 1980 rules also make provision for the President to set aside a decision where an appeal has been heard in the absence of an appellant. Consequently, a construction of the 1943 Act and r 37 of the 1980 rules which precludes any general power to set aside a decision is neither inconsistent with the statutory scheme nor the acknowledged width of the discretion given to the PAT in determining appeals. b

[37] The submission is further supported by the temporal limitation on the power to mitigate the consequences of any non-compliance with the 1980 rules which is the point at which the PAT reaches a decision on the appeal (see *Akewushola's case*). c

Issue 2

[38] Even if the 1943 Act and 1980 rules could properly be construed as conferring a power on the President of the PAT to set aside a decision of the PAT where there had been an irregularity, natural justice would require any party affected by such a decision to be given an opportunity to make representations to the PAT. This, it is submitted, is a self-evident proposition but is supported by r 19(4) which provides that a copy of a form of decision is conclusive evidence of the PAT's decision because express provision is made for the public to rely on the decision. d

[39] Moreover, a requirement to give an affected party the opportunity to make representations where the PAT is minded to set aside a decision because of an irregularity would be entirely consistent with the express provisions for setting aside a decision where an appeal has been determined in the absence of the appellant (see rr 20 and 21). In such cases the power to arrange for an appeal to be reheard is subject to: (1) an application being made to the President without undue delay; and (2) the President affording each party a reasonable opportunity to make representations. It is difficult to conceive of a case where even if he had the power to do so the President could unilaterally and without any reference to either of the affected parties simply direct that a decision should be set aside and the appeal reheard. e

Issue 3

[40] The irregularity relied upon by the PAT as justifying the setting aside of the original decision was that the statement of case did not meet Mr Jones' claim that it was the medication he took for his asthma (an accepted disablement) that caused the sweats and nosebleeds which soiled his clothes and bedding (see PAT's decision of 19 June 2003). f

[41] Rule 5(1) of the 1980 rules requires the Secretary of State to prepare a document to be called a 'Statement of Case' which is required to contain: (1) the relevant facts (including the appellant's relevant medical history) relating to the appellant's case as known to the Secretary of State; and (2) in the case of an entitlement appeal, the Secretary of State's reasons for making the decision against which an appeal is brought. g

[42] In the present case Mr Jones' application to the War Pensions Agency for clothing allowance was dated 5 June 2001. His application was refused on 20 July 2001. Mr Jones appealed to the PAT. The Secretary of State prepared a statement of case containing the relevant facts and it being an entitlement appeal, his reasons for making the decision. Mr Jones answered the Secretary of State's h

a statement of case attaching statements and documents. In his supplementary statement he said:

b 'I suffer from a great deal of bed wetting and clothing wetting at regular periods when my carer cannot react quick enough to my needs—this wetting is brought on because of the treatment I have to take for my war disability of bronchial asthma (damaged lungs) which leaves a continuous build up of fluids in the lungs—to disperse this fluid I have to take BUMETANIDE for the rest of my life ... On medical advice I was advised to bring this point to your attention as this is another main reason for damage to my clothing etc which soils and also relates to wear and tear.'

c [43] In an undated response the Secretary of State commented on Mr Jones' answers presumably in accordance with r 5(5) in a document headed 'Secretary of State's further reasons for decision' in which he said:

d 'Mr Jones is now contending that the steroid treatment for his accepted disablement of bronchial asthma could be aggravating his non-accepted disablement of diabetes and causing bad sweats and bed wetting; also that his lack of mobility due to his accepted disablements is resulting in additional wear and tear of his clothing. Mr Jones is also disputing the "aggravated" label in respect of his bronchial asthma. In response to these contentions, War Pensions Agency Medical Services have confirmed that the "aggravated" label of Mr Jones' bronchial asthma and the assessment of 20% remain appropriate. This level of assessment is not responsible for exceptional wear and tear of his clothing. Any subsequent deterioration in his chest condition is due to non-service factors and the need for steroids does not relate to that percentage accepted for war pension purposes. Bed wetting is not accepted as part of Mr Jones' accepted disablement and again

e therefore is a non-accepted disablement and unrelated to any wear and tear. Finally, Mr Jones' lack of mobility would not be responsible for abnormal wear and tear of clothing and in any case cannot be related to his accepted disablements.'

f [44] In responding to the Secretary of State's further reasons for decision

g Mr Jones said, *inter alia*:

h '... I have always stated the effect steroids have on my conditions. I have informed the WPA to contact my GP and consultants plus make inquiries of independent medical specialists and they will find that the following can/does have the following effects: A/ Bed sweats—change of moods and anxiety ...'

[45] Consequently, the issue as to whether or not the treatment for Mr Jones' accepted disablement was or was not causative of sweats etc at night was not overlooked by the Secretary of State but was a matter of dispute between him and Mr Jones. Moreover, the issue was one which was before the PAT albeit that the tribunal hearing his appeal does not appear to have appreciated the point that Mr Jones was making (see the PAT's original decision).

j [46] In the circumstances, the issue of jurisdiction apart, the rationale for the PAT unilaterally setting aside its decision on the basis that the Secretary of State had failed in his statement of case to meet Mr Jones' claim about the link between his asthma and the soiling of his clothes is not supported by the facts.

THE PRESIDENT'S POSITION, AS IT APPEARS FROM THE DOCUMENTS PRESENTED TO THE COURT

[47] It is apparent from the comments made by the President and the decisions attached to his comments that the Jones (and now settled Lawson) cases are not the first time the PAT has purported to use r 37 to set aside a decision reached on an appeal and remit it to a freshly constituted tribunal for rehearing. Moreover, from those other decisions it is plain that: (1) the PAT has not always given the Secretary of State (discharging his duties through the War Pensions Agency) an opportunity to make representations; and (2) where the War Pensions Agency has been consulted it has on a number of occasions agreed to the original decision being set aside and the appeal being remitted to a fresh tribunal. There are nevertheless limits to the extent to which this court should attempt to rule in connection with each of the other cases.

[48] The following points can be seen to emerge. In the Lawson case (now settled), the Secretary of State at the fresh hearing had argued that the PAT had no jurisdiction to rehear the appeal for the same reasons advanced in the skeleton argument in the present case. However, the PAT rejected that submission on the following grounds relating to the construction of s 6(3) of the 1943 Act.

- It would be inconsistent to construe s 6(3) of the 1943 Act as prohibiting the PAT from setting aside a decision under r 37 of the 1980 rules where art 67(2A) of the 1983 order allows an assessment decision made by the PAT to be reviewed by the Secretary of State and it cannot have been Parliament's intention to prevent the PAT from reviewing its own decision but allow the Secretary of State to do so.

- If s 6(3) of the 1943 Act should be read with a qualifying implication which saves the power given to the Secretary of State by art 67(2A) of the 1983 order to review a PAT decision such an implication should be read so as to allow r 37 to be used to set aside PAT decisions that have been reached in breach of the rules.

- The words of r 37 which permit the President to direct that the proceedings on an appeal are 'void' where there has been non-compliance with the 1980 rules do not limit the exercise of that power only to the breach of any rule but to the proceedings as a whole. Moreover, in practical terms, the President is only likely to be considering a remedy under r 37 of the 1980 rules after a tribunal has reached a decision.

- The PAT was established to provide a relatively informal, expeditious, accessible and economic means of appeal for claimants. This is reflected in the 1980 rules which provide for the costs of a claimant on an appeal to the High Court against a PAT's decision to be met by the Lord Chancellor. Given this context it would be extraordinary if the only remedy available to the claimant where the PAT had failed to give reasons for its decision was by way of judicial review in an assessment appeal which is not an appeal on the merits and which may be costly to make.

- If the Secretary of State's argument as to the construction of s 6(3) of the 1943 Act is correct then logically r 20(5) of the 1980 rules which gives the PAT power to set aside a decision reached in the absence of the parties is also ultra vires and Parliament cannot have intended when amending the 1943 Act to insert s 6(2A) to make the power under r 20(5) of the 1980 rules to set aside a decision reached in the appellant's absence given also ultra vires.

[49] It appears from the President's comments that the setting aside of decisions reached on appeals under r 37 of the 1980 rules is an established practice

a which has been assented to by the War Pensions Agency and, in some cases, suggested by the Secretary of State's representatives.

[50] Further, and in relation to Mr Jones' case, it is apparent from the President's comments that the reason why the President set aside the decision reached by the PAT on 27 February 2002 was that in the chairman's view 'the tribunal's reasons for decision were inadequate because they did not deal with the appellant's main argument' and, therefore, there was an arguable case that 'the tribunal's decision was erroneous as a matter of law'. Moreover, it was because the PAT perceived that it had made an error of law and because 'the chairman suggested that there might be an appropriate alternative to giving permission to appeal to the High Court' that the President set aside the original decision under r 37. No indication has been given as to why the Secretary of State was not given an opportunity to make representations on that proposed course of action.

CONCLUSIONS

d [51] Firstly, it is not relevant to the proper construction of the rules that the Secretary of State through the War Pensions Agency has in the past consented to a decision of the PAT being set aside under r 37 or even proposed that the President should set aside an appeal decision. Jurisdiction in this regard cannot be conferred by consent.

e [52] Secondly, there is no inconsistency between the ability of the Secretary of State to review a decision of the PAT pursuant to art 67(2A) of the 1983 order and the 1943 Act and 1980 rules. The powers defined by the 1983 order are pursuant to an Order in Council made in the exercise of the royal prerogative pursuant to s 12(1) of the Social Security (Miscellaneous Provisions) Act 1977 whereas the 1980 rules are made under the 1943 Act. Moreover, the ability of the Secretary of State to review a decision of the PAT under art 67(2A) of the 1983 order is only f exercisable where he is satisfied that there has been a relevant change of circumstances since the decision was made, including any improvement or deterioration in the disablement. This reflects the Secretary of State's ongoing obligation to make proper provision for servicemen and the inevitable changes that may occur in their disablements in respect of which they are entitled to assistance. By way of contrast, the PAT's function, important though it is, is to adjudicate between g an appellant (whose application for assistance has been refused) and the Secretary of State (whose decision it was to refuse it) on the facts known at the time.

[53] Thirdly, the power to set aside a decision on an appeal conferred by rr 20 and 21 of the 1980 rules is expressly provided for by para 5(1)(a) of the schedule to the 1943 Act whereas the 1943 Act does not make any provisions for the making of h rules for dealing with irregularities and more particularly for the setting aside of a decision where there has been non-compliance with the rules. Although it could be argued that para 5(1)(a) of the schedule only gives the Lord Chancellor the power to make rules with respect to the *manner* of hearing appeals where an appellant is absent and does not extend to giving the President power to set aside i a decision once it has been taken, the ability to set aside such a decision is a necessary safeguard against the effects of decisions which are taken in the absence of the appellants and can properly be read into the 1943 Act.

[54] Fourthly, although the statutory right of appeal and the power of the PAT to set aside a decision on an appeal under s 6(2A) of the 1943 Act on a joint application by the appellant and the Secretary of State where there is new evidence or the PAT's decision is erroneous in point of law is restricted to

entitlement appeals, that appears to have been the plain intention of Parliament. Indeed the anomaly created by a statutory right of appeal to the High Court against a decision of the PAT on an entitlement appeal and the necessity to challenge a decision on an assessment appeal by judicial review has always existed as the amendments to s 6(2) of the 1943 Act made by the 2000 Act only substituted the words 'sections 1, 2, 3, 4 or 5A' for the words originally enacted, namely 'section one' to 'four' (see s 57(2) of the 2000 Act).

[55] As regards the PAT's practice of using r 37 to set aside decisions on appeals evidenced by the decisions attached to the President's comments, there appears to be no consistency as to when the War Pensions Agency is or is not given an opportunity to make representations. However, if the 1943 Act and r 37 do give the President power to set aside decisions reached by a tribunal on an appeal where there has been an irregularity, it would be consistent with the principle of natural justice that a party affected by a decision to set aside an earlier PAT decision and remit the appeal to be reheard should be given an opportunity to make such representations as he might wish.

[56] Further, it appears plain from the President's comments that the rationale for setting aside the PAT's decision in this case relates not to a failure by the Secretary of State to comply with r 5 of the 1980 rules but because the PAT recognised that its reasons for dismissing Mr Jones' appeal had not addressed Mr Jones' principal argument and there had therefore been an error of law which would have entitled Mr Jones to have permission to appeal to the High Court. In other words, the deficiency which caused the President to set aside the PAT's decision was not a failure by the Secretary of State in the preparation of the r 5 statement of case but a failure by the PAT to address Mr Jones' argument that it was the steroids which he was taking for his accepted condition which gave rise to the claim.

CONCLUSION

[57] For the foregoing reasons, the President had no power to set aside the PAT's decision of 27 February 2002 and/or that decision was taken in breach of natural justice and/or the reason given for exercising the power was irrational.

[58] The case should be remitted to the PAT for directions in connection with Mr Jones' application for leave to appeal to the High Court.

Application allowed.

Dilys Tausz Barrister.

Leigh v Michelin Tyre plc

[2003] EWCA Civ 1766

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, ARDEN AND DYSON LJJ

17 NOVEMBER, 8 DECEMBER 2003

Costs – Assessment – Estimate of costs – Claimant in personal injury proceedings lodging seriously inadequate costs estimate – Claimant and defendant settling claim in favour of claimant – Claimant lodging bill of costs in substantially greater amount than costs estimate – Whether bill of costs reasonable – Whether claimant bound by inadequate costs estimate – CPR PD 43, para 6.6.

The claimant brought proceedings claiming damages for personal injury against the defendant. Both parties completed and filed allocation questionnaires and the claim was allocated to the multi-track. In the allocation questionnaire the claimant's solicitors estimated their costs to date as £3,000 plus value added tax (VAT), and their overall costs as likely to be £6,000 plus VAT. Before trial the claim was settled on terms that the defendant pay a certain sum in damages plus costs. CPR PD, 43, para 6.6^a provided, inter alia, that on an assessment of the costs of a party, the court could have regard to any estimate previously filed by that party and might take such estimate into account as a factor among others, when assessing the reasonableness of any costs claimed. The claimant's solicitors lodged a bill of costs in which they claimed £21,741 including VAT and the district judge assessed costs of £20,488 including VAT, making no deduction to reflect the fact that the claimant's solicitors had filed an inadequate costs estimate. The defendant's appeal to the judge was dismissed and it appealed to the Court of Appeal, contending that the claimant should be bound by the costs estimate given in the allocation questionnaire, because the estimate had been so seriously inadequate.

Held – An inadequate estimate of costs did not bind the party who had made it solely by reason of its inadequacy. Where there was a substantial difference between the amount of a costs estimate and the costs claimed on an assessment, the costs estimate could be taken into account by the court in determining the reasonableness of the costs claimed, using the power contained in CPR PD 43, para 6.6: (i) where there was no satisfactory explanation for the difference, since in the absence of a satisfactory explanation, the court could conclude that the difference itself was evidence from which it could conclude that the costs claimed were unreasonable; (ii) where the other party showed that it had relied on the estimate in a certain way; and (iii) in a case where the court decided that it would probably have given different case management directions if a realistic estimate had been given. It would not be a correct use of the power conferred by CPR PD 43, para 6.6 to hold a party to his estimate simply in order to penalise him for providing an inadequate estimate. To avoid double jeopardy, the costs judge should determine how, if at all, to reflect the costs estimate in the assessment before deciding, whether, for reasons unrelated to the estimate, there were elements of the costs claimed which were unreasonably incurred or unreasonable in amount. In the

^a Paragraph 6, so far as material, is set out at [4], below

instant case there was no sufficient reason to hold that the claimant should be bound by his estimate and the appeal would therefore be dismissed (see [26]–[30], [33], [38], [39], below).

Cases referred to in judgment

AB v Leeds Teaching Hospitals NHS Trust, In the matter of the Nationwide Organ Group Litigation [2003] EWHC 1034 (QB), [2003] 3 Costs LR 405.

C (legal aid: preparation of bill of costs), Re [2001] 1 FLR 602, CA.

Godwin v Swindon BC [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997.

Jefferson v National Freight Carriers plc [2001] EWCA Civ 2082, [2001] 2 Costs LR 313.

Lownds v Home Office [2002] EWCA Civ 365, [2002] 4 All ER 775, [2002] 1 WLR 2450.

Wong v Vizards [1997] 2 Costs LR 46.

Cases also cited or referred to in skeleton arguments

Anthony v Ellis & Fairburn (a firm) [2000] 2 Costs LR 277.

Callery v Gray (Nos 1 and 2) [2002] UKHL 28, [2002] 3 All ER 417, [2002] 1 WLR 2000; *affg sub nom Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 4 All ER 1, [2001] 1 WLR 2142.

Callery v Gray, Russell v Pal Pak Corrugated Ltd [2001] EWCA Civ 1117, [2001] 3 All ER 833, [2001] 1 WLR 2112.

Long Eaton Plant Hire Ltd v Nelsons (a firm) (2002) 146 SJLB 205, SCCO.

Malkinson v Trim [2002] EWCA Civ 1273, [2003] 2 All ER 356, [2003] 1 WLR 463.

Sarwar v Alam [2001] EWCA Civ 1401, [2001] 4 All ER 541, [2002] 1 WLR 125.

Solutia UK Ltd v Griffiths [2001] EWCA Civ 736, [2002] PIQR P176.

Appeal

The defendant, Michelin Tyre plc, appealed, with the permission of Judge Mitchell, from his decision on 27 February 2003 dismissing their appeal from the decision of District Judge Chapman on 9 May 2002 assessing the costs to be paid by the defendant, to the claimant, Michael Peter Leigh, following the settlement of a personal injury action brought by the claimant against the defendant, in the sum of £20,488.83. The facts are set out in the judgment of the court.

Guy Mansfield QC and Simon J Brown (instructed by *Ricksons*, Manchester) for the defendant.

John Foy QC and Mark Whalan (instructed by *Tinsdills*, Hanley) for the claimant.

Cur adv vult

8 December 2003. The following judgment of the court was delivered.

DYSON LJ.

INTRODUCTION

[1] One of the principal objects of the Woolf reforms was the control of costs. The Civil Procedure Rules include a number of innovations which were designed to enable the court to limit recoverable costs and thereby further the overriding objective defined in CPR 1.1. One of the innovations was the requirement that parties provide cost estimates at important stages of litigation (notably the allocation and listing questionnaire stages), and the conferring on the court of the

a power to take the parties' estimates into account on an assessment of costs. At the heart of this appeal lies CPR PD 43, para 6.6 which provides:

b 'On an assessment of the costs of a party the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed.'

[2] In the present case, the claimant's solicitors filed an allocation questionnaire in which they said that they estimated the claimant's solicitors' profit costs to date at £3,000 plus VAT, and their overall profit costs as likely to be £6,000 plus VAT. The practice direction in force at that time (February 2000) did not state that the estimate should include disbursements in accordance with the definition of 'costs' in CPR 43.2(1)(a). The practice direction has since been changed to spell out that estimates must include disbursements. The claimant's solicitors never revised their estimates. In the event, the litigation was eventually settled, and they lodged a bill of costs in which they claimed £21,741.28. This comprised £14,482.80 in respect of profit costs, £4,314.70 for disbursements and £2,943.78 for VAT. The first of these figures included £11,744 for their profit costs in respect of the period after the allocation questionnaire stage. This should be compared with the estimate of £3,000 given at the allocation questionnaire stage for future solicitors' profit costs. The district judge assessed the claimant's recoverable costs at £20,488.83 inclusive of VAT. He made no deduction to reflect the fact that the claimant's solicitors had previously given what proved to be a wholly inadequate estimate for their future profit costs. The defendant says that the district judge erred in not reducing the assessed costs to reflect the earlier estimate. It failed to persuade Judge Mitchell that the district judge was wrong. Permission to appeal was given because it seemed that the appeal raised an important point of principle as to the relevance of costs estimates in the assessment of costs.

THE RULES AND THE PRACTICE DIRECTION

[3] At the date of the allocation stage in the present case, the practice direction supplementing CPR Pt 26 provided that the allocation questionnaire should be in form N150, which required estimates to be given of costs incurred by legal representatives to date and of the overall costs. CPR PD 26, para 2.1 provided: 'Attention is drawn to the Costs Practice Direction 43, paragraph 4.5(1) which requires an estimate of costs to be filed and served when an allocation questionnaire is filed'. CPR PD 43, section 4 dealt with estimates of costs. Paragraph 4.1 provided:

'This section sets out certain steps which parties must take in order to keep the parties informed about their potential liability in respect of costs and in order to assist the court to decide what, if any, order to make about costs and about case management.'

[4] By the time the listing stage had been reached, some significant changes had been made to the practice direction. In particular, section 4 of CPR PD 43 had been replaced by section 6. The new para 6.1 was in almost the same terms as its predecessor para 4.1. An 'estimate of costs' was now given a wider definition: it was an estimate of 'base costs (including disbursements)'. 'Base costs' were defined by para 2.2 of the practice direction as costs other than the

amount of any additional liability as defined by r 43.2. Paragraphs 6.3–6.6 of the amended practice direction provided:

‘6.3 The court may at any stage in a case order any party to file an estimate of base costs and to serve copies of the estimate on all other parties. The court may direct that the estimate be prepared in such a way as to demonstrate the likely effects of giving or not giving a particular case management direction which the court is considering, for example a direction for a split trial or for the trial of a preliminary issue. The court may specify a time limit for filing and serving the estimate. However, if no time limit is specified the estimate should be filed and served within 28 days of the date of the order.

6.4(1) When a party to a claim which is outside the financial scope of the small claims track, files an allocation questionnaire, he must also file an estimate of base costs and serve a copy of it on every other party, unless the court otherwise directs. The legal representative must in addition serve an estimate upon the party he represents.

(2) Where a party to a claim which is being dealt with on the fast track or the multi track, or under Part 8, files a pre-trial check list (listing questionnaire), he must also file an estimate of base costs and serve a copy of it on every other party, unless the court otherwise directs. Where a party is represented, the legal representative must in addition serve an estimate on the party he represents.

(3) This paragraph does not apply to litigants in person.

6.5 An estimate of base costs should be substantially in the form illustrated in Precedent H in the Schedule of Costs Precedents annexed to the Practice Direction.

6.6 On an assessment of the costs of a party the court may have regard to any estimate previously filed by that party, or by any other party in the same proceedings. Such an estimate may be taken into account as a factor among others, when assessing the reasonableness of any costs claimed.’

[5] The other important new elements were: (a) the requirement that legal representatives should serve on their clients their estimates of costs; and (b) the provision in para 6.6 that cost estimates may be taken into account on an assessment of costs when assessing the reasonableness of any costs claimed. Section 6 of CPR PD 43 has not been further amended, and governs the position today.

[6] The only rule relating to the assessment of costs to which we need refer is CPR 44.5 which provides for the factors that are to be taken into account in deciding the amount of costs:

‘(1) The court is to have regard to all the circumstances in deciding whether costs were—(a) if it is assessing costs on the standard basis—(i) proportionately and reasonably incurred; or (ii) were proportionate and reasonable in amount, or (b) if it is assessing costs on the indemnity basis—(iii) unreasonably incurred; or (iv) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to—(a) the conduct of all the parties, including in particular—(i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the

a proceedings in order to try to resolve the dispute; (b) the amount or value of any money or property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge and responsibility involved; (f) the time spent on the case; and (g) the place where and the circumstances in which work or any part of it was done.

b (Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)'

[7] The notes in the current edition of *Civil Procedure* (the White Book) (2003) vol 1, state at para 44.7.2:

c 'On completing the allocation questionnaire and the listing questionnaire the party must set out an estimate of costs incurred to date and an estimate of likely future costs. Section 6 of the Costs Practice Direction deals with this. Considerable care and precision is required in the preparation of such estimates since the estimates of opposing parties are likely to be compared one with another. An over generous estimate may result in an opponent recovering a similar amount, while an under-generous estimate may result in a recovery on behalf of the client which does not reflect the actual costs involved.'

THE FACTS

e [8] The claimant, who at the material times was employed by the defendant, suffered injuries at work in May 1996 and July 1997. On 27 May 1999, he issued proceedings alleging that the injuries were caused by the defendant's negligence and/or breach of statutory duty. The claim form and particulars of claim were served on 2 September 1999. By its defence served on 2 February 2000, the defendant denied liability, causation and loss. Both parties completed and filed f allocation questionnaires, and on 24 February, the claim was allocated to the multi-track. Apart from the costs estimates to which we have already referred, the claimant's allocation questionnaire included the statement that he intended to use one expert witness, a consultant orthopaedic surgeon. The defendant said that it intended to use two experts, an engineer and an orthopaedic surgeon. It also stated that its estimate of costs incurred to date was £2,500, and that it g estimated the likely overall costs at £7,500.

[9] There was a listing hearing on 6 April 2001. Neither party filed or served on the other side an updated estimate of costs as required by CPR PD 43, para 6.4(2). At the hearing, the claimant was given permission to rely on the report of an employment expert. This was because the defendant's witness h statements asserted that the claimant would have been made redundant and would therefore have lost his employment even if he had not been injured. The trial date was set for 23 July 2001. On 16 July, the claim was settled on terms that the defendant pay £48,000 less Compensation Recovery Unit benefits plus costs.

j [10] As we have said, the claimant's bill of costs was lodged in the sum of £21,741.28. The defendant submitted points of dispute on 6 December 2001. It raised a number of points of detail, but the principal point of dispute was the defendant's contention that the claimant should not be permitted to receive more than the amount of the costs estimate contained in the allocation questionnaire plus 15%, ie £6,900 in total. The argument was put in two ways. First it was said that, since the claimant had not approved an increase in the amount of the estimate given by his solicitor in the allocation questionnaire, the claimant's

solicitor would not be able to recover from him more than that estimate plus 15% (see *Wong v Vizards* [1997] 2 Costs LR 46), and on an application of the indemnity principle, the defendant was not liable to pay the claimant more than the claimant was liable to pay his solicitor. Secondly, it was said that, regardless of the indemnity principle, the defendant should not be liable to pay more than the amount of the costs that had been estimated, because it was entitled to rely on the cost estimates that had been given by the claimant's solicitors. a

[11] The claimant's solicitors responded as follows. They explained why the costs were so much higher than had been estimated at the allocation stage. Late disclosure of documents by the defendant's solicitors had obliged them to carry out unexpected investigations and further work. The redundancy issue had not been foreseen: this too needed to be considered. Further, it had not been foreseen that engineering expert evidence would be required: in the event, an engineering expert had to be instructed. The claimant's solicitors also explained (in answer to the indemnity principle point) that the prosecution of the claimant's claim was funded by the Transport and General Workers' Union (the TGWU). The TGWU gives the solicitors general authority to proceed with any claim which has a reasonable prospect of success, and does not require them to provide an estimate of costs. b

[12] District Judge Chapman held the assessment on 9 May 2002. At this hearing, he dealt with the points of detail and, subject to the point of principle raised by the defendant in relation to the claimant's solicitors' costs estimate, he assessed the claimant's reasonable and proportionate costs at £20,488.83. At the same hearing, he heard argument on the point of principle, but he reserved judgment on this until 21 May. In his reserved judgment, he distinguished *Wong v Vizards* on the ground that in that case the client had expressly required the solicitor to give costs estimates. He held that the claimant's solicitors had failed to comply with CPR PD 43, para 6.4(1) in that they had failed to serve on the claimant or his union a copy of the costs estimate which they had given in the allocation questionnaire. He also noted that neither party had complied with the requirement of CPR PD 43, para 6.4(2) that there be filed with the listing questionnaire an estimate of costs at that stage. The district judge said that he— c

'did not believe that the defendant's solicitors or insurers (the paying party as it turns out) relied at any stage upon the claimant's solicitors' costs estimate in the AQ [allocation questionnaire] in deciding whether to continue to conduct the litigation as they did. Indeed it is not so suggested. The defendant's decision to agree the compromise settlement figure was not influenced by the claimant's solicitor's costs estimates in the AQ.' d

[13] The nub of the district judge's reasoning is contained in the following passage of his judgment: e

'(vi) The requirements to provide costs estimates from time to time are confusing. It has been common practice it seems for solicitors to provide at allocation questionnaire stage an estimate of profit costs only excluding VAT and disbursements and further not to provide any estimate of costs when filing the listing questionnaire. The allocation questionnaire form itself simply asks what the overall costs are likely to be. Practice Direction 43, para 6.2 defines an "estimate of costs" which should include disbursements (but there is no reference to VAT). Precedent H provides for costs, VAT and disbursements including estimates of trial costs. The precedent includes, f

a inter alia, counsel's brief and refresher fees, experts' fees, expenses of
witnesses of fact, attendances on all those people and perhaps others. In
b many cases, of which this is one, it will simply not be possible at the
allocation questionnaire stage which follows shortly after the defence and is
before exchange of experts' reports, disclosure of documents, exchange of
witness statements of fact and many other possible developments in the
proceedings, for either party to estimate with any degree of accuracy the
c costs and disbursements which are likely to be incurred if the claim proceeds
to trial. Costs estimates are required by the court primarily to assist in all
aspects, including costs, of the proper management of the case and as a
reminder to the parties of the potential costs of the litigation they are
undertaking. The court has the power, not exercised in this case, under
d CPR PD 43, para 6.3 to direct costs estimates to be prepared at any time in
the course of proceedings. I anticipate that a more clearly defined process
will evolve as courts pay more attention, as the present practice direction
allows, to the costs estimates which are provided during the course of
proceedings. (vii) However, whereas it is entirely appropriate that estimates
of costs already incurred should be accurate, it would in my judgment be an
unintended and unfair consequence of complying with CPR PD 6 to the
extent of filing and serving on the other party (but not the client) if the
e solicitors estimating future costs (and disbursements) at such an early stage
of the action were at the conclusion of the action to be tied to that estimate
as against the other party unless there is clear evidence that the other party
relied upon that estimate. (viii) In the absence of any evidence that the
defendant in this case relied upon the claimant's solicitors estimate of further
costs and so informed the claimant's solicitors, I have concluded that the
claimant's solicitors should not be bound to that estimate and should be
f entitled to recover from the defendant the costs which have been assessed at
the hearing on 9 May 2002.'

[14] The defendant appealed. Judge Mitchell gave judgment on 27 February 2003. He held that the Solicitors' Practice Rules and the indemnity principle had no part to play here. So far as CPR PD 43, para 6.6 is concerned, the judge said:

g '[16] The contents of a number of the practice directions have served to
engender satellite litigation of which the Costs Practice Direction has been a
fruitful source. Furthermore, the stipulated procedures have of themselves
added to the costs of proceedings. To produce a costs estimate with the
detail in form H requires an expenditure of chargeable time. The purpose
and effect of requiring such estimates to be provided is not clearly stated. If
h the intended purpose is to limit the recoverable costs by reference to the
estimate that is something which, in my judgment, requires a clear
statement in the rules themselves rather than something which is to be
attempted by a practice direction, the effect of which would be to govern or
fetter the exercise of the court's discretion under the statutory rules in the
j manner which is implied by CPR PD 43, para 6.6.

[17] I have recited the district judge's express finding that, at the allocation questionnaire stage, an estimate could not have been provided with any degree of accuracy. That finding will have been informed by this district judge's recent and extensive experience of conducting personal injury litigation, mainly on behalf of defendants. I would observe that, if solicitors are to be bound by such estimates in the manner which is submitted by the

defendants, all that is likely to be achieved is that ever more time will be expended and costs incurred in connection with them. Moreover, it is likely that the estimates of future costs will either be routinely inflated to provide for every eventuality or will be so qualified as to be meaningless.

[18] I reject, therefore, the first and primary basis for Mr Brown's attack on the district judge's assessment. Equally, it follows from what I have said that I do not consider that any material breach of the Civil Procedure Rules themselves has been demonstrated which should have been penalised by a reduction of the claimant's costs.

[19] So far as his final fall-back position, I agree that a substantial departure from the costs estimate called for an explanation. I think it is evident from the district judge's decision that he was satisfied by the explanation provided by the claimant's solicitors.

[20] In conclusion, the defendants have failed to satisfy me that the decision of the district judge was wrong. Accordingly, the appeal will be dismissed.'

THE RATIONALE FOR COSTS ESTIMATES

[15] The provisions relating to the giving of estimates of costs at significant stages of litigation are important in assisting the court to achieve the overriding objective stated in CPR 1.1 and to control the costs of litigation. The purpose of requiring costs estimates is, as is made clear by CPR PD 43, para 6.1, to keep the parties informed about their potential liability in respect of costs, and to assist the court to decide what, if any, order to make about costs and case management. Realistic costs estimates will also enable the parties to settle costs issues: they should therefore reduce the need for assessments of costs. In his final report on *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (July 1996), Lord Woolf said:

'32. It is important that the court is aware of the parties' estimate of the expenditure which has been or will be incurred when considering the future conduct of a case. The parties' estimates will be dependent on how they are proposing that the case should be conducted. If one method of dealing with the case would be beyond the resources of one of the parties, then dealing with the case justly may involve not adopting that procedure. This could be particularly important where, for example, one party wishes a case to remain on the fast track but the other is arguing for the case to be transferred to the multi-track.

33. Estimates need not go into detail and would therefore not disclose confidential information which might be of tactical value to an opponent. That would fall far short of the radical proposal set out by Adrian Zuckerman in the issues paper. The estimates would be indications to help the procedural judge decide the best course of action rather than budgets which limited what parties could recover. My other recommendations need to be "bedded down" before proceeding further in this direction on costs.'

[16] Costs estimates are an important part of the machinery of case management. At the first case management conference, the court will have the parties' statements of case, and will therefore be aware of the issues in the case. The allocation questionnaires will inform the court how many witnesses, and in particular how many expert witnesses, each party wishes to call at the hearing. The parties' costs estimates are part of the material that is placed before the court

a at this early stage of the litigation to enable it to form a view as to what measures it should take in order to manage and control the case in the interests of what is reasonable and proportionate. In *Jefferson v National Freight Carriers plc* [2001] EWCA Civ 2082 at [40], [2001] 2 Costs LR 313 at [40], Lord Woolf CJ approved the following statement by Judge Alton:

b 'In modern litigation, with the emphasis on proportionality, it is necessary for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of
c modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.'

d [17] We accept, of course, that it will not always be possible at the allocation questionnaire stage to provide a reasonably accurate estimate of the likely overall costs. But it should usually be possible to do so even at that stage, especially in run-of-the-mill cases. Where it becomes clear during the course of the litigation that the estimate was inaccurate, it is all the more important to comply with the obligation in CPR PD 43, para 6.4(2) to file an updated estimate at the listing questionnaire stage.

e [18] If it is true, as the district judge in the present case suggested, that it is common practice for solicitors to provide costs estimates only at the allocation questionnaire stage, then that practice should cease. Until and unless CPR PD 43, para 6.4(2) is removed, solicitors should also file an estimate of costs at the stage of the listing questionnaire, unless the court otherwise orders.

f [19] The provisions about the purpose of costs estimates and their relevance in relation to the assessment of costs appear in practice directions, and not in the rules themselves. This seems to have influenced the judge in his interpretation of CPR PD 43, para 6.6. He referred to passages in the judgments of this court in *Re C (legal aid: preparation of bill of costs)* [2001] 1 FLR 602, and *Godwin v Swindon BC* [2001] EWCA Civ 1478, [2001] 4 All ER 641, [2002] 1 WLR 997. In the former,
g Hale LJ said ([2001] 1 FLR 602 at 608–609 (para 21)):

h 'Unlike the Lord Chancellor's orders under his "Henry VIII" powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the *Practice Directions* are not made by Statutory Instrument. They are not laid before Parliament or subject to either the negative or
j positive resolution procedures in Parliament. They go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament. But there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for *Practice Directions* made for the Supreme Court by the Heads of Division. As Professor Jolowicz says, [*'Practice Directions and the Civil Procedure Rules'* (2000) CLJ 53], p 61, "It is right that the court should retain its power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate".'

[20] In the latter, May LJ said ([2001] 4 All ER 641 at [11]):

‘Practice directions are not the responsibility of the Civil Procedure Rule Committee, whose responsibility under s 2 of the Civil Procedure Act 1997 is limited to making civil procedure rules. Practice directions are subordinate to the rules: see para 6 of Sch 1 to the 1997 Act. They are, in my view, at best a weak aid to the interpretation of the rules themselves.’

[21] It is true that the ground rules which set out the relevant criteria for the assessment of costs are contained in the rules, not the practice directions. But the rules are, to some extent, open-textured. In particular, CPR 44.5(1) provides that the court is to have regard to ‘all the circumstances’ in deciding whether the costs were proportionately and reasonably incurred, or were proportionate and reasonable in amount. Without prejudice to that general injunction, the court must also have regard to the various factors mentioned in r 44.5(3), of which the first is the conduct of the parties. In our judgment, the provisions in the practice direction as to the giving of estimates of costs at various stages of the litigation are made pursuant to the power in the court to regulate its own procedure within the limits set by the statutory rules and to fill in gaps left by those rules. CPR PD 43, para 6.6 does not purport to, nor does it, introduce criteria for the assessment of costs which are inconsistent with, or additional to, those contained in r 44.5 itself. The provision has been drafted conservatively: the court *may* have regard to any estimate previously filed, and such estimate *may* be taken into account as a factor among others when assessing the reasonableness of any costs claimed. In our judgment, this merely spells out explicitly what is implicit in the broad power conferred on the court by r 44.5(1). For completeness, we should also mention r 44.14 which gives the court the power to disallow all or part of the costs which are being assessed where a party or his legal representative fails to comply with a rule or practice direction.

[22] The judge questioned the purpose of the provision of costs estimates. As we have said, it is to enable all parties to the litigation to know what their potential liability for costs may be. That enables them to decide whether to attempt to settle the litigation, or to pursue it, and (in the latter case) what resources to apply to the litigation. But at least as importantly, it also enables the court to take account of the likely costs in determining what directions to give. In so far as the judge was suggesting that costs estimates are unnecessary, and will merely add to the costs of the litigation, he was wrong to do so. The practice direction is expressed in clear mandatory terms: costs estimates must be provided. It is also to be noted that it requires the legal representatives to serve the costs estimates on their clients. Apart perhaps from cases such as the present where a solicitor acts for a client who makes it clear that he or she does not require such estimates, it is also part of a solicitor’s ordinary professional duty to provide the client with an estimate of future costs.

[23] Nor do we agree with the judge in so far as he seems to have been of the view that CPR PD 43, para 6.6 fetters the exercise of the court’s jurisdiction in relation to the assessment of costs. The language plainly does no such thing.

TAKING COSTS ESTIMATES INTO ACCOUNT ON AN ASSESSMENT OF COSTS

[24] So how should CPR PD 43, para 6.6 be applied where there is a substantial difference between the amount of the costs estimate and the costs claimed on an assessment? If there is no substantial difference between the two figures, then para 6.6 will have no significance. But, if there is a substantial difference as there

a was in the present case, the practice direction gives no guidance as to *how* that difference should be taken into account in determining the reasonableness of the costs claimed. It is clear that some guidance is required. In a valuable article 'Costs in Personal Injury Cases' (2002) JPIL 166 at 171 Professor John Peysner said this of costs estimates:

b 'Cost estimates, like building estimates, have a potential to make costs more predictable and controllable. In project management proper estimating is crucial, contingencies are built in and if the estimate is exceeded the contractor must explain. In cost assessment terms estimation, in effect, should shift the burden of proof onto the potentially receiving party to estimate correctly (always bearing in mind the litigators duty to the court) and to re-estimate. The author was very exercised in the run up to the Civil
c Procedural Rules about this idea and thought that it would be of great value. In fact it appears to have been a damp squib. Anecdotal evidence suggests that litigators are uncertain as to how the information disclosed is used, judges suspect that the estimating process is not rigorous and there seems little evidence of judges revisiting estimates on assessment.'

d [25] If costs estimates have proved to be a 'damp squib', it may be that the reason for this is that judges simply do not know how to take them into account when assessing costs. Another factor may be that, as Judge Mitchell said in the present case, there is a concern that, if para 6.6 is taken seriously, it will merely encourage satellite litigation.

e [26] What follows is not intended to provide an exhaustive guide as to the circumstances in which a costs estimate may be taken into account in determining the reasonableness of the costs claimed, but it should assist judges in the application of para 6.6 of the practice direction. First, the estimates made by solicitors of the overall likely costs of the litigation should usually provide a useful
f yardstick by which the reasonableness of the costs finally claimed may be measured. If there is a substantial difference between the estimated costs and the costs claimed, that difference calls for an explanation. In the absence of a satisfactory explanation, the court may conclude that the difference itself is evidence from which it can conclude that the costs claimed are unreasonable.

g [27] Secondly, the court may take the estimated costs into account if the other party shows that it relied on the estimate in a certain way. An obvious example would be where A shows that he relied on the relatively low estimate given by B not to make an offer of settlement, but carried on with the litigation on the basis that his potential liability for costs was likely to be of the order indicated in B's estimate. In our judgment, it would be a proper use of para 6.6 of the practice
h direction to take such a factor into account in deciding what costs it was reasonable to require A to pay B on an assessment.

[28] Thirdly, the court may take the estimate into account in cases where it decides that it would probably have given different case management directions if a realistic estimate had been given. To take a rather crude example: suppose
j that at the allocation questionnaire stage the claimant provides an estimate of overall costs in the sum of £20,000, and claims £50,000 at the assessment. The court might conclude that, if it had known that the claimant's costs were likely to be of the order of £50,000, rather than £20,000, it would probably have given different directions from the ones it gave, and that these would have had the effect of reducing the claimant's costs. It might, for example, have trimmed the number of experts who could be called, and taken other steps to slim down the

complexity of the litigation in the interests of controlling costs in a reasonable and proportionate manner. a

[29] In our view, para 6.6 of the practice direction gives the court the power to take matters such as these into account in deciding whether, and if so how far, to reflect them in determining what costs it is reasonable to order the paying party to pay on an assessment. We do not, however, consider that it would be a correct use of the power conferred by para 6.6 to hold a party to his estimate simply in order to penalise him for providing an inadequate estimate. Thus, if b
(a) the paying party did not rely on the estimate in any way, (b) the court concludes that, even if the estimate had been close to the figure ultimately claimed, its case management directions would not have been affected, and c
(c) the costs claimed are otherwise reasonable and proportionate, then in our view it would be wrong to reduce the costs claimed *simply* because they exceed the amount of the estimate. That would be tantamount to treating a costs estimate as a costs cap, in circumstances where the estimate does not purport to be a cap.

[30] Nor is there any justification for interpreting the provisions in the CPR as equating costs estimates with costs budgets or caps. There is, however, much to be said for costs budgeting and the capping of costs. Some judges have made prospective costs cap orders exercising the general power conferred by s 51(1) of the Supreme Court Act 1981: see, for example, Gage J in *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB), [2003] 3 Costs LR 405. This is not the place to review these decisions. Suffice it to say that, whatever the scope of the jurisdiction to make such orders, it is quite different from the jurisdiction that is exercised retrospectively at the stage of costs assessment, and when the court is required to decide the amount of reasonable and proportionate costs. Costs estimates can also alert the judge responsible for case management to the need to take appropriate action to prevent disproportionate costs from being incurred. d

[31] We acknowledge the concerns about the danger of satellite litigation. It might be said that the guidance that we have sought to give will foster disputes. Did the paying party who alleges that he relied on the estimate in fact rely on it, and to what extent? Would the court in fact have made different case management decisions if it had been provided with a realistic costs estimate, and what effect would that have had on the litigation and the parties' costs? What is the explanation for the difference between the costs estimate and the costs claimed at the assessment stage, and does the explanation satisfactorily account for the difference? These are all valid questions to ask. But these concerns do not justify setting at nought the important CPR provisions relating to the making of costs estimates. If costs estimates are not taken into account at the assessment stage, then they will be entirely nugatory. It should not be difficult for the court to determine whether, and if so how, the paying party has relied on the costs estimate given by the receiving party without conducting an elaborate and detailed investigation. Likewise, in most cases the court should be able without prolonged investigation to form a judgment as to whether, and if so how, the case would have been managed differently if a realistic costs estimate had been given. e

[32] If, applying the guidance given in this judgment, the court is satisfied that the costs claimed should be reduced having regard to the costs estimate, the question remains: by how much should the costs be reduced? This will always depend on the circumstances of the individual case. It is a matter for the judgment of the court to decide what reduction to make. Regard should be had to the costs estimate when considering whether the costs claimed were f
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h
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a reasonably incurred and reasonable in amount. Moreover, where justice so requires, specific deductions can be made from the costs recoverable to reflect the impact that erroneous and uncorrected estimates have had on case management or on the conduct of the other party.

b [33] We consider that, contrary to what occurred in the present case, the costs judge should determine how, if at all, to reflect the costs estimate in the assessment *before* going on to decide whether, for reasons unrelated to the estimate, there are elements of the costs claimed which were unreasonably incurred or unreasonable in amount. This will avoid the danger of 'double jeopardy' referred to in the context of a discussion about proportionality by Lord Woolf CJ in *Lownds v Home Office* [2002] EWCA Civ 365 at [30], [2002] 4 All ER 775 at [30], [2002] 1 WLR 2450.

c [34] We recognise that the use of CPR PD 43, para 6.6 to control costs by taking costs estimates into account at the assessment stage is not the most effective way of controlling the cost of litigation. It seems to us that the prospective fixing of costs budgets is likely to achieve that objective far more effectively. The question of costs budgets was raised before the Civil Procedure Rule Committee in June 2001. It is contentious and important. The committee decided to explore the issue, but has not reached any conclusion about it. We invite the committee to re-examine the provisions relating to costs estimates to see whether they should be amended to make them more effective in the control of costs; and also to reach a conclusion on the issue of cost budgets.

e THE PRESENT CASE

[35] On behalf of the defendant, Mr Guy Mansfield QC does not seek to challenge the finding by the district judge that the defendant did not rely on the costs estimate given by the claimant in the allocation questionnaire, nor does he suggest that, if a realistic estimate had been given, the court would probably have managed the case differently. Furthermore, he does not submit that the costs estimate was a reliable guide as to the amount of costs that it would be reasonable to award at the assessment stage. On the contrary, he submits that the estimate was an obviously unreliable guide as to the costs that it would be reasonable to award: it was, he says, a hopeless estimate. He points out that the estimate of costs to be incurred by the claimant after the allocation stage was based on an estimate of 25 hours' work, whereas the estimate of costs to be incurred by the defendant was based on 50 hours' work. It is common ground that ordinarily a claimant's legal representative shoulders a greater burden than his counterpart. In so far as the district judge was satisfied that there was an explanation for the difference between the amount in the costs estimate and the amount finally claimed, Mr Mansfield submits that he was in error. The only features of the case that were not foreseeable when the claimant completed the allocation questionnaire were (a) the site visit, and (b) the point raised by the defendant that the claimant's employment would have been terminated by reason of redundancy even if he had not been injured. This latter point led to the appointment of an employment expert. But neither feature explained the gulf between the two figures for solicitors' profit costs. He accepts that the costs assessed by the district judge were reasonable and proportionate if the costs estimate is left out of account. But the claimant should be bound by that estimate.

[36] Mr John Foy QC submits that the district judge was entitled to conclude that the claimant should not be bound by the costs estimate, that the circuit judge

was right not to interfere with that decision, and that this court should follow the same course. He also submits that the costs estimate was made on the footing that the case would be settled at an early stage, so that the overall costs estimated were those up to the time when it was thought that the case was likely to settle. a

[37] We should say at once that all costs estimates are required to include estimates of the overall costs to be incurred on the assumption that the case will not settle, and not merely estimates of future costs up to some (unspecified) date on which it is thought that the case is likely to, or might, settle. There is no warrant for interpreting the provisions as to costs estimates in any other way. b

[38] Despite the persuasive way in which Mr Mansfield puts his case, we are in no doubt that this appeal must be dismissed. We are prepared to accept his submission that the costs estimate was hopelessly inadequate and that there is no satisfactory explanation for the gulf between the estimate and the final figure. But the essence of his argument is that the claimant should be bound by the estimate *for no other reason than* that the estimate was made and it was hopelessly too low. In other words, the claimant should be penalised because the estimate was seriously inadequate. For the reasons given at [26]–[30], above, that is not a sufficient reason to hold that a party should be bound by his estimate. c

[39] It follows that this appeal must be dismissed. d

Appeal dismissed.

Kate O'Hanlon Barrister.

a Perotti v Collyer-Bristow (a firm) and other applications
 [2003] EWCA Civ 1521

b COURT OF APPEAL, CIVIL DIVISION
 CHADWICK AND CARNWATH LJ
 6 OCTOBER 2003

c *Community Legal Service funding – Provision of legal representation in civil proceedings – Claimant in civil proceedings applying for provision of legal representation – Whether lack of legal representation depriving claimant of effective access to court – Human Rights Act 1998, Sch 1, Pt I, art 6(1).*

d The claimant, a litigant in person, made a number of applications for permission to appeal in proceedings arising out of the administration of the estate of his late uncle, in proceedings in negligence against his former legal advisers, and in proceedings against his local housing authority. Under the Access to Justice Act 1999, the Legal Services Commission exercised its functions in relation to civil proceedings in the provision of the Community Legal Service. It provided a code setting out the criteria according to which it decided whether to fund services for an individual as part of the Community Legal Service. Guidance published by the **e** Commission stated that art 6^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provided for the right to a fair hearing, was directly relevant to decision making under the code. The claimant's various appellants' notices all sought additional relief in substantially similar form, **f** applying, inter alia, for an order that the Court of Appeal provide him with legal representation on the application for permission to appeal 'pursuant to the common law and/or [the convention]'. The applications were listed together for a hearing on the preliminary question whether the claimant should be granted legal representation for the hearing of the applications before the court determined the applications themselves on their merits.

g **Held** – The court had no power to grant legal representation in civil proceedings. The decision whether or not to fund legal services in civil proceedings was a matter for the discretion of the Legal Services Commission, although if the court were to indicate that legal representation was necessary in order to ensure a fair **h** hearing, it would be likely that public funding would be made available, if the applicant qualified on financial grounds. The obligation on the state to provide legal aid in civil cases arose, under art 6(1) of the convention, if the fact of presenting his own case could be said to prevent a claimant from having effective access to the courts. The test was whether a court was put in such a position that **j** it could not do justice in the case because it had no confidence in its ability to grasp the facts and principles of the matter on which it had to decide. In such a case a litigant in person would be deprived of effective access because, although he could present his case, he could not do so in a way which would enable the court to fulfil its paramount function of reaching a just decision. The applications

a Article 6, so far as material, is set out at [28], below

in the instant cases were applications for permission to appeal, where the scope for advocacy was relatively limited. Nothing in any of the applications for permission to appeal required the provision of legal representation in order to enable the court to grasp the principles involved and the facts material to those principles when called upon to decide the question which would be before it, which was whether there was a real prospect of success, or in the case of applications for a second appeal, whether there was an important point of principle or practice or whether there was some other compelling reason why the appeal should be heard. Accordingly, the claimant would not be denied effective access to the courts if he were not legally represented and the applications would therefore be dismissed (see [22], [26], [27], [29], [31]–[39], [41], below).

Notes

For the Community Legal Service, and for the right to a fair trial, see, respectively, Supp to 27(2) *Halsbury's Laws* (4th edn reissue), para 1866A, and 8(2) *Halsbury's Laws* (4th edn reissue) para 134.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

Cases referred to in judgments

Airey v Ireland (1979) 2 EHRR 305, [1979] ECHR 6289/73, ECt HR.

Bhamjee v Forsdick (No 2) [2003] EWCA Civ 1113, [2004] 1 WLR 88.

Ebert v Venvil, *Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670, CA.

Munro v UK (1987) 52 DR 158, E Com HR.

X v UK (1984) 6 EHRR 136, E Com HR.

Applications

The claimant, Angelo Perotti, applied for permission to appeal against: (i) an order made by Hart J on 7 February 2003 in proceedings brought by the claimant against Arnander Irvine & Zeitman and others, refusing, inter alia, to order that the claimant be provided with legal representation on the applications for permission to appeal from orders made by Master Moncaster on 29 and 30 July 2002; (ii) orders made respectively by Blackburne J on 9 April 2003 and Neuberger J on 10 April 2003 on an application by Kenneth Watson, the administrator of the estate of the uncle of the claimant, for an extended civil restraint order against the claimant; (iii) the refusal of Rimer J on 22 July 2003 to grant the claimant permission to apply for an order staying the sale of his former home; (iv) an order of Holman J on 6 June 2003 for the transfer to the Chancery Division of an application for a grant of administration under s 116 of the Supreme Court Act 1981 and a counter-application for a grant of administration de bonis non to the claimant; (v) an order of Gross J on 3 February 2003 refusing the claimant's application in proceedings brought by him against Barlow Lyde & Gilbert (a firm), Griffe & Co (a firm), Biddle (a firm), Mr Watson, and Mr Semken, for transcripts of the judgments of Master Leslie on 20 January 2003 to be provided at public expense; (vi) an order of Master Venne on 2 April 2003 requiring the claimant to lodge bundles conforming to the usual requirements of the Court of Appeal; (vii) an order of Hooper J on 15 May refusing a stay of proceedings; (viii) an order of Judge Green QC dismissing the claimant's appeal under s 204 of the Housing Act 1996 against a decision of the London Borough of Camden as local housing authority that the claimant was not a homeless person in priority need within s 189(1)(c) of the 1996 Act; (ix) orders of Lindsay J in the

a course of trial of negligence proceedings against the claimant's former legal advisers, Collyer-Bristow and the judgment of Lindsay J on 31 January 2003. In each application the claimant applied for legal representation to be granted to him. The applications for permission were listed together for hearing on the preliminary question whether the Court of Appeal should accede to any, and if so which, of the claimant's applications for the provision of legal representation.

b The facts are set out in the judgment of Chadwick LJ.

Mr Perotti appeared in person.

Sarah Moore (instructed by the *Treasury Solicitor*) as advocate to the court.

CHADWICK LJ.

c [1] There are 23 applications listed for hearing before this court. In each of those applications the applicant is Angelo Perotti. Mr Perotti is an experienced litigant. He appears today, as he has often appeared in the past in this court, to present his applications in person. He has done so with his usual skill and fluency.

d [2] This court has had, in addition, the benefit of submissions made by Miss Sarah Moore, who has been appointed by the Attorney General as advocate to the court in order to assist us in the matters which we have to consider. We are most grateful for her assistance; and, in particular, for the full and careful written submissions which she has put before us and has made available to Mr Perotti in advance of this hearing. Those written submissions have been of great value in helping us to identify the issues which we have to decide today.

e [3] Much of the litigation in which Mr Perotti has been engaged stems from the administration of the estate of his late uncle, Mr Lorenzo Perotti, who died in April 1984. Administration of the estate was granted to Mr Kenneth Watson, a solicitor and then a partner in the firm of Mackrell, Turner, Garrett, but since retired, as attorney administrator for the named executor, Mr Impanni.

f Mr Angelo Perotti is a residuary beneficiary under his uncle's will. Mr Impanni has since died.

[4] On 17 March 1992 Mr Perotti commenced administration proceedings against Mr Watson and others seeking, amongst other things, the removal of Mr Watson as attorney administrator. Those proceedings eventually came on for trial before Rimer J in the Chancery Division in early 1997. The trial lasted

g some 20 days and Mr Perotti was successful in part and unsuccessful in other parts. Mr Watson was allowed three-quarters of the costs of defending the proceedings and given permission to take those costs out of the estate. That has had the effect of exhausting the assets in the estate in the payment of the costs of litigation.

h [5] Mr Perotti's appeal against Rimer J's decision was dismissed in this court in February 2001, and his petition for leave to appeal to the House of Lords has been refused.

[6] One of the applications before us, 2003/0577, seeks permission to appeal an order of Rimer J made on 3 March 2003 dismissing Mr Perotti's application to

j reopen the judgment and order which that judge had made in the administration proceedings in February 1997.

[7] Mr Perotti was represented in the administration proceedings, for part of the time, by solicitors and counsel. Following his failure in those proceedings, he commenced further proceedings—the 'negligence' proceedings—against those former legal advisers, alleging negligence in relation to their conduct of the administration proceedings on his behalf. The negligence proceedings were

heard by Lindsay J at a trial in October and November 2002, and judgment was given on 31 January 2003. a

[8] Fourteen of the applications now before this court, A3/2003/0552, 0552(A), 0553–0562, 1608 and 1610, arise directly out of the negligence proceedings. I shall describe them in more detail later in this judgment, but I should mention at this stage (i) that 2003/0552(A) is an application to appeal or review a decision of Master Venne refusing to order the provision of transcripts of evidence at public expense, and (ii) that the remainder of those applications are for permission to appeal from orders made by Lindsay J in the course of the trial, or, in the case of 2003/0562, for permission to appeal the order made at the conclusion of the trial dismissing the proceedings with costs. That group comprises the bulk of the applications. b

[9] The remaining nine applications fall into five groups. First, 2003/0393 seeks permission to appeal an order made by Hart J on 7 February 2003 in proceedings brought by Mr Perotti against another firm of solicitors, Arnander Irvine & Zeitman, and others, in which the judge refused applications for permission to appeal from orders made by Master Moncaster on 29 and 30 July 2002 and refused to order that Mr Perotti be provided with legal representation on the applications for permission to appeal. There being no right to appeal from an order refusing permission to appeal, the only live application under that reference is for permission to appeal against Hart J's refusal to order legal representation. c

[10] Second, 2003/0906 and 0907 and 2003/1662. Applications 0906 and 0907 are applications for permission to appeal against orders made respectively by Blackburne J on 9 April 2003 and by Neuberger J on 10 April 2003, on an application by Mr Watson for what used to be known as an *Ebert v Venvil* order (see *Ebert v Venvil*, *Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670) but is now, following the decision of this court in *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 88, properly to be described as an extended civil restraint order. d

[11] On 9 April 2003 Blackburne J dismissed an application to have the hearing fixed for 10 April adjourned. On 10 April Neuberger J dismissed a renewed application for an adjournment of that hearing and made a civil restraint order in substantially the form sought by Mr Watson. It is not wholly clear from Mr Perotti's appellant's notice in 2003/0907 whether he seeks permission to appeal only from the dismissal of his application to adjourn the hearing or also from the extended civil restraint order that was made, but I will assume that the application covers the substantive restraint order as well as the refusals to adjourn. e

[12] 2003/1662 is indirectly linked to the earlier order in 2003/0907 because that is an application for permission to appeal the refusal by Rimer J on 22 July 2003 to grant Mr Perotti the permission which he needed under the terms of the restraint order made by Neuberger J on 10 April 2003 to apply in the Chancery Division for an order staying the sale of his former home known as 43A Ridgmount Gardens, WC1. f

[13] Third, 2003/1293 is an application for permission to appeal against an order by Holman J on 6 June 2003 affirming, save as to the provisions as to costs, orders made by District Judge Maple on 6 and 7 May 2003 for the transfer to the Chancery Division of an application for a grant of administration under s 116 of the Supreme Court Act 1981 following the death of Mr Impanni in the previous year and a counter-application for a grant of administration de bonis non to g

a Mr Perotti. The issue on that application, in broad terms, was whether the grant should be to the former attorney administrator or to Mr Perotti as residuary beneficiary. The district judge and Holman J thought that that was a matter dealt with better in the Chancery Division, which had had some familiarity with the earlier proceedings.

[14] The fourth group comprises 2003/0322 and 0322(A) and 2003/1193. b Those applications arise in proceedings brought by Mr Perotti against three firms of solicitors, Barlow Lyde & Gilbert, Griffe & Co and Biddle, and also against Mr Watson and a barrister, Mr Semken, under reference HQ/02X00856. In those proceedings Master Leslie had made orders on 20 January 2003. Mr Perotti sought to appeal those orders to a High Court judge. He came before Gross J on 3 February 2003. Gross J refused Mr Perotti's application that day for provision c of transcripts of Master Leslie's judgments to be provided at public expense. It is that order which is the subject of the application 2003/0322.

[15] On 2 April 2003 Master Venne made an unless order requiring Mr Perotti to lodge bundles which conformed to the usual requirements of this court. 2003/0322(A) is an application to review or set aside that order.

d [16] On 15 May 2003 Hooper J refused a stay of all proceedings in that action until 28 days after a hearing in this court—a hearing which is this present hearing. The application for permission to appeal Hooper J's order is the subject of 2003/1193.

[17] Finally, 2003/1626. That is an application for permission to appeal from e an order made on 1 July 2003 by Judge Green QC dismissing Mr Perotti's appeal under s 204 of the Housing Act 1996 against a decision of the London Borough of Camden, as the local housing authority, that he, Mr Perotti, was not a homeless person who was in priority need for the purposes of s 189(1)(c) of that Act.

[18] I now return to examine in more detail the applications which have arisen f out of the negligence proceedings. 2003/0562 may be described as the substantive application; that is to say, application for permission to appeal from the order made following the conclusion of the trial. 2003/0552 is an application for permission to appeal against the judge's refusal at the outset of the trial on 22 October 2002 to adjourn the trial so that Mr Perotti could seek legal g representation. 2003/0553, 0555, 0558 and 0559 are applications for permission to appeal against further refusals of applications to adjourn made by Mr Perotti during the course of that trial. 2003/0554 is an application for permission to appeal against an order that Mr Perotti provide original documents to the defendants so that they could be photocopied. 2003/0556 is for permission to appeal against the judge's refusal to allow an amendment of the statement of claim, and 2003/0557 is for permission to appeal against a refusal to direct the h issue of a witness summons. 2003/0560 and 0561 are applications for permission to appeal against the judge's refusals to recuse himself from further hearing of the trial.

[19] Part A in s 10 is in a very similar form in each of the appellant's notices in 2003/0552–0562. Paragraphs 1 and 2 are in these terms:

j 'I apply for an order that:

1. That the Court of Appeal do provide me with legal representation in this application for PTA herein whether pursuant to the common law and/or the European Convention on Human Rights, ECHR, as shown in the Human Rights Act 1998 and/or otherwise et cetera and inter alia and that the hearing of this application be adjourned generally in the meantime.

2. Failing paragraph 1 above: that the Court of Appeal do grant me permission to appeal herein so that I may obtain automatic legal representation and that the court do adjourn generally the hearing of this application in the meantime so that my lawyers can be fully and properly instructed et cetera.’

And then, by way of explanation, a note in these terms:

‘Explanation: where a litigant in person obtains permission to appeal the RCJ Citizens Advice Bureau will provide the litigant with legal representation by the Bar Pro Bono Unit. Please note that in these circumstances legal representation is guaranteed.’

The applications under Part A, s 10 continue on the basis that the applications under paras 1 and 2 fail. They ask for the application for permission to appeal to be heard on notice with appeal to follow if permission is granted, and there are many other applications for directions. The subsequent applications, 2003/0577, 0906, 0907, 1193 and 1293 contain the same request in very much the same terms; as does application 2003/0322.

[20] It is clear that the question whether Mr Perotti should be granted legal representation for the hearing of these applications ought to be decided before the court proceeds to determine the applications themselves on their merits. If the court were to make the orders which Mr Perotti seeks, then time would have to be allowed for legal representatives to be instructed. If the order directing legal representation is refused, then Mr Perotti must be given some opportunity to prepare himself to present the applications for permission to appeal in person, or to make other arrangements of his own for legal representation.

[21] It was in those circumstances that all these applications have been listed together for a hearing on the preliminary question whether the court should accede to any, and if so which, of these various applications that the court provide him with legal representation. In recognition of the importance of that issue to Mr Perotti, the court thought it right to seek the assistance of an advocate to the court. That assistance has been provided in full measure, for which we are grateful.

[22] Put in the terms in which Mr Perotti seeks his relief—namely that the court do provide him with legal representation—the answer, as it seems to me, to the applications which he makes is an unequivocal ‘No’. This court has no power in civil proceedings—comparable to that conferred by para 2(1) of Sch 3 to the Access to Justice Act 1999 in criminal proceedings—to grant a right to representation. It must be borne in mind that, where the power conferred by para 2(1) of Sch 3 to the 1999 Act is exercised in criminal proceedings, it gives rise to an obligation on the Legal Services Commission to fund the representation as part of their functions in providing the Criminal Defence Service (see ss 12(3) and 14 of the 1999 Act). There is no parallel obligation imposed on the Commission in respect of civil proceedings; and no comparable power to grant legal representation in the court.

[23] The powers of the Legal Services Commission in relation to civil proceedings arise in the exercise of its functions in the provision of the Community Legal Service (see s 4 of the 1999 Act). Section 4(1) is in these terms:

‘The Commission shall establish, maintain and develop a service known as the Community Legal Service for the purpose of promoting the availability to individuals of services of the descriptions specified in subsection (2) and,

a in particular, for securing (within the resources made available, and priorities set, in accordance with this Part) that individuals have access to services that effectively meet their needs.'

The Commission is required to set priorities for the funding of its services as part of the Community Legal Service (see s 6(1) of the 1999 Act).

b [24] On the basis that services in connection with the applications for permission to appeal which are now before us would not fall within Sch 2 to the 1999 Act as excluded services, the decision whether or not to fund representation for Mr Perotti would be made by the Commission in accordance with the Funding Code prepared pursuant to s 8 of the Act and laid before both Houses of Parliament by the Lord Chancellor pursuant to s 9.

c [25] Miss Moore has helpfully drawn our attention to para 6.5 of the Decision Making Guidance given in Pt C of the Funding Code, which is to be found in the *Legal Services Commission Manual* (2003) vol 3 pp 3C-44/39-3C-44/40 (para 3C-049). She points out that, as a matter of practicability, it follows from the guidance given in that paragraph that if this court were to indicate that legal representation were necessary to protect Mr Perotti's rights under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), then it is likely that funding would be made available by the Commission. In those circumstances, she suggests, it ought to be possible for Mr Perotti to find a firm of solicitors willing to make the necessary application. The relevant paragraph in
d the guidance contains the following:
e

'Article 6 is directly relevant to decision making under the Funding Code. Indeed it is an aim of the Access to Justice Act 1999, and the rules of the Funding Code in particular, to ensure that individuals have the opportunity of a fair hearing in the determination of their civil rights. The Funding Code
f Criteria seek to achieve this for cases which have sufficient merit to justify public funding. To this extent the Funding Code already takes Article 6 fully into account. The Funding Code Criteria must be applied in every case, but where the Commission has a discretion, for example whether funding should be requested for a case under section 6(8)(b) of the 1999 Act, the Commission
g will take into account the Article 6 implications for the individual client. It is therefore material to consider when exercising any discretion whether, without public funding, the individual would be deprived of a fair hearing.'

[26] For my part, I accept that if a court—and, perhaps, in particular the Court of Appeal—were to indicate that legal representation was necessary in order to
h ensure a fair hearing, it would be, at the least, likely, on an application made through solicitors in the usual way, that public funding would be made available by the Legal Services Commission (if of course the applicant qualified on financial grounds). But at the end of the day the decision whether or not to fund legal services in civil proceedings would be a matter for the Commission. It is not for
j this court, or any other court, to direct the Commission to exercise its discretion to provide funding. Still less, as it seems to me, is it for this court to direct an individual firm of solicitors, or an individual solicitor, to make an application for funding from the Legal Services Commission. The Commission does not itself provide representation in civil proceedings. It does not provide services under the Community Legal Service comparable in this respect to those provided under the Criminal Defence Service.

[27] The question, then, is whether this is a case in which the court ought to express the view that legal representation is necessary to ensure that Mr Perotti has a fair hearing of his applications for permission to appeal. a

[28] The need to ensure a fair hearing arises, of course, in the context of the rights conferred by art 6(1) of the convention. So far as material, art 6(1) contains the following provision:

‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ b

The provisions in art 6(1) are to be compared and contrasted with those in art 6(3), and in particular with art 6(3)(c), which is in these terms: c

‘Everyone charged with a criminal offence has the following minimum rights ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...’ d

[29] As the Commission observed in *Munro v UK* (1987) 52 DR 158, it must be assumed that in making specific provision in art 6(3)(c) for the right to free legal services in relation to criminal matters, and in not making the same specific provision in relation to civil proceedings, a difference of approach was intended. There is no obligation imposed therefore, in express terms, to provide free legal representation in civil cases. Nevertheless, it is not in doubt that one aspect of the right to a fair hearing, conferred itself in terms by art 6(1), is effective access to the courts. The point is made in *Airey v Ireland* (1979) 2 EHRR 305 at 314–315 (para 24). The European Court of Human Rights said: e

‘The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial. It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.’ f

[30] That may be contrasted with the position in relation to criminal proceedings, where the right is an absolute right. The contrast was emphasised not only in *Munro v UK*, to which I have just referred, but also by the Commission’s observations in *X v UK* (1984) 6 EHRR 136. It is said there (at para 3): g

‘In this respect the Commission recalls that unlike the situation concerning criminal proceedings, (cf. Art. 6(3)(c)), the Convention does not guarantee as such a right to free legal aid in civil cases. Only in exceptional circumstances, namely where the withholding of legal aid would make the assertion of a civil claim practically impossible, or where it would lead to an obvious unfairness of the proceedings, can such a right be invoked by virtue of Art. 6(1) of the Convention (cf. *Airey v. Ireland* ...).’ h

[31] Miss Moore suggests in her written submissions, in my view correctly, that the obligation on the state to provide legal aid arises if the fact of presenting his own case can be said to prevent him from having effective access to the courts. j

a But a litigant who wishes to establish that without legal aid his right of effective access will have been violated has a relatively high threshold to cross.

[32] It is, in my view, important to have in mind that however much this court, and indeed any other court, would welcome the assistance that can be given by a legally qualified and competent advocate, the test is not whether (with such assistance) this court would find it easier to reach the decision which it has to reach on the facts of the case. This court, and other courts, have ample experience of cases in which the material is not presented in an ideal form; and have not found it impossible to reach just decisions in such cases. The test under art 6(1), as it seems to me, is whether a court is put in a position that it really cannot do justice in the case because it has no confidence in its ability to grasp the facts and principles of the matter on which it has to decide. In such a case it may well be said that a litigant is deprived of effective access; deprived of effective access because, although he can present his case in person, he cannot do so in a way which will enable the court to fulfil its paramount and over-arching function of reaching a just decision. But it is the task of courts to struggle with difficult and ill-prepared cases; and courts do so every day. It is not sufficient that the court might feel that the case could be presented better; the question for the court is whether it feels that the case is being, or will be, presented in such a way that it cannot do what it is required to do—that is to say, reach a just decision. If it cannot do that the litigant is effectively deprived of proper access to the courts.

[33] How then should those principles be applied to the present applications? It is important to keep in mind that these applications are applications for permission to appeal. Save in the few cases where the application is for permission to bring a second appeal, the threshold for obtaining permission to appeal is set relatively low. The question for the court is: does the appeal have a real, as distinct from fanciful, prospect of success? The court is not concerned on an application for permission to appeal to satisfy itself that the applicant will succeed. The court has to do no more than satisfy itself that there is a real prospect of success; that is to say, it has to identify the points that would be argued on an appeal and consider whether those points can be described as properly arguable.

[34] In those cases where the application is for a second appeal, the test is a higher one. It is necessary to show some important point of principle or practice or some other compelling reason why a second appeal should be entertained by this court. In my experience, this court is usually well able to determine whether there is an important point of principle or practice, and well able to decide whether there is such a sense of underlying injustice that, absent a point of principle or practice, this court should, nevertheless, be ready to interfere on a further appeal.

[35] It follows, therefore, that the scope for advocacy on an application for permission to appeal is relatively limited. That itself is recognised by the time that is normally allowed for such applications if made in court. The court takes the view, as a pragmatic matter, that it should normally be possible to determine within 20 minutes or so (after the necessary pre-reading) whether the hurdle is surmounted.

[36] In my view, there is nothing in any of the applications which Mr Perotti seeks to make to this court which requires the provision of legal representation in order to enable the court to grasp the principles involved and the facts material to those principles when called upon to decide whether there is a real prospect of success; or, in the case of applications for a second appeal, whether there is an

important point of principle or practice or whether there is some other compelling reason why the appeal should be heard. a

[37] I have described earlier in this judgment the nature of the applications for permission. Mr Perotti, in the course of submissions to us this morning, has indicated in clear terms what points he would wish to take in relation to some of those applications had we been hearing the applications on their merits. Having heard him, I have no doubt that a court will be able to deal with the matter justly b when it has to decide these applications on the merits and that the absence of legal representation in these applications will not deny Mr Perotti effective access to justice.

[38] I emphasise that I make those comments in the context of the applications for permission to appeal. If those applications, or some of them, succeed—which is not the issue now before us—it may well be that in the course of preparing for the appeals points of law requiring research and more detailed analysis will emerge. If so, this court has available to it the privilege of being able to seek the assistance of an advocate to the court on those points. But it would be quite wrong at this stage, in my view, either to burden the Legal Services Commission with an obligation to consider providing legal representation on the ground that, without it, effective access would be denied, or to require the Bar Pro Bono Unit (or anyone else) to provide their services free on a general basis. If the need arises in the future I have no doubt that it can be met. I am not persuaded that it arises at this stage and, accordingly, I would not myself give the direction that Mr Perotti seeks or indicate that this is a matter where, absent legal representation, he will be denied effective access for the purposes of advancing c his applications for permission to appeal. d e

CARNWATH LJ.

[39] I agree.

[40] The applications with which we are concerned, summarised by Chadwick LJ, are only the latest in Mr Perotti's long-running legal campaign arising out of the administration of his uncle's estate. I have little doubt that it would have been of benefit to the court, and time and energy would have been saved by everyone involved, including probably Mr Perotti, if the court had been able not only to order payment for legal representation, but also to direct, having done so, that no application should be made by Mr Perotti other than through legal representatives. However, we do not at present have such powers, nor is that the issue. The question, as Chadwick LJ has said, is whether lack of legal representation means that the applicant is deprived of effective access to the court. In relation to the applications which we have before us at this stage, for the reasons given by Chadwick LJ, I agree that he is not. f g h

CHADWICK LJ.

[41] It follows that the applications made in the terms of para 1 in s 10 of the application 2003/0552, and all similar applications in these matters, are refused. i

[42] It will, I think, go without saying (but I say it none the less) that, having refused the application under para 1, the court would not think it right to grant permission to appeal without further consideration of the merits solely so that Mr Perotti would obtain automatic legal representation, thereby bypassing the hurdle which we have indicated in relation to para 1. Nevertheless, these matters remain to be heard on their merits and for that purpose I will (but not now) give

a directions for their hearing. I will do that in writing, and notice will of course be given to the parties concerned.

[43] I will also extend the stay that has at present been granted, or accepted by way of undertaking from Barlow Lyde & Gilbert, in 2003/1662 until after either that matter has been determined or further order in the meantime. Barlow Lyde & Gilbert are to have liberty to apply to discharge the stay, on notice, if they wish to do so; but in the meantime that stay will continue.

b

Applications dismissed.

Kate O'Hanlon Barrister.

Lawson v Serco Ltd

[2004] EWCA Civ 12

COURT OF APPEAL, CIVIL DIVISION

PILL, MUMMERY AND MAY LJJ

16–17 DECEMBER 2003, 23 JANUARY 2004

Employment Tribunal – Jurisdiction – Unfair dismissal – British employee employed overseas by English company bringing complaint of unfair dismissal – Whether employee’s employment conferring on employee right not to be unfairly dismissed – Employment Rights Act 1996, s 94(1).

The employer was a company registered in England and Wales. It provided support services for the Royal Air Force and civilian police on Ascension Island, which was a dependency of an overseas territory of the United Kingdom. The employee, who worked for the employer on Ascension Island, was of British nationality and was domiciled in England. The employee resigned, in circumstances which he claimed amounted to a constructive dismissal, and made a complaint to an employment tribunal under s 94(1)^a of the Employment Rights Act 1996, which provided that an employee had the right not to be unfairly dismissed by his employer. The tribunal held that it had no jurisdiction. The employee’s appeal was allowed by the Employment Appeal Tribunal, which held that the yardstick for determining jurisdiction was provided by the proximity of an employer to the United Kingdom. The employer appealed. The Foreign and Commonwealth Office, as interested party, submitted that the correct test to be applied in determining the question of jurisdiction in relation to a claim for unfair dismissal was the ‘base’ test, ie where the employee was based at the material time.

Held – Section 94(1) of the 1996 Act covered employments in Great Britain, save where there was express provision to the contrary. In most cases it would not be difficult to decide whether the employment was in Great Britain; borderline cases would depend on an assessment of all the circumstances of the employment. The 1996 Act did not permit the adoption of the test of sufficient, or substantial connection with Great Britain, or the ‘base’ test. While the residence of the parties could be relevant to where the employment was, the emphasis had to be on the employment itself. In the instant case the employee had not been employed in Great Britain, however strong his and his employers’ British connections, and the employment tribunal had correctly held that it had no jurisdiction to consider his complaint. Accordingly, the appeal would be allowed (see [15], [17], [22], [23], [27]–[30], below).

Jackson v Ghost Ltd [2003] IRLR 824 and *Bishop v Financial Times Ltd* [2003] All ER (D) 359 (Nov) disapproved.

Notes

For rights arising in the course of employment generally, and for employment outside Great Britain, see 16 *Halsbury’s Laws* (4th edn) (2000 reissue) paras 87, 103.

^a Section 94, so far as material, is set out at [8], below

- a For the Employment Rights Act 1996, s 94(1), see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 689.

Cases referred to in judgment

- Bishop v Financial Times Ltd* [2003] All ER (D) 359 (Nov), EAT.
Carver (née Mascarenhas) v Saudi Arabian Airlines [1999] 3 All ER 61, [1999] ICR 991, CA.
 b *Clark v Oceanic Contractors Inc* [1983] 1 All ER 133, [1983] 2 AC 130, [1983] 2 WLR 94, HL.
Jackson v Ghost Ltd [2003] IRLR 824, EAT.
Paramount Airways Ltd, Re [1992] 3 All ER 1, [1993] Ch 223, [1992] 3 WLR 690, CA.
Sawers, Re, ex p Blain (1879) 12 Ch D 522, [1874–80] All ER Rep 708, CA.
 c *Todd v British Midland Airways* [1978] ICR 959, CA.
Tomalin v Pearson (S) & Son Ltd [1909] 2 KB 61.

Cases referred to in skeleton arguments

- Arab Bank plc v Merchantile Holdings Ltd* [1994] 2 All ER 74, [1994] Ch 71, [1994] 2 WLR 307.
 d *Bryant v Foreign and Commonwealth Office* [2003] All ER (D) 104 (May), EAT.
First Castle Electronics Ltd v West [1989] ICR 72, EAT.
Harrods (Buenos Aires) Ltd, Re [1991] 4 All ER 334, [1992] Ch 72, [1991] 3 WLR 397, CA.
 e *McDonnell v Congregation of Christian Brothers Trustees (formerly Irish Christian Brothers)* [2003] UKHL 63, [2004] 1 All ER 641, [2003] 3 WLR 1627, HL.
New Zealand Loan and Mercantile Agency Co Ltd v Morrison [1898] AC 349, PC.
Owusu v Jackson (t/a Villa Holidays Ball-Inn Villas) [2002] EWCA Civ 877, [2003] PIQR 186, CA.
Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
 f *Spiliada Maritime Corp v Cansulex Ltd, The Spiliada* [1986] 3 All ER 843, [1987] AC 460, [1986] 3 WLR 972, HL.
Swift v A-G for Ireland [1912] AC 276, HL.
White v Reflecting Roadstuds Ltd [1991] ICR 733, EAT.

g Appeal

- Serco Ltd (the employer) appealed from the decision of the Employment Appeal Tribunal (Judge Altman, A Manners and B Switzer) on 11 March 2003 ([2003] All ER (D) 146 (Mar)) allowing the appeal of Stephen Lawson (the employee) against a decision of the Employment Tribunal promulgated on 30 October 2001 by
 h which it held that it had no jurisdiction to consider a complaint of unfair dismissal made by the employee against the employer. The Foreign and Commonwealth Office was granted permission to take part in the appeal as an interested party. The facts are set out in the judgment of the court.

- j *Erich Suter* (instructed by Serco Ltd) for the employer.
Jacques Algazy and Paul Spencer (instructed by Mills, Kemp & Brown, Barnsley) for the employee.
Jonathan Moffett (instructed by the Treasury Solicitor) for the interested party.

23 January 2004. The following judgment of the court was delivered.

PILL LJ.

[1] This is an appeal by Serco Ltd (the appellants) against a decision of the Employment Appeal Tribunal (the EAT) made on 11 March 2003 whereby they allowed an appeal from a decision of an Employment Tribunal held at Watford and promulgated on 30 October 2001. The Employment Tribunal had held that it had no jurisdiction to consider a complaint of unfair dismissal made by Mr Stephen Lawson (the respondent) against his employers, the appellants. The Foreign and Commonwealth Office was granted permission to take part in the appeal as an interested party in relation to the territorial extent and applicability of the relevant legislation.

[2] The appellants are a company registered in England and Wales with a head office in Middlesex. The company provided support services for the Royal Air Force and civilian police on Ascension Island. The respondent was appointed a security supervisor as from 22 September 2000. He is of British nationality, domiciled in England. He was interviewed in England, paid in pounds sterling in England and was given a 'no tax' coding by the Inland Revenue on the ground that his work was on Ascension Island. No mention was made of any law other than the law of England applying to the contract.

[3] Difficulties arose because of the number of additional hours the respondent was required to work. He resigned on 6 April 2001 in circumstances which he claimed amounted to a constructive dismissal.

[4] Application was made to the Employment Tribunal on 8 June 2001. The qualifying period for an ordinary claim for unfair dismissal had not been served but it was claimed that the respondent's health and safety was being put in peril by the requirement to work long hours and a claim could be brought because the respondent was asserting a right under the Working Time Regulations 1998, SI 1998/1833. It would be necessary for the Employment Tribunal to make findings of fact on this issue. The EAT dismissed a cross-appeal by the present appellants that the health and safety issue had not been raised before the Employment Tribunal.

[5] The issue of jurisdiction does not turn upon the precise status of Ascension Island, a small island in the South Atlantic Ocean, but it may be described briefly. It is a dependency of St Helena, which is an overseas territory of the United Kingdom. St Helena has a legislative council. Legislative power over its dependencies is vested in its governor. If there is no inconsistency with local law, and subject to local circumstances, the law of England will apply.

[6] Elaborate arguments have been addressed to tribunals in this and other cases where the jurisdictional issue has arisen. A jurisdictional test was formerly provided in s 196 of the Employment Rights Act 1996. Sub-section (2) provided that ss 94 and 95, amongst other sections, did not apply to employment 'where under the employee's contract of employment he ordinarily works outside Great Britain'. The statutory provisions which originally conferred the right of action for unfair dismissal, s 22 of the Industrial Relations Act 1971, and para 9(2) of Sch 1 to the Trade Union and Labour Relations Act 1974, provided that the right did not apply to any employment 'where under the contract of employment the employee ordinarily works outside Great Britain'. Section 196 of the 1996 Act was repealed by s 32(3) of the Employment Relations Act 1999 with effect from 25 October 1999. Claims have since been brought, in a variety of circumstances,

a by employees engaged in work wholly or mainly outside Great Britain, by which expression we refer to England and Wales, and Scotland.

[7] Tests have been suggested as substitutes for the former test under s 196. These have included a sufficient or substantial connection test, a 'base' test, a 'territorial extent' test based on s 244 of the 1996 Act and the test favoured by the EAT in the present case which provides no fetter on jurisdiction where the claim is brought against an employer who resides or carries on business in England and Wales. That limit is supplied, it is contended, by reg 11(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 which defines the proceedings in which the rules shall apply. The EAT stated, at para 17, that 'in all cases it is the proximity of the respondent to the United Kingdom that provides the yardstick for determining jurisdiction'.

c [8] In our judgment, consideration of this issue must start with the section in the 1996 Act creating the statutory right relied on. This case is concerned with the statutory right in s 94(1) of the 1996 Act not to be unfairly dismissed. Section 94(1) provides that 'an employee, has the right not to be unfairly dismissed by his employer'. The question is: what are the employments covered by the section? The answer, in our judgment, is straightforward though it may be difficult to apply in some cases: employment in Great Britain. It is necessary to consider the several factors which have led us to that conclusion.

d [9] We start on the basis that it is highly unlikely that Parliament intended to give this statutory right to all employees wherever they worked, subject to being able to serve proceedings on an employer in Great Britain. Far from it being inevitable that the repeal of s 196 produced that result, as found by the EAT, it would be necessary to find the plainest indications in the legislation, without s 196, before it could be concluded that Parliament intended to confer such a wide jurisdiction upon a domestic tribunal.

e [10] Two possible reasons for the repeal of s 196 are evident from the legal context of the 1999 Act. They are obvious without reference to, though confirmed by, a statement of the Minister of State in the House of Commons when introducing the amendment to the Employment Relations Bill which led to the repeal of s 196. The reasons are, first to meet the requirements of Council Directive (EC) 96/71 (the posting of workers Directive) (OJ 1997 L18 p1), and, second, an intention to mitigate the effect of the decision of this court in *Carver (née Mascarenhas) v Saudi Arabian Airlines* [1999] 3 All ER 61, [1999] ICR 991, to which case reference will be made.

f [11] An examination of the 1996 Act as a whole does not support the startling proposition that, in the absence of the former s 196, s 94(1) confers the right not to be unfairly dismissed on employees everywhere. As Brett LJ stated in *Re Sawers, ex p Blain* (1879) 12 Ch D 522 at 528, [1874–80] All ER Rep 708 at 711: 'the governing principle is that all legislation is prima facie territorial', although the position of British subjects was more broadly stated in that case, Cotton LJ stating that 'all laws of the English Parliament must be territorial—territorial in this sense, that they apply to and bind all subjects of the Crown who come within the fair interpretation of them ...' (see (1879) 12 Ch D 522 at 531, [1874–80] All ER Rep 708 at 713)).

g [12] In *Tomalin v Pearson (S) & Son Ltd* [1909] 2 KB 61 it was held that the Workmen's Compensation Act 1906 did not apply to an accident happening abroad. It was held that, subject to exceptions provided in the 1906 Act, including in s 7, it did not apply to an accident beyond the territorial limits of the United Kingdom. Cozens-Hardy MR stated ([1909] 2 KB 61 at at 865–866):

'What is the widow's claim here? She is claiming, not as a party to the contract, not as claiming any rights under a contract made by her or by any person through whom she claims, but she is simply claiming the performance by the defendants of a statutory duty, which statutory duty is said to be found in the Workmen's Compensation Act. Now that brings us face to face with this proposition. What is the ambit of the statute and what is the scope of its operation? It seems to me reasonably plain that this is a case to which the presumption which is referred to in *Maxwell on the Interpretation of Statutes* in the passage at p. 213 ... must apply: "In the absence of an intention clearly expressed or to be inferred from its language, or from the object or subject-matter or history of the enactment, the presumption is that Parliament does not design its statutes to operate beyond the territorial limits of the United Kingdom."

[13] Farwell LJ stated ([1909] 2 KB 61 at 65):

'The question is one purely of the construction of the statute. The words of s. 1, sub-s. 1, are so wide that some limitation must necessarily be affixed to them. The words are, "If in any employment personal injury by accident arising out of and in the course of the employment is caused to any workman," and so on. To my mind the words "any employment" there must be restricted to employment within the ambit of the United Kingdom or on the high seas as provided by s. 7.'

[14] Section 244(1) of the 1996 Act provides: '... this Act extends to England and Wales and Scotland but not to Northern Ireland.'

[15] We do not accept the submission made by Mr Suter, on behalf of the appellants, that the territorial limitation in s 244 concludes the present issue. That section defines the area within which the enactment is law, the first question, but does not define the persons and matters in relation to which the statute operates, the second question. The question to be decided is: on what employees does the law of England and Wales confer the right not to be unfairly dismissed? The distinction is illustrated by an example given by Mr Moffett, on behalf of the interested party, in a very different context. Section 10(4) of the Sex Offenders Act 1997 provides that the Act 'extends to England and Wales and Northern Ireland', the first question, but s 7(1) provides that certain acts 'done by a person in a country or a territory outside the United Kingdom ... shall constitute [a] sexual offence under the law of [the relevant] part of the United Kingdom', the second question.

[16] The general principle is that 'an enactment applies to all persons and matters within the territory to which it extends, but not to any other persons or matters' (*Bennion on Statutory Interpretation* (4th edn, 2002) p 306). In *Clark v Oceanic Contractors Inc* [1983] 1 All ER 133 at 144, [1983] 2 AC 130 at 152, in the context of a tax statute, Lord Wilberforce considered the scope of the territorial principle. He stated:

'That principle, which is really a rule of construction of statutes expressed in general terms, and which, as James LJ said is a "broad principle", requires an inquiry to be made as to the persons with respect to whom Parliament is presumed, in the particular case, to be legislating. Who, it is to be asked, is within the legislative grasp or intendment, of the statute under consideration?'

a The question of comity, in its usual form, does not arise because, on the respondent's case, the powers of courts in other jurisdictions would not be affected by the grant of rights in this jurisdiction. The power to claim here does not purport to conclude the right to claim elsewhere.

[17] Far from supporting the proposition that the legislature was granting a right to employees everywhere to bring a claim in this jurisdiction, provided the employer was within the jurisdiction, there are several indications that the 1996 Act is to apply only to employment in Great Britain: (a) Section 201 confers a power to extend the provisions of the Act to offshore employment 'even where' such application may affect the employee's activities outside the United Kingdom (s 201(3)(b)). (b) Section 215 provides that, for the purpose of calculating periods of continuous employment, account is to be taken of a period of employment 'even where' during that period the employee was engaged in work wholly or mainly outside Great Britain. (c) When s 196 was repealed, provisions in it relating to mariners were in substance re-enacted in s 199(7) making it possible for mariners, provided the criteria specified in s 199(7) are met, to claim under s 94(1) of the 1996 Act even though their employment is mainly outside Great Britain. These provisions would be unnecessary if the statute otherwise covered employment outside Great Britain, provided the employer was within the jurisdiction.

[18] The provision in s 204(1) that it is immaterial whether the law which governs the contract of employment is the law of the United Kingdom, or a part of the United Kingdom or not, is not inconsistent with the conclusion that the 1996 Act applies only to employment in Great Britain. Protection covering employment in Great Britain is not to be defeated by a choice of a law other than that of the jurisdiction.

[19] For the respondent, Mr Algazy relies on the Rome Convention on the Law Applicable to Contractual Obligations 1980, as enacted in the law of England and Wales as Sch 1 to the Contracts (Applicable Law) Act 1990. He does so only as a means of undermining any argument that the law of the forum may be defeated by the choice by the parties of another law and the relevance of the convention does not extend beyond establishing that proposition. Mr Algazy accepts that the convention does not assist in the construction of the 1996 Act. Section 204(1) of the 1996 Act and the 2001 Regulations are consistent in this respect with the requirement of the convention. The right to bring a claim for unfair dismissal in Great Britain cannot be defeated by a choice of law other than that of a part of Great Britain. On the question whether it is only to an employment in Great Britain that the right to claim for unfair dismissal attaches, the convention is not material.

[20] Reference was made in argument to the Directive concerning the posting of workers in the framework of the provision of services. In art 2 of the Directive, it is provided that "posted worker" means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works'. Article 3 of the Directive requires member states to provide protection, with respect to a variety of matters arising out of the employment relationship, to workers posted to their territory. Article 6 provides:

'In order to enforce the right to the terms and conditions of employment guaranteed in Article 3, judicial proceedings may be instituted in the Member State in whose territory the worker is or was posted, without

prejudice, where applicable, to the right, under existing international conventions on jurisdiction, to institute proceedings in another State.' a

[21] The requirement to implement the Directive was undoubtedly a factor in the decision to repeal s 196 of the 1996 Act, which was inconsistent with the provisions of the Directive. The requirement that the right to claim for unfair dismissal did not apply to employment where 'under the employee's contract of employment he ordinarily works outside Great Britain' would not have provided that protection for workers posted to Great Britain required by the Directive. It does not throw light, directly, on the rights in the courts of Great Britain of employees who are not posted workers. Assuming that effect is given to the Directive in other member states, a British worker posted to one of those states will acquire employment rights there but that does not necessarily eliminate his rights within this jurisdiction. The Directive does, however, demonstrate the need for a degree of flexibility in the application of employment law as between jurisdictions following the increased movement on a temporary basis of labour between jurisdictions within the European Community. b c

[22] We are in no doubt that the Employment Tribunal had no jurisdiction to consider a claim for unfair dismissal by the respondent. On the evidence, he was not employed in Great Britain within the meaning of s 94(1) of the 1996 Act. He was employed on Ascension Island, however strong were his and his employers' British connection. The test applied by the EAT is not the correct one. Save where there is express provision to the contrary, the 1996 Act covers employment in Great Britain. That is its 'legislative grasp'. d e

[23] The question has been approached in different ways by differently constituted EATs and tribunals and it is necessary to address the question further, at least to state that it follows that we do not accept that jurisdiction is determined by the rules of procedure. Neither do we accept the 'substantial connection' test adopted by the EAT in *Bishop v Financial Times Ltd* [2003] All ER (D) 359 (Nov), Judge Burke QC presiding. In a judgment delivered on 25 November 2003, Judge Burke stated (at [72]–[73]): f

'In our view the repeal of section 196(2) cannot be taken to have had the effect that employees who had or whose employment had a substantial connection with Great Britain should not be entitled to the rights conferred by the [1996 Act] and the ability to assert those rights against their employer in the Employment Tribunal. While the Court of Appeal in *Paramount* did not limit the relevant jurisdiction by a sufficient or a substantial connection test, it achieved that result by treating the presumption as rebutted but the operation of the broad jurisdiction thus arising as limited by a sufficient connection test upon the basis of which the courts would exercise its discretion. In our judgment, it being accepted that the presumption does not apply in full to the applicability of the rights provided by the [1996 Act] but that those rights are not to be regarded as provided to the whole world without restriction, the correct analysis in the present case, as the Employment Appeal Tribunal decided in *Jackson*, is that the presumption is rebutted but that there is an implied restriction of the applicability of the rights provided by the [1996 Act] to cases in which there is a sufficient or substantial connection with the United Kingdom and that there is to be found the limit for which the parties and we have been seeking. Such a test would involve consideration of all factors surrounding the employment, including the place of employment, the residence of the employer and the g h j

a employee, and matters of that kind—but not the proper law of a contract (section 204 of the [1996 Act]. It will be for Tribunals in individual cases to consider the facts as a whole and weigh them so as to decide whether there was or was not the requisite connection with the United Kingdom.’

b [24] A similar approach had been adopted by the EAT in *Jackson v Ghost Ltd* [2003] IRLR 824 at [85], Judge Peter Clark presiding, where, rejecting an employee’s right to claim for unfair dismissal, it was stated that the employment must have ‘a sufficient, that is substantial connection with this country’. The 1996 Act does not in our view permit the adoption of the sufficient connection test considered by Sir Donald Nicholls V-C in *Re Paramount Airways Ltd* [1992] 3 All ER 1 at 11–12, [1993] Ch 223 at 239–240 in the quite different circumstances of jurisdiction in bankruptcy.

c [25] For the interested party, Mr Moffett proposes a reversion to the ‘base’ test advocated by Lord Denning MR in *Todd v British Midland Airways* [1978] ICR 959 at 964–965. Lord Denning stated:

d ‘The “base” test, if I may say so, is a good sensible way of overcoming the literal meaning of the words “ordinarily working” in the statute. It affords good guidelines for the tribunals which have to deal with so many of these cases. A man’s base is the place where he should be regarded as ordinarily working, even though he may spend days, weeks or months working overseas. I would only make this suggestion. I do not think the terms of the contract help much in these cases. As a rule, there is no term in the contract about exactly where he is to work. You have to go by the conduct of the parties and the way they have been operating the contract. You have to find at the material time where the man is based.’

e [26] *Todd* was distinguished in *Carver (née Mascarenhas) v Saudi Arabian Airlines* f [1999] 3 All ER 61, [1999] ICR 991 on the basis that the test as stated failed to have regard to the words ‘under the employee’s contract of employment’ in s 196(2) of the 1996 Act. It was held that the question raised by s 196(2) had to be determined by reference to the position as it appeared at the date of the contract from the relevant terms of the contract of employment, expressed or implied. We accept that the wording of the section, as construed in *Carver*, and the resulting exclusion from protection of employees who may have worked for some years in Great Britain, contributed to the decision to repeal the section.

g [27] Mr Moffett submits that, upon the repeal of s 196, a reversion to the ‘base’ test is appropriate. We do not accept that submission. The test was irrevocably linked to the wording of s 196, and earlier legislation, and the concept of h ‘ordinarily working’. It is not appropriate to a statutory regime which does not include the section. Nor does it comply with the test as now enacted, that is, whether the employment is in Great Britain, though the location of the employee’s base may throw some light on where the employment is.

j [28] We accept the need for a degree of flexibility in applying the test. The posting of workers Directive provides protection in a jurisdiction visited. Protection in a jurisdiction from which there is a temporary absence is not necessarily excluded and the existence of the Directive points to the need for a degree of flexibility in deciding where the employment is. A dismissal during a single, short absence from Great Britain, for example, would not normally exclude the protection of the 1996 Act. In most cases it will not be difficult to decide whether the employment is in Great Britain; borderline cases will depend

on an assessment of all the circumstances of the employment in the particular case. The residence of the parties may be relevant to where the employment is, but the emphasis must be upon the employment itself. That, we repeat, is the 'legislative grasp' of the 1996 Act. a

[29] This case is concerned with the statutory right not to be unfairly dismissed. Different considerations will apply when contractual claims, for example for wrongful dismissal, are to be determined. Upon a contractual claim, the power to stay may arise, but we see no need to consider that point in the present case. b

[30] We allow the appeal and dismiss the claim.

Appeal allowed.

Kate O'Hanlon Barrister. c

a **R (on the application of Green) v Police
Complaints Authority**
[2004] UKHL 6

b **HOUSE OF LORDS**

LORD BINGHAM OF CORNHILL, LORD HOFFMANN, LORD SCOTT OF FOSCOTE, LORD
RODGER OF EARLSFERRY AND LORD CARSWELL

19–21 JANUARY, 26 FEBRUARY 2004

- c *Police – Complaint against police – Investigation – Police Complaints Authority –
Discharge of functions of authority – Statements taken by police in statutory
investigation into complaint by member of public – Member of public seeking disclosure
of statements – Whether disclosure necessary for proper discharge of functions of
authority – Whether prohibition of inhuman or degrading treatment necessitating
disclosure – European Convention for the Protection of Human Rights and
d Fundamental Freedoms 1950, art 3 – Police Act 1996, s 80(1)(a).*

The claimant lodged a complaint alleging that he had been deliberately knocked
down by a police officer driving an unmarked police car. As was required by the
Police Act 1996 where the conduct complained of had caused serious injury, the chief
e constable referred the complaint to the police complaints authority. The authority
supervised the investigation of the complaint by another police force. The
investigating officer produced an interim report, following which the officer
concerned was charged with driving without due care and attention. He later
pleaded guilty to the offence. A final report was submitted to the authority
f together with a substantial amount of supporting information. The chief
constable informed the authority that it was not proposed to bring any
disciplinary proceedings against any officer in relation to the incident. The
authority then had to consider whether to recommend that the chief constable
should bring such proceedings. It decided against so recommending, but
g following a complaint from the claimant, after he received the decision letter,
about the basis on which that decision had been reached, the authority agreed to
conduct a full review of the claimant's case and to make a fresh decision. The
authority wrote to the claimant saying that it would look afresh at all the evidence
in the case and invited him to submit any further evidence. At the claimant's
request, in order to allow him to consider what further evidence to submit, the
h authority sent a list of all the witness statements and documents that it would be
taking into account. The claimant asked for disclosure of everything in the list.
The authority replied that it was unable to accede to that request as s 80^a of the
1996 Act prohibited the disclosure of any information received by the authority
in connection with its functions (but with certain specified exceptions), and the
relevant exception in s 80(1)(a), did not apply, as the disclosure was not necessary
j 'for the proper discharge of the functions of the authority'. The claimant applied
for judicial review. The judge ordered disclosure of certain material, but that
decision was reversed by the Court of Appeal. The claimant appealed,
submitting that he was entitled to disclosure under the statutory scheme

a Section 80, so far as material, is set out at [37], below

established by the 1996 Act, and pursuant, inter alia, to art 3^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which prohibited inhuman or degrading treatment. a

Held – (1) The main aim of the authority in carrying out its functions in supervising the police investigation of alleged misconduct on the part of police officers was to satisfy the legitimate interests both of complainants and of the wider public that the investigation of complaints, and any decisions on taking disciplinary proceedings should be, and should be seen to be, independent and thorough. In the proper discharge of its functions, the authority might judge that it was necessary to disclose certain information derived from an investigation to claimants if their legitimate interests and those of the wider public were to be met. However, the purposes of the legislation would not be served by disclosure of as much information as possible while the investigation was going on, and nothing in the scheme of the act suggested that the authority should do so (see [1]–[3], [16], [40], [53], [54], [56], [76], below). b

(2) Article 3 of the convention required that the degree of involvement of a claimant in the investigation be sufficient to safeguard his legitimate interests. In the instant case the claimant's particular status and legitimate interests as a complainant had been recognised and safeguarded by his involvement at many stages of the investigation. It followed that the authority had been entitled to take the view that, in terms of s 80(1)(a) of the 1996 Act, disclosure of the witness statements and other material sought by the claimant was not necessary for the proper discharge of its functions. Accordingly, the appeal would be dismissed (see [1]–[3], [63], [67], [68], [75], [76], [86], below); dicta of Lord Bingham of Cornhill in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] 4 All ER 1264 at [20] considered. c

Notes d

For restriction on disclosure of information, and for the prohibition of torture; inhuman and degrading treatment or punishment see, respectively 36(1) *Halsbury's Laws* (4th edn reissue) para 470 and 8(2) *Halsbury's Laws* (4th edn reissue) para 124. e

For the Police Act 1996, s 80(1)(a), see 33 *Halsbury's Statutes* (4th edn) (2003 reissue) 1359. f

Cases referred to in opinions g

Assenov v Bulgaria (1999) 28 EHRR 652, [1998] ECHR 24760/94, ECt HR.

Edwards v UK, (2002) 12 BHRC 190 ECt HR.

Jordan v UK (2001) 11 BHRC 1, ECt HR. h

McCann v UK (1996) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR.

R (on the application of Amin) v Secretary of State for the Home Dept [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169.

Cases referred to in list of authorities

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL. j

A-G's Ref (No 1 of 1990) [1992] 3 All ER 169, [1992] 1 QB 630, [1992] 3 WLR 9, CA.

^b Article 3, so far as material, provides: 'No one shall be subjected to ... inhuman or degrading treatment ...'

- a* *Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, [1994] 1 AC 531, [1993] 3 WLR 154, HL.
- Frankson v Home Office, Johns v Home Office* [2003] EWCA Civ 655, [2003] 1 WLR 1953.
- Gül v Turkey* (2002) 34 EHRR 719, [2000] ECHR 22676/93, ECt HR.
- H (minors) (sexual abuse: standard of proof), Re* [1996] 1 All ER 1, [1996] AC 563, [1996] 2 WLR 8, HL.
- b* *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473, [1995] 1 WLR 804.
- Marcel v Comr of Police of the Metropolis* [1992] 1 All ER 72, [1992] Ch 225, [1992] 2 WLR 50, CA.
- Ogur v Turkey* (2001) 31 EHRR 912, [1999] ECHR 21594/93, ECt HR.
- c* *R (on the application of Bennion) v Chief Constable of Merseyside Police* [2001] EWCA Civ 638, [2001] IRLR 442, [2002] ICR 136.
- R (on the application of Boot) v DPP* [2001] EWHC Admin 982.
- R (on the application of Ebrahim) v Feltham Magistrates' Court, Mouat v DPP* [2001] EWHC Admin 130, [2001] 1 All ER 831, [2001] 1 WLR 1293.
- d* *R v Arif* (1993) Times, 17 June, CA.
- R v Bass* [1953] 1 All ER 1064, [1953] 1 QB 680, [1953] 2 WLR 825, CA.
- R v Chief Constable of West Midlands Police, ex p Wiley, R v Chief Constable of Nottinghamshire Constabulary, ex p Sunderland* [1994] 3 All ER 420, [1995] 1 AC 274, [1994] 3 WLR 433, HL.
- R v Criminal Injuries Compensation Authority, ex p Leatherland* [2001] ACD 76.
- e* *R v Derby Crown Court, ex p Brooks* (1985) 80 Cr App R 164, DC.
- R v Looseley, A-G's Ref (No 3 of 2000)* [2001] UKHL 53, [2001] 4 All ER 897, [2001] 1 WLR 2060.
- R v Metropolitan Police Comr, ex p Blackburn* [1968] 1 All ER 763, [1968] 2 QB 118, [1968] 2 WLR 893, CA.
- f* *R v Richardson* [1971] 2 All ER 773, [1971] 2 QB 484, [1971] 2 WLR 889, CA.
- R v Roberts* (1998) 162 JP 691, CA.
- R v Secretary of State for the Home Dept, ex p Hickey (No 2)* [1995] 1 All ER 490, [1995] 1 WLR 734, DC.
- R v Shannon* [2001] 1 WLR 51, CA.
- g* *R v Skinner* (1994) 99 Cr App R 212, CA.
- R v Smith* [1968] 2 All ER 115, [1968] 1 WLR 636, CA.
- Taylor v Anderton (Police Complaints Authority intervening)* [1995] 2 All ER 420, [1995] 1 WLR 447, CA.
- Taylor v Serious Fraud Office* [1998] 4 All ER 801, [1999] 2 AC 177, [1998] 3 WLR 1040, HL.
- h*

Appeal

- j* The claimant Anthony Lloyd Green appealed, with permission given by the Appeal Committee of the House of Lords on 17 December 2002, from the decision of the Court of Appeal (Simon Brown, Chadwick and Hale LJ) on 26 March 2002 ([2002] EWCA Civ 389, [2002] UKHRR 985) allowing the appeal of the Police Complaints Authority from the decision of Moses J on 21 December 2001 ([2001] EWHC Admin 1160, [2002] UKHRR 293) granting the claimant's application for judicial review of the authority's decision contained in a letter dated 3 April 2001. The Secretary of State for the Home Department, the Chief Constable of South Yorkshire Police, and Det Sgt Andrew Lawrence appeared as interested parties.

The Crown Prosecution Service made written submissions. The facts are set out in the opinion of Lord Rodger of Earlsferry.

Richard Gordon QC and *Stephen Cragg* (instructed by *Howells*, Sheffield) for the appellant.

Stuart Catchpole QC and *Steven Kovats* (instructed by the *Treasury Solicitor*) for the authority.

Mark Shaw QC (instructed by the *Treasury Solicitor*) for the Secretary of State.

Robert Smith QC and *David Jones* (instructed by the *Dr T Searl*, Sheffield) for the chief constable.

Michael Harrison QC and *Nicholas Johnson* (instructed by *Russell Jones and Walker*, Wakefield) for Det Sgt Lawrence.

Their Lordships took time for consideration.

26 February 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, for the reasons given by my noble and learned friend Lord Rodger of Earlsferry, which I have had the advantage of reading in draft, I agree that this appeal should be dismissed.

LORD HOFFMANN.

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Rodger of Earlsferry. For the reasons he has given, I too would dismiss this appeal.

LORD SCOTT OF FOSCOTE.

[3] My Lords, I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend Lord Rodger of Earlsferry and am in complete agreement with his analysis of the issue and with his reasons for concluding that this appeal should be dismissed. Having regard, however, to the manner in which the case for the appellant was put to your Lordships I wish to add a few supplemental remarks.

[4] The appeal arises out of a complaint by the appellant, Mr Green, of serious police misconduct. The complaint, pursuant to the statutory scheme prescribed by the Police Act 1996 and the regulations made thereunder, was investigated by a member of a police force other than that to which the officers complained about belonged and the investigation was supervised by the Police Complaints Authority (the authority).

[5] The important features of the authority's supervisory role are, in my opinion, for present purposes, the following. (1) The authority has power to ensure that a suitable officer conducts the investigation (see s 72(3)(b) of the 1996 Act). No suggestion has been made that the officer appointed to investigate Mr Green's complaint was not suitable. (2) At the end of the investigation, when the investigating officer has sent his report to the chief officer of the police force to which the officers complained about belong and a copy of the report has been sent to the authority, the authority must make a statement stating whether the investigation has been properly conducted and, if they think the investigation has not been properly conducted, identifying the defects (s 73(2) and (9)). On

a 10 January 2000, the investigation having commenced in June 1999, the authority issued a statement that the investigation of Mr Green's complaint had been carried out to its satisfaction. A copy of the statement was sent to the appellant. There has been no challenge to this statement. (3) The authority has no power over decisions, taken in the light of the investigating officer's report, as to what, if any, criminal proceedings an officer complained about should face. This is a matter for the prosecuting authorities (ss 73(1)(b), (2) and 75(2), (3)). In the event, the prosecuting authorities decided to charge Det Sgt Lawrence with driving without due care and attention. He pleaded guilty by post and was fined £250 plus costs. His driving licence was endorsed with five points. (4) The authority has power to recommend, and, if necessary, to insist, that disciplinary proceedings be brought against an officer complained about (s 76). In the present case the authority decided not to recommend that disciplinary proceedings be taken against Det Sgt Lawrence. Following a complaint by Mr Green about the basis on which that decision had been reached the authority agreed to review the case again and reach a fresh decision.

d [6] Before reaching its fresh decision as to whether or not to recommend disciplinary proceedings against Det Sgt Lawrence, the authority invited Mr Green to send them any additional evidence or any additional representations he wanted them to take into account. The appellant contends that before responding to this invitation he is entitled to disclosure of the witness statements and other documentary evidence held by the authority. The witness statements and documents constitute the evidential material collected by the investigating officer in the course of his investigation and supplied by him to the authority.

f [7] Mr Gordon QC, counsel for the appellant, put the case for disclosure of this material on two connected grounds. First he submitted that Mr Green was entitled to disclosure under the statutory scheme established by the 1996 Act and the regulations made thereunder. As to that, there is nothing I can usefully add to the reasons given by Lord Rodger for concluding that s 80 stands immovably in Mr Green's path. Disclosure to Mr Green is not necessary for any of the functions of the authority.

g [8] But, secondly, Mr Gordon submitted that the appellant had the right to disclosure of the material pursuant to arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969).

h [9] I would agree with counsel that the nature of the complaint against Det Sgt Lawrence did engage arts 2 and 3. Mr Green was alleging that Det Sgt Lawrence had driven the car into him deliberately. He said it had been an attempt by Det Sgt Lawrence to kill him. If Mr Green had been killed by the collision with the car and it had been the case that the fatal collision had been deliberately brought about by Det Sgt Lawrence, there can be no doubt but that art 2 would have been engaged. It would have been incumbent on the state to conduct a 'thorough, impartial and careful examination of the circumstances surrounding the [killing]' (see *McCann v UK* (1996) 21 EHRR 97 at 164 (para 163)). A no less thorough, impartial and careful examination would be required in the case of an allegation of an attempted killing by a police officer while on duty.

j [10] Further, if a police officer while on duty were to drive a car at someone with the intention of inflicting serious physical injury, such as the fractured femur that Mr Green sustained, the infliction of the injury could, in my opinion,

reasonably be represented as constituting inhuman treatment for art 3 purposes. But in the absence of the requisite intention, art 3 would not, in my opinion, be engaged. There is a clear difference between using a vehicle as a tool by means of which to inflict serious injury and carelessly, or even recklessly, using a vehicle with the unintended consequence that serious injury is caused. Conduct of the latter sort might constitute a serious criminal offence under domestic law but it would not, in my opinion, engage art 3. a

[11] It is clear, therefore, that Mr Green's allegation that Det Sgt Lawrence drove the car at him deliberately in order to kill or seriously to injure him did engage arts 2 and 3 and did require a thorough, impartial and careful investigation by a suitable and independent state authority (see *Asenov v Bulgaria* (1999) 28 EHRR 652 at 701 (para 102)). b

[12] The investigation of a complaint of serious police misconduct carried out by a suitable member of a police force other than that of which the officer complained about is a member, and with the investigation supervised, in the manner provided for by the 1996 Act, by the authority constitutes an investigative structure that complies, in my opinion, with the requirements of the convention. And a statement by the authority at the end of the investigation certifying that the investigation has been properly conducted shows, in my opinion, unless the statement can be impugned, that the obligation for the state to subject the allegation to a thorough, impartial and careful investigation has been discharged. c

[13] In the present case the investigation and the investigating officer's report led to the levelling of criminal charges against Det Sgt Lawrence no more serious than driving without due care and attention. An injury, notwithstanding its serious nature, inflicted by a police officer driving without due care and attention would not begin to engage either arts 2 or 3. Both are directed at conduct very far removed from relatively minor driving offences. d

[14] So, unless the appellant could challenge the conduct of the investigation, arts 2 and 3 should have had no further relevance. The authority, a body accepted as being independent of the police, expressed its satisfaction with the conduct of the investigation. Mr Green has not challenged that decision of the authority. Articles 2 and 3 ought, in my view, to have played no further part. e

[15] The judicial review proceedings that have now found their way to this House relate to the only outstanding decision that the authority has still to reach, namely, a decision as to whether to recommend disciplinary proceedings against the police officers about whom Mr Green complained, in particular Det Sgt Lawrence. The properly conducted investigation into their conduct has already taken place and has led to no more than a driving without due care and attention charge against Det Sgt Lawrence. Articles 2 and 3 have, in my opinion, no possible relevance to the authority's decision about disciplinary charges. f

[16] The only point for the House is a very narrow one, namely, whether Mr Green's disclosure request can find its way around the block presented by s 80. In my opinion, for the reasons given by Lord Rodger, it cannot. I, too, would dismiss this appeal. g

LORD RODGER OF EARLSFERRY. h

[17] My Lords, in the early evening of 7 April 1999 police officers were carrying out a surveillance operation in relation to a property in Catherine Road, Sheffield. In the course of that operation Detective Sergeant Lawrence, who was a member j

a of the South Yorkshire Police, was driving an unmarked police car. The appellant, Mr Anthony Lloyd Green, rode his cycle along Catherine Road. Det Sgt Lawrence in the police car pursued him from there into Bressingham Road where the car collided with the appellant's bicycle. The appellant was knocked off but got up and ran off. The car then collided with the appellant and ran over his legs. The appellant suffered injuries, including a fractured femur.

b THE HISTORY OF THE APPELLANT'S COMPLAINT

[18] On 4 May 1999 the appellant lodged a complaint against the police, alleging that he was 'deliberately knocked down by the police car'. The Chief Constable of South Yorkshire Police (the chief constable) asked for an officer from a separate force, the West Yorkshire Police, to investigate the complaint. Since the appellant had suffered 'serious injury' as a result of Det Sgt Lawrence's conduct, in accordance with s 70(1)(a)(i) of the Police Act 1996 the chief constable referred the appellant's complaint to the Police Complaints Authority (the authority). As required by s 72(1) of the 1996 Act, the authority then supervised the investigation of the complaint by the West Yorkshire force. In particular, in exercise of their powers under s 72(3) the authority approved the choice of the investigating officer from the West Yorkshire force.

[19] The investigating officer proceeded to investigate the complaint. As part of that investigation, on 10 June 1999 the appellant made a statement about his complaint. In it he complained about the conduct of a number of officers in connection with the incident and its aftermath. These additional allegations were included in the investigation. On 6 October 1999 the appellant and his solicitor viewed a video recording of the incident made from a police helicopter—indeed they saw it several times. After that the appellant made a further statement to the investigating officers which concluded: 'Having seen the video, it looks like the officers were trying to kill me.'

[20] Because of the six-month time limit in s 6 of the Road Traffic Offenders Act 1988 for bringing summary proceedings, the investigating officer provided an interim report on which the Director of Public Prosecutions could, if so advised, arrange for proceedings under the Road Traffic Act 1988 to be started in due time. The Director of Public Prosecutions in fact decided to bring proceedings against Det Sgt Lawrence for driving without due care and attention in contravention of s 3. Under s 73(7) and (8) of the 1996 Act the Director of Public Prosecutions could, exceptionally, bring these proceedings before the authority had submitted an 'appropriate statement' in terms of s 73(2).

[21] On 15 November 1999 in terms of s 73(1) the investigating officer submitted his final report to the authority and sent a copy to the chief constable. It included 24 statements and 23 other documents and exhibits, including video evidence and copies of tape-recorded interviews with the officers concerned.

[22] On 10 January 2000 in terms of s 73(2) the authority submitted a statement to the chief constable which concluded: 'The matter has been investigated to the satisfaction of the Police Complaints Authority.' A copy of the statement was sent to Det Sgt Lawrence and to the appellant in accordance with s 73(3) and (4). At the same time the appellant was told that, following the conclusion of any criminal matters, the chief constable would tell the authority whether it was proposed to charge any officer with a disciplinary offence. If the decision was not to do so and the authority disagreed, they would have power to

recommend or, if necessary, to direct the chief constable to bring a disciplinary charge. a

[23] On 10 March 2000 in the Sheffield Magistrates' Court, Det Sgt Lawrence pleaded guilty by letter to driving without due care and attention. In due course the magistrates fined him £250 and imposed five penalty points. He was ordered to pay £55 costs. A representative of the appellant's solicitor attended the hearing. If Det Sgt Lawrence had not pleaded guilty, the appellant would have been an important witness at any trial. It is equally clear that, if disciplinary proceedings were brought in relation to the incident, the appellant would be an important witness. b

[24] The chief constable then informed the authority that it was not proposed to bring disciplinary proceedings against any officer in relation to the incident or its aftermath. In terms of s 76(1) the authority had to consider, in particular, whether to recommend that the chief constable should bring such proceedings against Det Sgt Lawrence. On 5 September 2000 a member of the authority, Anne Boustred, wrote to the appellant to tell him that the authority did not intend to recommend disciplinary proceedings. Ms Boustred stated *inter alia* that, in the absence of any 'irrefutable' evidence of recklessness or intent on the part of Det Sgt Lawrence, she did not believe that a disciplinary hearing would find any more fault in the officer's conduct than did the trial. In their reply dated 13 September 2000 the appellant's solicitors pointed out that the authority member had misdirected herself in considering that the absence of 'irrefutable evidence' against Det Sgt Lawrence was a sufficient basis for deciding against disciplinary proceedings. c
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[25] On 22 September the authority member issued a fresh letter, this time simply saying that, 'in the absence of any evidence of recklessness or intent on the part of Det Sgt Lawrence', she did not believe that a disciplinary hearing would find any more fault than did the trial—ie than was involved in the plea accepted by the prosecution. On 23 November 2000 the appellant lodged a judicial review claim form challenging the authority's letters of 5 and 22 September 2000. On 14 December 2000 the authority filed an acknowledgment of service, accepting that the reference in the letter of 5 September to 'irrefutable evidence' had been an error and that the letter of 22 September had failed to make it sufficiently clear that the authority were directing themselves that the issue was whether there was a genuine prospect of a finding of misconduct which would go beyond a finding of careless driving. The acknowledgment of service went on to state: 'Accordingly, the [authority] intends to conduct a full review of [the appellant's] case and to make a fresh decision.' Thereafter on 25 January 2001, on the ground that the matter was now academic, Maurice Kay J refused permission. f
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[26] On 26 January 2001 Caroline Mitchell, another member of the authority, wrote to the appellant's solicitors to tell them that she had been 'appointed to conduct the review into the investigation of your client's complaints against officers of the South Yorkshire Police'. She indicated that, while she would 'look afresh at all the evidence in the case', she would 'confine [her] review to the conduct of Sgt Lawrence'. The letter gave the appellant the opportunity 'to submit any further evidence' within 14 days. On 31 January the appellant's solicitors replied and said that the review should not be confined to the conduct of Det Sgt Lawrence. They also said that, in order to consider what further evidence to submit, the appellant wanted to know what evidence the authority already had. h
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a [27] On 13 February 2001 Ms Mitchell stated that she was 'happy to review the entire case rather than confining the review to Sgt Lawrence'. She attached a schedule listing the statements and documents that she would be taking into account. On 26 February the appellant's solicitors wrote to Ms Mitchell asking her to 'disclose to us all the statements and documents in the list you sent to us so that we are in a position to make informed representations'. On 13 March she b replied, declining to disclose the statements and documents. She ended her letter by saying that if the appellant wished to submit any evidence to her, she would be pleased to receive it as soon as possible so that the review might be taken forward.

c [28] On 14 March 2001 the appellant and the authority signed a consent order withdrawing the judicial review proceedings 'upon the [authority] conducting a full review of [the appellant's] complaint and making a fresh decision in relation to the police complaint'.

d [29] On 23 March 2001 the appellant's solicitors wrote to Ms Mitchell noting that she was not willing to provide disclosure of any of the statements or documents. They went on to say that without disclosure they were not able to make informed e representations to her and that the appellant was therefore disadvantaged. They did not have copies of the correspondence with the Crown Prosecution Service and were therefore unable to make effective representations. Generally, they were not able to make informed representations based on the evidence. They believed that non-disclosure was in breach of arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1943); Cmd 8969). If they did not hear from Ms Mitchell by 30 March that disclosure would be forthcoming, they would advise their client to commence proceedings for judicial review.

f [30] On 3 April 2001 Ms Mitchell replied, indicating that the authority were unable to accede to the appellant's solicitors' request for disclosure and giving the reasons. In particular she said:

'Section 80 of the Police Act 1996 prevents the Authority disclosing any information received by the Authority in connection with its functions under Part IV of the 1996 Act. The information which you have requested is such g information. Section 80 sets out three exceptions where disclosure is permitted. The only one of the three that is presently relevant is s.80(1)(a). This permits disclosure "so far as may be necessary for the proper discharge of the functions of the Authority". The Authority does not consider in the h circumstances that disclosing to Mr Green the material that you seek is necessary for the proper discharge of its functions. Mr Green is the person who made the complaints and has himself made a statement for the purpose of the investigation of those complaints. He knows the identities of the persons whose statements have been received by the Authority. He and his legal representatives have seen the video of the incident, though they do not retain a copy. The Authority is satisfied that the material available to it (which includes evidence from Mr Green) does not contain anything on j which at present it requires Mr Green's representations in order for it to carry out its statutory functions. Mr Green remains free to submit to the Authority any further evidence which he wishes the Authority to consider, and I note in this connection the letter dated 5 March 2001 from Mr J. F. Watts enclosed with your letter of 23 March, which will of course receive consideration. The Authority recognises that Article 3 of the

European Convention on Human Rights requires a Contracting State to provide a thorough and effective investigation into serious injury caused by the use of force by officers of the State. It is the Authority's statutory function to ensure, as an independent body, that this happens. The Authority is satisfied that disclosing the material that you seek to Mr Green is not required in order for the United Kingdom to comply with its obligations under Article 3. The Authority is aware that Mr Green has either made or intimated a claim for compensation against South Yorkshire police. The determination of that claim, and of any civil proceedings that result from it, is a separate matter and has no bearing on the issues of disclosure under s.80(1)(a).'

The letter from Mr Watts, to which Ms Mitchell referred, related to events at the hospital to which the appellant was taken after the incident.

[31] The claim form in the present proceedings was issued on 25 April 2001 and challenged the decision in Ms Mitchell's letter of 3 April 2001 on behalf of the authority. In due course, after acknowledgments of service on behalf of the authority, the Home Secretary and Det Sgt Lawrence, Stanley Burnton J ordered an oral hearing of the application for permission. On 17 August 2001 the appellant amended the grounds in the claim form, but continued to challenge the same decision. On 19 December 2001 the oral permission hearing was listed before Moses J. At this stage the authority had filed no evidence. Without giving advance notice to the parties—but also without objection from them—Moses J proceeded to treat the hearing as both the application for permission and the substantive hearing. On 21 December he gave an extempore judgment ([2001] EWHC Admin 1160, [2002] UKHRR 293), ruling that the authority should disclose certain material. He gave the parties an opportunity to agree what documents should be disclosed to the appellant.

[32] On 11 January 2002 the authority filed a notice of appeal against the decision of Moses J. On 14 February 2002 the appellant and the authority signed a draft order agreeing that the authority would disclose to him the documents scheduled to the order. On 1 March 2002, accordingly, Moses J ordered the authority to disclose 28 witness statements, seven of them redacted, and 14 other documents, three of them redacted. The order was pronounced on the basis of an undertaking by counsel for the appellant that he would not disclose the material or information in the material, or cause or permit it to be disclosed, to any person other than his own counsel or firm of solicitors or the Crown Prosecution Service/Director of Public Prosecutions. In the event, however, only the video recording of the incident was actually handed over.

[33] At the hearing of the appeal the Court of Appeal had the benefit of certain additional evidence that had not been before Moses J. On 26 March 2002 the Court of Appeal allowed the authority's appeal ([2002] EWCA Civ 389, [2002] UKHRR 985). On 17 December 2002 your Lordships' House granted the appellant leave to appeal.

[34] In order to try to minimise any further delay in dealing with the appellant's complaint, however, the appellant and the authority agreed that the authority would begin their review. On 23 October 2003 the deputy chairman was able to inform the appellant's solicitors that Ms Katherine Reid, an authority member, had been asked to undertake the review and that the authority were waiting for the results of certain further work that they had commissioned. On 30 December 2003 Ms Reid sent a 12-page letter to the appellant setting out her provisional

a decision on the various aspects of his complaint. The letter goes into the relevant matters in very considerable detail, summarising key aspects of the evidence gathered in the original investigation. Ms Reid also makes reference to the report from the professional road traffic investigators commissioned by the authority to help them to assess the nature of Det Sgt Lawrence's driving for the purposes of deciding whether to recommend that disciplinary proceedings should be brought. On the basis of her detailed analysis of the evidence and a close scrutiny of the video, Ms Reid considers that there was a reasonable prospect of a disciplinary tribunal being satisfied to the relevant standard of proof that Det Sgt Lawrence's driving fell below the required standard. She reaches this conclusion on the basis of the existing evidence and there was nothing in the new independent report to cause her to alter this view. None the less, having regard to the passage of time since the incident, to the fact that Det Sgt Lawrence had been told of the original decision that he was not to face disciplinary proceedings, and to the availability of lesser, proportionate means of dealing with Det Sgt Lawrence's standard of driving, her provisional conclusion is that there should be no disciplinary proceedings against him. She adds that, if her involvement in the case had been at the material time in 2000, a different conclusion might have been reached.

[35] At the end of her letter Ms Reid told the appellant that he now had an opportunity to comment within 28 days on her provisional decision 'and to send any further information or evidence [he] may have'. She enclosed a reply form which set out the choices open to the appellant. The form asks the appellant to tick all the options that apply. The possible options are:

f 'I believe the Authority has made a mistake in law or reasoning. (Please enclose your written reasons.) I believe that the proposed action to deal with the officer is inappropriate. (Please enclose your written reasons.) I want to make other comments on the provisional decision. (Please enclose your comments.) I have new evidence that has not been considered, and I enclose copies. (Please set out what the evidence is, e.g. photos, medical evidence etc. Do not send originals. If you have items which are difficult to copy, such as photographs, videos or audio tapes, please respond within the time allowed, and the Authority will ask the force to make arrangements to collect the items from you and send us copies.)'

g Mr Gordon QC indicated that the appellant intended to take up the invitation to comment on the provisional decision.

[36] The present proceedings are not, of course, for review of this provisional decision but for review of the authority's decision of 3 April 2001 to refuse disclosure of the material sought by the appellant. Your Lordships were invited to look at the provisional decision letter, however, not just to show the stage which the authority's review of the appellant's complaint had reached but also as an illustration of the way the authority were now handling complaints involving a possible breach of art 2 or 3 of the convention. Mr Catchpole QC explained that the authority had previously been piloting a system of issuing provisional decisions in two police authority areas but, following on the decision of Moses J in these proceedings, they had decided to use it in all such cases.

SECTION 80 OF THE 1996 ACT

[37] The authority's decision of 3 April 2001 to refuse the appellant's request for disclosure took s 80(1)(a) of the 1996 Act as its starting point. For that reason s 80 is also the correct place to begin any review of that decision:

(1) No information received by the Authority in connection with any of their functions under sections 67 to 79 or regulations made by virtue of section 81 shall be disclosed by any person who is or has been a member, officer or servant of the Authority except—(a) to the Secretary of State or to a member, officer or servant of the Authority or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons, (b) for the purposes of any criminal, civil or disciplinary proceedings, or (c) in the form of a summary or other general statement made by the Authority which does not identify the person from whom the information was received or any person to whom it relates.

(2) Any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine of an amount not exceeding level 5 on the standard scale.'

[38] The section contains a general ban on members, officers or servants of the authority disclosing any information received by the authority and makes disclosure a criminal offence punishable with a fine. This is a somewhat unpromising starting point for identifying what Mr Gordon contended was a general duty on the authority to disclose information to complainants, such as the appellant, unless there were good reasons not to disclose the information. Indeed the section does not itself require the authority to disclose information in any circumstances. Rather, the three exceptions to the ban in sub-s (1) in effect permit the authority to disclose information in circumstances falling within the exceptions. The parties are agreed that, since the appellant seeks disclosure of statements from named witnesses, referring to named individuals and relating to Det Sgt Lawrence and other officers about whom the appellant has complained, the only conceivable basis for permitting that disclosure would be exception (a). That exception gives the authority power to disclose information when the disclosure is necessary for the proper discharge of their functions. In the present case, therefore, s 80(1)(a) permitted Ms Mitchell, as a member of the authority, to disclose the material to the appellant 'so far as', but only 'so far as', this was 'necessary for the proper discharge of the functions of the Authority'.

[39] Mr Gordon submitted that all the evidential material which the appellant sought should be disclosed; he did not differentiate among the items. The critical question is therefore whether disclosure of that material is 'necessary' for the 'proper' discharge of the authority's functions. If disclosure is necessary for that purpose, then a member of the authority not only can, but indeed must, make it; if it is not necessary, then she cannot lawfully make it and commits a criminal offence if she does. Mr Harrison QC for Det Sgt Lawrence described the authority as having a discretion whether to disclose information. But deciding whether the disclosure of information is necessary for the proper discharge of the authority's functions involves an exercise of judgment rather than an exercise of discretion. The authority member can only disclose information when in her judgment disclosure is necessary if the authority is to discharge their functions properly in the circumstances. In that event, she must disclose it. Obviously, not all members of the authority will reach the same judgment on this matter in every situation, but discussion, experience and training will doubtless help to

- a develop a common view. In the present case Ms Mitchell's judgment was that disclosure of the material sought by the appellant was not necessary for the proper discharge of the authority's functions in the circumstances. The authority have backed that judgment. The appellant challenges it on the ground that disclosure is necessary for the authority to discharge their functions compatibly with his convention rights. If he is right, and in the circumstances no reasonable
- b member of the authority could have thought that disclosure was unnecessary, then it follows that the material must be disclosed and the relevant member of the authority has the power to disclose it under s 80(1)(a).

THE AIMS OF THE AUTHORITY UNDER THE 1996 ACT

- c [40] Although the 1996 Act contains no general statement of the aims of the authority, they are by no means obscure. The police in this country are organised into various disciplined forces. Recruits go through a period of residential training, including a certain amount of drill. Police officers are promoted to various ranks with the power to give orders to more junior officers. Policemen and women regularly have to confront dangers and challenges that members of the public can avoid. They therefore enjoy special powers of restraint and are privy to information that is not available to the public but, above all, they have to be able to rely on the loyalty and help of their fellow officers. So members of a successful police force, like members of a successful unit in the armed forces, will be imbued with a certain esprit de corps. The flip side of these positive features is the risk that,
- d out of a misplaced sense of loyalty, officers may close ranks and condone, or turn a blind eye to, misconduct by a fellow officer, especially when the complaint is made by an outsider. In particular, complaints of misconduct may not be investigated thoroughly or objectively. To counteract these risks—which are evident not only to complainants but to the wider public—Parliament passed the legislation that now makes up Ch I of Pt IV of the 1996 Act. The provisions tackle the problem in two ways. First, they impose a series of duties on the chief constable and the police
- e officer appointed to carry out the investigation; secondly, they establish the authority and set out their functions. The main role of the authority is to supervise the police investigation of alleged misconduct on the part of police officers and to make sure that the investigation is independent and thorough. But, of course, there could still be a risk that, for much the same misguided reasons, no action would be
- f taken on the results of such an investigation. In the case of possible criminal conduct, that risk is met if the decision on criminal proceedings is taken by the independent Director of Public Prosecutions. That external independent check is not available with disciplinary proceedings. So Parliament gave the authority the right to recommend and, ultimately to insist, that such proceedings should be
- g brought, even against the views of the chief constable.
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THE SCHEME OF THE 1996 ACT

- j [41] The relevant provisions are to be found in Ch I of Pt IV of the 1996 Act. They are shortly to be superseded by Pt 2 of, and Sch 3 to, the Police Reform Act 2002. The scheme of the new legislation is, however, so different that counsel were agreed that, while it might show the state of Parliament's thinking about the issue of disclosure today, it does not assist in interpreting or applying the existing legislation.

[42] For present purposes the special provisions in the 1996 Act for handling complaints against senior officers can be left on one side. In other cases, the starting point is the duty of the chief constable, when a complaint is submitted,

to take steps for the purpose of obtaining or preserving evidence relating to the conduct complained of (see s 67(1)). This duty, which is given the highest priority, is plainly intended to prevent evidence being removed or destroyed. Thereafter under s 68(1) the chief constable must record the complaint—no mere formality, but a step that makes sure that the complaint is not ignored or concealed. Where the complaint cannot be resolved informally, it is the chief constable's duty to appoint a member of his own or of some other force to investigate it formally (see s 69(5) and (6)). The chief constable may refer any complaint to the authority but, if the complaint alleges *inter alia* that the conduct 'resulted in the death of, or serious injury to, some other person', then he must refer it (see s 70(1)(a) and (b)). For their part, the authority can require the chief constable to submit any complaint for their consideration (see s 70(2)).

[43] However the complaint comes to them under the 1996 Act, 'the Authority shall supervise the investigation' (see s 72(1)). Very importantly, when the authority are to supervise the investigation of a complaint, under s 72(3) they may require that the chief constable is not to appoint any officer from his own or any other force to investigate the complaint unless the authority have given notice that they have approved the appointment of that person. If an appointment has already been made, the authority may demand that another officer be appointed after approval by the authority. These powers should ensure that the investigating officer is not only truly independent but likely to pursue the investigation diligently.

[44] Once the investigating officer is appointed, it is up to him to investigate the complaint. The authority are not involved. But at the end of the investigation the investigating officer submits a report to the authority and sends a copy to the chief constable (see s 73(1)). After considering the report, under s 73(2) the authority must submit an appropriate statement about the investigation to the chief constable. In terms of sub-s (9) an 'appropriate statement' means a statement—

'(a) as to whether the investigation was or was not conducted to the Authority's satisfaction, (b) specifying any respect in which it was not so conducted, and (c) dealing with any such other matters as the Secretary of State may by regulations provide.'

A separate statement may be submitted in respect of the disciplinary and criminal aspects of an investigation (see s 73(5)). Other than in exceptional circumstances, neither the chief constable nor the Director of Public Prosecutions is to bring criminal proceedings before the authority submit their statement to the chief constable (see s 73(7) and (8)).

[45] The 1996 Act does not spell out what is to happen if the authority submit a statement to the effect that the investigation was not satisfactory. The implication must be, however, that the chief constable will take account of the authority's criticisms and, unless they can be shown to be mistaken, ensure that the perceived defects in the investigation are remedied. Otherwise, the authority's supervision of the investigation would be at best ineffective and the purposes of the legislation would be frustrated. This would be apparent not only to the complainant but to all interested members of the public.

[46] When the chief constable receives the copy of the report submitted to the authority under s 73(1), he must determine whether it indicates that a criminal offence may have been committed by an officer of his force (see s 75(2)). If so, he

a must send a copy of the report to the Director of Public Prosecutions (see s 75(3)). Again, the 1996 Act does not spell out what is to happen next. This is simply because, assuming that the investigation has been satisfactory, the Director of Public Prosecutions and the Crown Prosecution Service, who are independent of the police, will treat it like any other report of alleged criminal conduct. Applying the appropriate criteria, they will decide whether to bring criminal proceedings. If brought, proceedings follow the usual course: it will be for the prosecution to make any appropriate discovery to the defendant and, in the event of a trial, to present the evidence fairly. The decision to convict or acquit is for the magistrates or jury.

c [47] The authority have no role to play in supervising any of these stages. This is because the steps are taken not by the police but by bodies which are independent of the police. Parliament must therefore have decided that the potential dangers that are inherent in any situation where the police investigate themselves are not present at these later stages. Indeed a scheme that subjected the independent prosecuting authorities to supervision by the authority would raise substantial, and very different, issues.

d [48] Once the Director of Public Prosecutions has dealt with the question of criminal proceedings, the chief constable must send the authority a memorandum stating whether he has brought, or proposes to bring, disciplinary proceedings in respect of the conduct complained of. If not, he must give his reasons (see s 75(3) and (4)). The chief constable must send a similar memorandum to the authority when, on considering the report, he decides that there is nothing to indicate that an officer committed a criminal offence (see s 75(5)). In either event, if the chief constable has indicated that he intends to proceed with disciplinary proceedings, he must do so (see sub-s (7)). The proceedings will fall to be conducted in accordance with the Police (Conduct) Regulations 1999, SI 1999/730.

f [49] Where the chief constable's memorandum indicates that he has not taken disciplinary proceedings, and does not propose doing so, the authority may recommend that he bring them (see s 76(1)). If the chief constable accepts the recommendation, he must proceed with the disciplinary proceedings. If, however, the chief constable remains unwilling to take such proceedings, the authority may direct him to do so and they must supply him with a written statement of their reasons for so directing (s 76(3) and (4)). The chief constable must comply with the direction. This power provides a long stop against any conceivable danger that a chief constable, perhaps because of narrower concerns of force morale, might overlook the wider public interest in taking appropriate disciplinary proceedings. To enable the authority to discharge these important functions properly, under s 76(7)(b) the chief constable must 'supply the Authority with such other information as they may reasonably require for the purposes of discharging' them.

g [50] Once the chief constable brings disciplinary proceedings, the authority's functions are at an end. All the further steps are for other persons and bodies whose performance the authority have neither the duty nor the power to supervise. Indeed, strictly speaking, there is nothing in the legislation or in the regulations that requires that the authority even be informed of the outcome. Parliament assumes that proceedings which are conducted in accordance with the 1999 regulations will by their nature be sufficiently thorough and

independent. Again, any provision for such proceedings to be supervised by the authority would raise very significant issues. a

[51] By contrast, under reg 25 of the 1999 regulations, if a disciplinary hearing is held, after giving his evidence, a complainant, such as the appellant, is allowed to attend while witnesses are being examined or cross-examined. Although the hearing is conducted in private (see reg 26(1)), at the discretion of the presiding officer, the complainant may be accompanied by a friend or relative (see reg 25(2)) and a solicitor may attend, subject to the consent of all the parties to the hearing. Moreover, where the officer concerned gives evidence, the presiding officer must put to him any proper questions which the complainant requests should be put. Alternatively, the presiding officer may allow the complainant to put the questions himself (see reg 25(4)). b

THE AIMS OF THE LEGISLATION c

[52] In these circumstances I am, with respect, unable to accept Hale LJ's formulation of the primary purpose of the authority's functions. She said, in her judgment in the Court of Appeal ([2002] UKHRR 985 at [74]–[77]), that the statutory functions of the authority are there to fulfil at least three purposes: d

[75] (1) The primary purpose must be to secure proper behaviour by police officers, by ensuring that allegations of improper behaviour are fully investigated and any wrongdoers brought to book, either by prosecution or by disciplinary proceedings.

[76] (2) That purpose can only be achieved by a process which is fair, and perceived to be fair, by both parties to the complaint, the complainant and the officer against whom the complaint is made. Proper behaviour is not secured or promoted by a disciplinary process which is arbitrary or unfair. Why keep to the rules if you may be punished anyway? Why make a complaint if it will be turned down anyway? e

[77] (3) The process must also be such as to promote public confidence in the police. It is hugely important in a democratic society that the great mass of the population who are inclined to be law-abiding should have the reassurance that their law enforcement agencies can be trusted to act properly or face sanctions if they do not.' f

[53] The authority have not been given their functions so as to secure proper behaviour by police officers: that is the objective of good training, of force discipline, of codes of conduct and, ultimately, of the criminal law. Nor is it any part of the authority's functions to see that wrongdoers are 'brought to book' by being prosecuted. That is a matter for the independent prosecuting authorities. The aim of the authority in carrying out their functions must be to satisfy the legitimate interests of both complainants and the wider public that the investigation of complaints against police officers, and any decisions on taking disciplinary proceedings should be, and should be seen to be, independent and thorough. The means of achieving that purpose are for the authority to supervise the police investigation and thereafter to ensure that, where appropriate, disciplinary proceedings are taken against the officers concerned. g

[54] If that is the aim of the authority's work, it follows that they must carry out their functions in such a manner as to further that aim. In the language of s 80(1)(a) of the 1996 Act the 'proper discharge' of their functions will be designed to further that aim. Therefore, the authority may judge that it is necessary for the proper discharge of their functions to disclose certain information derived from h

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a the investigation to complainants if their legitimate interests and those of the wider public are to be met. And it is clear that the authority have so judged: they have adopted the practice, not specifically envisaged in the legislation, of writing to complainants to explain why their complaints are being rejected and of disclosing information from the investigation in such letters. The original (flawed) decision letter of 5 September 2000 in this case is an example. When
 b explaining the reasons for her decision, the authority member disclosed information about what various witnesses, named and unnamed, had said in the course of the investigation about the actions of various identifiable people. Since disclosure of that kind of information does not fall within either sub-para (b) or (c) of s 80(1), the authority must have judged that in this case disclosure of that information as part of a reasoned decision was necessary if the authority were to
 c discharge their functions in a transparent manner that would give effect to the legitimate interests of the appellant, as complainant, and of the wider public.

[55] The authority's assessment of the degree of disclosure of information necessary for the proper discharge of their functions may, of course, alter and deepen in the light of experience. The letter to the appellant's solicitor from an
 d authority member, James Elliot, dated 21 March 2000 explains indeed how the authority had been considering various aspects of disclosure before and after the Lawrence inquiry. It is consistent with this evolving approach that the authority should have decided to start issuing provisional decision letters to complainants inviting their comments in art 2 and 3 cases. As Mr Gordon rightly
 e pointed out, the information disclosed in the provisional decision is such that this practice too must be based on the judgment that issuing a provisional decision in these terms is necessary for the proper discharge of the authority's functions. There is no challenge to that assessment.

[56] Hale LJ envisaged ([2002] UKHRR 985 at [80]) that the purposes of the legislation would be served by the disclosure of as much information as possible
 f to both parties even while the investigation is going on. This would seem to imply that, subject to considerations about the contamination of the evidence, the proper discharge of the authority's functions would require disclosure to both parties at that stage. I deal briefly with the issues of contamination and confidentiality below, but at this stage I would reject this suggestion on
 g somewhat wider grounds. When the investigating officer is gathering evidence and other information under the authority's supervision, he will generally be conducting a criminal investigation. Police officers investigating a crime do not share their information with the suspect unless this will serve the purposes of the investigation. Indeed, it will often be essential that the suspect does not find out
 h that he is under investigation in case he destroys evidence or interferes with potential witnesses. Similarly, police officers investigating an allegation of assault, for example, will not routinely keep the supposed victim informed of the results of their investigation—if only because they must keep an open mind. At the end of their inquiries, the evidence may point to the supposed victim having
 j been the true aggressor in the incident. There is nothing in the scheme of the 1996 Act to suggest that the practice should be different for complaints against police officers. In particular, there is nothing to suggest that the authority, which do not carry out the investigation, should interfere with it by disclosing information while it is in progress. Indeed, as Mr Catchpole pointed out, even where disciplinary proceedings eventually take place, the police officer concerned has no right to be supplied with copies of any relevant statement,

document or other material obtained during the course of the investigation until three weeks before the hearing (see reg 13(1) of the 1999 regulations).

[57] Mr Gordon, while not abandoning the argument that a duty of disclosure applied during the criminal investigation, acknowledged the difficulties. He stressed, however, that in this case the decision to refuse disclosure was taken after the police investigation was over and the criminal proceedings were finished. At the relevant time the authority were considering, under s 76 of the 1996 Act, whether to recommend that the chief constable should bring disciplinary proceedings against police officers, in particular, Det Sgt Lawrence. At this stage the case for disclosure was compelling. By issuing the provisional decision letter outlining aspects of the evidence, the authority had shown that, in their judgment, in an art 3 case it was necessary for the proper discharge of these functions that this information be given to the appellant. In inviting the appellant to respond by pointing out mistakes in the authority's reasoning and, in particular, by supplying new evidence for their consideration, the authority had acknowledged that the appellant had an important role to play that could influence their final decision on disciplinary proceedings. What the authority had failed to realise, however, was that the appellant could not play that role effectively unless they gave him the witness statements and other documents which he sought. Only once he had that material—on which the authority member had based her provisional decision—would the appellant be in a position to assist the authority member by providing informed comment on her proposed decision. Although this applied to all the relevant witness statements, Mr Gordon gave, as a cogent example, certain independent witnesses who, he said, supported the appellant's contention that Det Sgt Lawrence had been trying to kill him. While the provisional decision letter ran to over 12 pages and dealt with a lot of material, the authority member made no mention of this important evidence. In order to comment effectively on this omission in the reasoning of the provisional decision, the appellant had to see the statements of the witnesses.

ARTICLE 3 OF THE CONVENTION

[58] In advancing this submission Mr Gordon prayed in aid art 3 of the convention prohibiting inhuman or degrading treatment. Although the incident giving rise to the appellant's injuries occurred in April 1999, some 18 months before the Human Rights Act 1998 was brought into force, neither the respondent nor any of the interveners contended that, for this reason, the obligation under art 3 to investigate the incident was not engaged. Indeed, counsel for the respondent argued the case on the basis that art 3 did apply. Moreover, he accepted that, when taken in conjunction with art 1, art 3—like art 2—required there to be an effective official investigation capable of leading to the identification and punishment of those responsible (see *Assenov v Bulgaria* (1999) 28 EHRR 652 at 701 (para 102), *McCann v UK* (1996) 21 EHRR 97 at 163–164 (paras 161–164)). I therefore proceed on the assumption that art 3 is engaged without exploring its precise ambit or deciding whether art 2 might also have been invoked since the appellant was alleging that Det Sgt Lawrence had tried to kill him.

[59] Both parties accepted that a convenient summary of the requirements of an effective investigation for the purposes of art 3, according to the case law of the European Court of Human Rights, was to be found in the speech of my noble and learned friend, Lord Bingham of Cornhill, in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51 at [20], [2003] 4 All ER 1264 at

a [20], [2003] 3 WLR 1169. In point (10) he said, referring to *Jordan v UK* (2001) 11 BHRC 1:

b "The European Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure (at 39 (para 143)). But it is "indispensable" (at 39 (para 144)) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.'

c While the general points analysed by Lord Bingham were not in doubt, counsel were sharply divided on the implications of art 3 for the involvement of a complainant, such as the appellant, in the investigation. Mr Gordon referred, in particular, to the judgments of the European Court of Human Rights in *Edwards v UK* (2002) 12 BHRC 190 and *Jordan v UK*, both involving applications based on art 2.

d [60] The first case arose out of the killing of Mr Christopher Edwards by a mentally disturbed prisoner who was sharing his cell in Chelmsford Prison. On the basis of art 2 Mr Edwards' parents alleged that the authorities had failed to protect their son's life and that they were responsible for his death. In addition they argued that the investigation of his death had not been adequate or effective. The European Court of Human Rights held that there had been a violation of
e art 2 in both respects. So far as the second aspect is concerned, there had been no inquest and the fellow prisoner had pleaded guilty to manslaughter and been dealt with by means of a hospital order. For that reason the circumstances of Mr Edwards' death were not investigated fully at his trial. The authorities involved did, however, set up a non-statutory inquiry to investigate the circumstances. The inquiry, chaired by a Queen's Counsel, sat in private. It
f heard evidence on 56 days over a period of ten months and eventually published a detailed report. The inquiry did not, however, have the power to compel the attendance of witnesses and, in fact, two prison officers refused to give evidence. The evidence of one of them, at least, would have been potentially significant.

g [61] The court ((2002) 12 BHRC 190 at 212–213) dealt with the inquiry in this way (35 EHRR 487 at 515):

'82. The inquiry sat in private, during its hearing of evidence and witnesses. Its report was made public, containing detailed findings of fact, criticisms of failures in the various agencies concerned and recommendations.

h 83. The government argued that the publication of the report secured the requisite degree of public scrutiny. The court has indicated that publicity of proceedings or the results may satisfy the requirements of art 2, provided that in the circumstances of the case the degree of publicity secures the
j accountability in practice as well as theory of the state agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible. No reason has been put forward for holding the inquiry in private, any possible

considerations of medical privacy not preventing the publication of details of the medical histories of Richard Linford and Christopher Edwards. a

84. The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject-matter of the inquiry, the court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests. b

The court concluded (at 214 (para 87)) that the lack of power to compel witnesses and the private character of the proceedings from which the applicants were excluded, save when they were giving evidence, failed to comply with the requirements of art 2. c

[62] In this respect the difference between the parents of the victim in *Edwards v UK* and the appellant in the present case could not be more striking. Mr Edwards' parents were excluded from the inquiry, except when giving evidence, and so could not even find out what was going on. The first they knew was when the inquiry published its report. By contrast, the appellant has been involved throughout the investigation of the incident envisaged by the 1996 Act. At the outset, he was interviewed and was able to give his version of events. At a later stage he and his solicitor saw the video recording and he then had a further opportunity to give evidence to the investigating officer. When the investigation was complete, the appellant received a copy of the appropriate statement by the authority, in terms of s 73(4). This was accompanied by a letter explaining what would happen next and, in particular, that the authority would have the power to recommend that disciplinary proceedings should be taken. In due course the authority member wrote to the appellant in fairly detailed terms to tell him that she had decided not to recommend such proceedings. This gave the appellant the opportunity to point out an error in the member's reasoning, which led her to withdraw that letter and issue a fresh decision letter. The appellant was then able to challenge that letter successfully in judicial review proceedings. Once these were over, another authority member, who had taken over the case, wrote to the appellant to explain how she proposed to conduct the review of his complaint. Again, the appellant was able to comment on her letter and bring about a modification in her approach. She also told the appellant the names of the witnesses whose statements she would be using, although she refused to disclose the statements themselves. After the decision of Moses J ([2002] UKHRR 293), the appellant was supplied with a copy of the video recording of the incident. Even while the present appeal was pending, the authority were in correspondence with the appellant's solicitors to explain how they proposed to proceed with the review. Finally, the authority member sent the appellant a very detailed letter setting out her proposed decision not to recommend proceedings. The letter explained the reasons, under reference to the evidence obtained in the initial police inquiry and a further expert report commissioned by the authority. The authority member also gave the appellant an opportunity to comment on the proposed decision and to submit further evidence. He intends to do so. Clearly, the member will have to consider any relevant material that the appellant submits. If, after doing so, the d
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- a a member remains of the same view, she will send the appellant a detailed letter setting out her final decision not to recommend proceedings and explaining the reasons. If, on the other hand, she changes her mind and decides to recommend disciplinary proceedings against Det Sgt Lawrence or any other officer, the appellant will have the right to be present at the hearing. Moreover, if the officer concerned gives evidence, the presiding officer at the hearing will require to put to him any proper questions proposed by the appellant and may indeed allow the appellant to put the questions himself.
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[63] In my view there is nothing in the judgment of the European Court of Human Rights in *Edwards v UK* to suggest that this degree of involvement of the appellant in the investigation of this particular incident is anything other than sufficient to safeguard his legitimate interests and so to meet the requirements of art 3.

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[64] In *Jordan v UK* (2001) 11 BHRC 1 the applicant claimed that in 1992 his son had been unjustifiably shot and killed by an officer of the Royal Ulster Constabulary and that there had been no effective investigation into, or redress for, his death. The court held that the inquest procedure under Northern Ireland law did not allow any verdict or findings which could play an effective role in the identification or prosecution of any criminal offences that might have occurred. For that reason it fell short of the requirements of art 2.

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[65] Having explained that a prompt response by the authorities to the investigation of a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts, the court continued (at 31 (para 109)):

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‘For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests ...’

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In considering the police investigation, the court held (at 34 (para 121)):

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‘As regards the lack of public scrutiny of the police investigations, the court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under art 2. The requisite access of the public or the victim’s relatives may be provided for in other stages of the available procedures.’

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The court clearly recognised that there are legitimate reasons why police investigations cannot be subjected to public scrutiny. Therefore, even though the victim or his next of kin must be involved in the investigative procedure to the extent necessary to safeguard his or her legitimate interests, this does not mean that art 2 gives any automatic right for them to be given access to police reports and investigative materials. So far as the public or the victim requires to be given access, this can be done at a later stage in the procedure—for example, at any inquest, trial or disciplinary proceedings. It appears that in *Jordan v UK*

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(at 37 (para 134)), the court would have favoured the disclosure of witness statements in advance of any inquest. a

THE DECISION NOT TO DISCLOSE STATEMENTS IN THIS CASE

[66] At the time of the decision letter of 3 April 2001 the authority member was at the stage of considering, in terms of s 76 of the 1996 Act, whether to recommend that disciplinary proceedings should be brought against police officers, in particular, Det Sgt Lawrence. The relevant question is, accordingly, whether the disclosure of the witness statements sought by the appellant was necessary for the proper discharge of that particular function of the authority. While it is correct to say that the investigation supervised by the authority had been completed by that time, s 76(7)(b) envisages that at this stage the authority themselves may wish to obtain further information. Moreover, the provisional decision issued after the judgment of the Court of Appeal ([2002] UKHRR 985) shows that, contrary to what Chadwick LJ had supposed (at [70]) the authority recognise that the appellant might indeed have something to contribute at this stage. Under the procedure now adopted by the authority in art 2 and 3 cases, the complainant has an opportunity to make that contribution when the authority member sets out her provisional decision and gives detailed information about the evidential basis of that decision. Even without seeing the witness statements and other primary material, such a letter puts a complainant, such as the appellant, in a position to make constructive criticisms of the proposed decision. For instance—to take the example on which Mr Gordon relied—the appellant can draw the member's attention to the absence of any reference to the evidence of the independent witnesses who, he says, support his view that Det Sgt Lawrence was trying to kill him. The appellant can also draw attention to any legal or other flaw in the reasoning of the proposed decision. In these ways, even without the material being disclosed, the appellant can make an effective contribution to the process of reaching the final decision on the complaint. Mr Gordon suggested that, even though Det Sgt Lawrence had been prosecuted and fined for driving without due care and attention, the authority might be persuaded by the appellant's response to the provisional decision to recommend that disciplinary proceedings be taken on the basis that he had, in effect, tried to kill the appellant. There is, however, considerable force in Mr Harrison's submission that this suggestion was unrealistic. In any event, the final decision under s 76 rests with the authority. b
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[67] In the Administrative Court ([2002] UKHRR 293), Moses J focused on the particular status of a complainant under art 3. He concluded that, to give effect to that status, the authority should disclose the statements of eye witnesses to a complainant such as the appellant. Having accepted that the appellant was not entitled to disclosure of certain internal communications, Moses J continued: h

[54] But eye witness accounts seem to me to fall into a different category. It seems to me that the claimant's legitimate interests cannot be adequately safeguarded without affording him an opportunity to comment upon factual statements made by those present at the scene at the time or shortly thereafter, for instance those who observed the aftermath at the site of the accident, such as debris or skid marks, no doubt available from the accident report. i

[55] As a witness and as one whose individual rights are engaged, it seems to me that he does have a right to comment upon the evidence of others

a which relates to evidence at the scene of the accident. There does not seem to be any other way in which his particular status can be recognised or his particular legitimate interest be safeguarded.'

b While it is correct, of course, that the appellant would be a witness in any disciplinary proceedings, that is in itself no reason for saying that he has a right to see and comment on others' evidence about the scene of the incident. Similarly, there are many ways in which the appellant's particular status and legitimate interests as a complainant can be recognised and safeguarded in the procedure required by art 3: the involvement of the appellant at many stages, from the start of the investigation through to the invitation to comment on the proposed decision on disciplinary proceedings, shows this. I would, accordingly, respectfully reject the reasoning and conclusion of Moses J, which he reached without the benefit of the fuller evidence now available and at a time when the authority had not adopted the general practice of issuing provisional decisions in art 3 cases.

c [68] For these reasons I am satisfied that in her letter dated 3 April 2001 the authority member was entitled to take the view that, in terms of s 80(1)(a) of the 1996 Act, disclosure of the witness statements and other material sought by the appellant was not necessary for the proper discharge of the authority's functions under s 76.

d [69] Indeed, as Hale LJ observed ([2002] UKHRR 985 at [86]), in complaints against the police—

e 'the best safeguard for all concerned is a fully reasoned decision, giving an account of the evidence received, any conclusions reached on disputes of fact, applying the appropriate law to the facts found, and explaining the considerations which have affected any discretion exercised. Only rarely should the reasonable recipient of such a decision be so suspicious as to wish to see the underlying evidence on which it is based. I would therefore conclude that a fully reasoned decision is the best way to safeguard the integrity of and promote individual and public confidence in the complaints procedure.'

f It is unnecessary to consider in this case whether, as Hale LJ went on to envisage, there might be exceptional cases in which it would be necessary for the authority to disclose the underlying evidence, even after the complainant has received a fully reasoned final decision letter.

g [70] My Lords, on the approach that I have adopted, the issues of the possible contamination of the evidence and of the need to maintain the confidentiality of witness statements are somewhat peripheral. Since both Simon Brown and Hale LJ examined them in considerable detail, however, I add some brief observations.

CONTAMINATION OF EVIDENCE

j [71] The authority's role is to supervise the police investigation of alleged misconduct by police officers. Where the report of the investigation shows that a crime may have been committed, it is then for the prosecuting authorities to consider whether to take proceedings. Plainly, Parliament cannot have intended that anything done by the authority should risk compromising the investigation or impairing the prospects of the Crown mounting a successful prosecution in an appropriate case. While there is no absolute rule that prevents a potential witness in a criminal trial from being shown the statements of other witnesses, in general this is avoided so far as possible. There are sound reasons for this approach. At

worst, a dishonest witness—and there are many dishonest complaints against the police—may trim his evidence to fit the evidence of another witness whose statement he has seen. If the issue was covered in his original statement, the alteration will be apparent and a cross-examiner can bring out the contradiction. But in other cases the witness will be alerted to a point that he had not mentioned in his original statement. Trimming of that kind is not so easily demonstrated. Even an honest witness may suppress a genuine doubt about what he saw or heard, if he discovers that another witness is going to give evidence to a certain effect. Equally importantly, if a witness has seen the statements of other witnesses, his evidence becomes vulnerable to cross-examination and comment on the basis that he has consciously, or subconsciously, altered his evidence to fit the evidence of the other witnesses. There are, certainly, situations where the overall benefit from disclosing the evidence of another witness can be said to outweigh these disadvantages. But the correct bodies to make that judgment are the police and the prosecuting authorities. The authority, who do not carry out the investigation or conduct the prosecution, are not well placed to reach a sound judgment on the point. A decision by the authority to disclose witness statements might therefore prejudice a potential prosecution. This would be contrary to the whole intention of Parliament in setting up the authority. Of course, if disclosure were actually necessary for the proper discharge of the authority's functions prior to any decision on prosecution, then the authority would have both the duty and the power to make it. But the risk of prejudicing the work of the police and prosecuting authorities by contaminating the evidence is a further reason for concluding that disclosure of witness statements to complainers who are potential witnesses is not, as a rule, to be considered necessary for the proper discharge of the authority's functions under the 1996 Act. If disclosure is to be made at this stage, it should be made by the police—as indeed is the current practice.

[72] Similar factors apply at the stage when disciplinary proceedings are under consideration. As long as no final decision has been taken on bringing proceedings, a complainant such as the appellant is a potential witness in those proceedings. While it is true that they are civil in nature, the risks of contaminating the evidence and reducing its cogency remain important. Again, the authority are not the body charged with conducting the proceedings and it is important that nothing which they do should have the potential for adversely affecting the quality of the evidence available at any hearing. These considerations reinforce the conclusion that the proper discharge of the authority's functions under s 76 will not, as a rule, necessitate disclosure of witness statements.

CONFIDENTIALITY OF WITNESS STATEMENTS

[73] The other factor considered by the Court of Appeal was the desirability of maintaining the confidentiality of statements given by witnesses. They did not consider that, in itself, this was a sufficient reason for never disclosing witness statements. I agree: if disclosure were indeed necessary for the proper discharge of the authority's functions, then the statements would have to be disclosed, whether or not they were regarded as confidential. But it should be recognised that the starting point of s 80 is that information provided to the authority is to be kept confidential. This mirrors the position with both the police and the prosecuting authorities. As a general rule, this appears to be entirely appropriate. Of course, witnesses who give evidence to the police must expect that, whether favourable or unfavourable to the potential accused, it will be disclosed and

a become public in the event of a trial. But, subject to that, they may have good reasons for being anxious that it should not be revealed—for example, if it tends to cast doubt on a complainer's trumped-up allegation against a police officer. The potential risks to such a witness are obvious. Parliament recognises this legitimate concern in s 80(1)(c) which allows information to be disclosed in the form of a summary that does not identify the person from whom the information was received. Similarly, in complaints against the police, as in many other cases, b the statements will often show individuals, including the witnesses themselves, in a bad light—behaving, especially through drink, in ways or in circumstances that they would be ashamed to see made public. So witnesses will be understandably concerned that their evidence about their own or others' misdemeanours should be kept confidential unless there is a trial. The concern c will be shared by the other people involved. The police and prosecutors are expected to respect that concern. And, again, in s 80(1)(c) Parliament has recognised that it is genuine. For these reasons I consider that the desirability of maintaining the confidentiality of witness statements is a legitimate factor to be taken into account when considering what the proper discharge of the authority's d functions requires at any particular stage.

[74] Finally, in this regard, it should be noted that, as Mr Smith QC emphasised on behalf of the chief constable, there is no provision in the 1996 Act which imposes any duty of confidentiality on the recipient of information disclosed by the authority under s 80. There would therefore appear to be nothing to prevent him from providing other witnesses with any statements e disclosed to him. Of course, many complainants would be responsible and would not do this. Indeed, in the present case before Moses J ([2002] UKHRR 293) the appellant gave an undertaking to keep the information confidential. But in other cases less scrupulous complainants would abuse the material disclosed, with possible adverse effects on the quality of the evidence available in any f prosecution or disciplinary proceedings. It is hard to see how an authority member would be in any position to make an accurate assessment of the potential risks in any individual case. This again suggests that, in general at least, the proper discharge of the authority's functions under the 1996 Act does not require them to disclose witness statements.

g [75] For these reasons I would refuse the appeal.

LORD CARSWELL.

[76] My Lords, I have had the advantage or reading in draft the opinion of my noble and learned friend Lord Rodger of Earlsferry, and I am in agreement that h the appeal should be dismissed. My reasons for so holding coincide very closely with his, but I should like to take the opportunity to state my conclusions in my own terms.

[77] The appeal concerns the application of s 80(1)(a) of the Police Act 1996, which provides that no information received by the Police Complaints Authority (the authority) shall be disclosed except to the Secretary of State or to a member, i officer or servant of the authority, 'or, so far as may be necessary for the proper discharge of the functions of the Authority, to other persons'. The basic function of the authority is to oversee the handling of complaints made by members of the public against police officers. The issue which we have to decide turns on the determination of the way in which the authority should properly discharge its functions in a case of this kind. In order to determine that it is necessary to consider the purposes of

the 1996 Act in instituting the system of oversight by the authority of complaints against the police. Hale LJ set out in her judgment in the Court of Appeal ([2002] EWCA Civ 389, [2002] UKHRR 985) a definition of three of those purposes, in the following terms:

[75] (1) The primary purpose must be to secure proper behaviour by police officers, by ensuring that allegations of improper behaviour are fully investigated and any wrongdoers brought to book, either by prosecution or by disciplinary proceedings.

[76] (2) That purpose can only be achieved by a process which is fair, and perceived to be fair, by both parties to the complaint, the complainant and the officer against whom the complaint is made. Proper behaviour is not secured or promoted by a disciplinary process which is arbitrary or unfair. Why keep to the rules if you may be punished anyway? Why make a complaint if it will be turned down anyway?

[77] (3) The process must also be such as to promote public confidence in the police. It is hugely important in a democratic society that the great mass of the population who are inclined to be law-abiding should have the reassurance that their law enforcement agencies can be trusted to act properly or face sanctions if they do not.'

I share the difficulty felt by Lord Rodger in accepting this formulation and I should prefer to set out my own.

[78] Public confidence in the police is a factor of great importance in the maintenance of law and order in the manner which we regard as appropriate in our polity. If citizens feel that improper behaviour on the part of police officers is left unchecked and they are not held accountable for it in a suitable manner, that confidence will be eroded. I therefore consider that the *proper* discharge of the functions of the authority involves fulfilling its objectives of maintaining and enhancing public confidence in the police and the proper administration of police services by endeavouring to ensure that the following ends are achieved: (a) police officers who behave in a way which falls below acceptable standards are not exempt from sanction but are duly subject to criminal and/or disciplinary proceedings; (b) members of the public, in particular those who have a legitimate complaint against a police officer, can see that this is being done with a suitable degree of transparency and that there is no collusion in or tolerance of improper behaviour by officers; (c) the process is conducted in a manner which is fair both to complainants and to police officers. As Lord Rodger of Earlsferry stated in his opinion, it is not the function of the authority to secure proper behaviour by police officers, although the exercise of their functions may tend to have that effect. Nor is it to bring wrongdoers to book, which is for prosecuting or disciplinary authorities. To that extent accordingly I could not accept Hale LJ's description of the first purpose of the authority, as set out by her at [75] of her judgment, although her second and third purposes are not dissimilar to those which I have formulated.

[79] There may be some tension or conflict between purposes (a) and (b), and decisions may have to be made which will prevail, bearing in mind the high importance of maintaining a desirable level of fairness in the complaints and adjudication process. The instant case is an example of just such a conflict, in that disclosure of the documents sought by the appellant would assist the achievement of the second purpose but might have the effect of hindering the effective

a accomplishment of the first. There is a demonstrable public benefit in disclosure of documents where it is reasonably possible, but where there is a countervailing factor of sufficient strength it cannot be said to be necessary within the terms of s 80(1)(a) of the 1996 Act.

b [80] For the reasons which Lord Rodger described in his opinion as his wider grounds, I would regard it as inappropriate to disclose witnesses' statements to a complainant while a criminal prosecution or disciplinary charge may be brought against the officer against whom the complaint has been made. I also regard the possibility of contamination as having quite material significance, for I think that it can be a problem in criminal cases and, by analogy, in the conduct of disciplinary charges. I agree that the issue of confidentiality is of relatively minor importance.

c [81] One then has to consider what steps can be and have been taken by the authority to inform the appellant of what is being done and why, with the object of enhancing his confidence and that of other persons in the integrity of the complaints process. The appellant has been given a detailed and fully reasoned provisional decision dealing with the authority's proposed recommendation, on which he has received an opportunity to comment. He has seen the video recording of the incident of which he complains and has been given (if somewhat belatedly) a copy of the video. He will receive a final version of the authority's decision when it is made.

d [82] The appellant makes the case that he cannot comment effectively on the proposed recommendation without seeing the underlying materials consisting of witnesses' statements. He has, however, received a pretty fair idea of their content from the provisional decision letter. If his information is less than perfect in extent, it is because of the strength of the countervailing considerations. I would therefore agree with the conclusion reached by the Court of Appeal f ([2002] UKHRR 985) that it is not necessary for the statements to be disclosed before criminal or disciplinary proceedings have either been completed or finally ruled out, which is not yet the case.

g [83] The appellant also relied on arts 2 and 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) as reinforcement for his case. There has not been unanimity in the views expressed by some of your Lordships about the applicability of these provisions. While I have reservations about the applicability of either to the present case, I should prefer to leave expression of a definite opinion on the issue to another occasion. I am content to assume for the purposes of this appeal that one or other article applies.

h [84] The requirements of the convention relating to effective investigations were set out in the opinion of my noble and learned friend Lord Bingham of Cornhill in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51 at [20], [2003] 4 All ER 1264 at [20], [2003] 3 WLR 1169, and I need not set them out here. It is sufficient to say that they can be very shortly summarised j for present purposes as requiring an independent investigation undertaken by the state, conducted with reasonable promptitude, capable of leading to a determination whether the acts of the agents of the state were justified and, if not, to identification and punishment of those responsible, with a sufficient element of public scrutiny of the process. I venture to doubt whether these requirements go beyond those imposed by domestic law in any material respect, but in any

event I consider that they have been satisfied in the case before your Lordships. Accordingly, if either arts 2 or 3 apply, there has in my opinion been no breach. a

[85] For the sake of completeness, I would add that I agree with the judgment of Simon Brown LJ rather than that of Chadwick LJ on the ability of the authority to re-open an investigation if they think it necessary in the light of representations made or evidence supplied following the issue of a provisional decision letter.

[86] I would therefore dismiss the appeal. b

Appeal dismissed.

Dilys Tausz Barrister.

a **Cullen v Chief Constable of the Royal Ulster Constabulary**
[2003] UKHL 39

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HUTTON, LORD MILLETT AND LORD RODGER OF EARLSFERRY

24, 25 MARCH, 10 JULY 2003

c *Solicitor – Access to – Right of person in custody – Police breaching statutory duty allowing person in custody access to solicitor – Whether actionable breach of duty – Whether damages recoverable – Northern Ireland (Emergency Provisions) Act 1987, s 15.*

d The claimant was arrested in Northern Ireland on suspicion of having been concerned in acts of terrorism. He was taken to a police station and held in custody. Under s 15(1)^a of the Northern Ireland (Emergency Provisions) Act 1987, a person detained under terrorism provisions and held in custody was entitled, if he so requested, to consult a solicitor privately. During his detention the claimant received only one unsupervised visit from his solicitor, the police thereafter delaying access, pursuant to s 15(8) of the 1987 Act under which a
e police officer could authorise a delay in complying with a detained person's request to see his solicitor privately if certain conditions were satisfied. However, s 15 conferred no power to authorise delay in anticipation of a detained person's request, and s 15(9) required that, if a delay were authorised, the detained person should be told of the reason for authorising it. The claimant later pleaded guilty
f to an offence and was sentenced to community service. He commenced an action for damages against the defendant chief constable, claiming, inter alia, infringement of his right of access to a solicitor under s 15 of the 1987 Act. The judge decided that the conditions set out in s 15(8) had been satisfied and that the police had had reasonable grounds for each decision to delay access to the claimant's solicitor or to restrict consultation to a supervised visit, but that
g the actions of the police were procedurally flawed because the delays had been anticipatory deferrals not triggered by any request on the claimant's part, nor had he been told the reason for authorising any of the delays. However, he further held that the procedural breaches of s 15 conferred no right of action for damages upon the appellant, that he had suffered no damage and that no loss had been
h proved. Accordingly, he gave judgment for the defendant. The Court of Appeal of Northern Ireland dismissed the claimant's appeal and he appealed to the House of Lords.

j **Held** – (Lord Bingham of Cornhill and Lord Steyn dissenting) The duty under s 15 of the 1987 Act was a quasi-constitutional right imposed for the benefit of the public at large, not for the protection or benefit of a particular class of individuals. Denial of that right by itself (ie where it did not cause or prolong unlawful detention) was incapable of causing loss or injury of a kind for which the law normally awarded damages. As a public law right, the remedy for breach of

a Section 15, so far as material, is set out at [3], below

the right to access to a solicitor under s 15 was judicial review. Accordingly, the appeal would be dismissed (see [33], [34], [42], [44], [49], [63], [66], [67], [69], [70], [85], [86], below).

Pickering v Liverpool Daily Post and Echo Newspapers plc [1991] 1 All ER 622, *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353 and *Olotu v Home Office* [1997] 1 All ER 385 applied.

Notes

For delay in allowing access to legal advice, see 11(1) *Halsbury's Laws* (4th edn reissue), para 730 and Supp to 11(1) *Halsbury's Laws* (4th edn reissue), para 730.

The Northern Ireland (Emergency Provisions) Act 1987 was repealed and replaced by the Northern Ireland (Emergency Provisions) Act 1991, with effect from 27 August 1991. The 1991 Act was repealed and replaced by the Northern Ireland (Emergency Provisions) Act 1996, with effect from 25 August 1996. The 1996 Act was repealed by the Terrorism Act 2000, with effect from 19 February 2001. Paragraphs 7 and 8 of Sch 8 to the 2000 Act regulate the right of access to legal advice for persons arrested under the 2000 Act and detained at police stations in England, Wales and Northern Ireland.

For the Terrorism Act 2000, Sch 8, paras 7, 8, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2166.

Cases referred to in opinions

Barrett v Enfield LBC [1999] 3 All ER 193, [2001] 2 AC 550, [1999] 3 WLR 79, HL.

Cinelli v Revere (1987) 820 F 2d 474, US Ct of Apps.

Crossman v R (1984) 9 DLR (4th) 588, Can FC.

Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544, [1949] AC 398, HL.

Darmalingum v State (2000) 8 BHRC 662, [2000] 1 WLR 2303, PC.

Dickson v HM Advocate 2001 JC 203, HC of Just.

Gillen's Application, Re [1988] NI 40.

Imbrioscia v Switzerland (1993) 17 EHRR 441, ECt HR.

King v R [1968] 2 All ER 610, [1969] 1 AC 304, [1968] 3 WLR 391, PC.

Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1981] 2 All ER 456, [1982] AC 173, [1981] 3 WLR 33, HL.

Lynch, Ex p [1980] NI 126.

Maharaj v A-G of Trinidad and Tobago (No 2) [1978] 2 All ER 670, [1979] AC 385, [1978] 2 WLR 902, PC.

McNabb v US (1943) 318 US 332, US SC.

Mohammed v State (1999) 6 BHRC 177, [1999] 2 AC 111, [1999] 2 WLR 552, PC.

Murray v UK (1996) 22 EHRR 29, E Com HR.

Olotu v Home Office [1997] 1 All ER 385, [1997] 1 WLR 328, CA.

O'Reilly v Mackman [1982] 3 All ER 1124, [1983] 2 AC 237, [1982] 3 WLR 1096, HL.

Paton v Ritchie 2000 JC 271, HC of Just.

People, The v Healy [1990] 2 IR 73, Ir SC.

Pickering v Liverpool Daily Post and Echo Newspapers plc [1991] 1 All ER 622, [1991] 2 AC 370, [1991] 2 WLR 513, HL.

R (on the application of PG) v London Borough of Ealing [2002] EWHC Admin 250, [2002] 1 WLR 65.

R v Chief Constable of Avon and Somerset Constabulary, ex p Robinson [1989] 2 All ER 15, [1989] 1 WLR 793, DC.

R v Chief Constable of the Royal Ulster Constabulary, ex p Begley [1997] 4 All ER 833, [1997] 1 WLR 1475, HL.

- a* *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1991] 3 All ER 733, [1992] 1 AC 58, [1991] 3 WLR 340, HL.
- R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, [1998] QB 575, [1998] 2 WLR 849, DC.
- R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.
- b* *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1, [1982] 2 WLR 465, HL.
- Russell's Application, Re* [1996] NI 310.
- Wassink v Netherlands* [1990] ECHR 1253/86, ECt HR.
- Williams v Liberty* (1972) 461 F 2d 325, US Ct of Apps.
- Wounded Knee Legal Defense/Offense Committee v Federal Bureau of Investigation* (1974) 507 F 2d 1281, US Ct of Apps.
- c* *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham LBC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases referred to in list of authorities

- A-G v Guardian Newspapers Ltd* [1987] 3 All ER 316, [1987] 1 WLR 1248, HL.
- d* *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126.
- Averil v UK* (2000) 8 BHRC 430, ECt HR.
- Bradley v Chief Constable of the Royal Ulster Constabulary* [1997] NIJB 254, Ir CA.
- Brennan v UK* (2001) 34 EHRR 507, [2001] ECHR 39846/98, ECt HR.
- British Airways Board v Laker Airways Ltd* [1984] 3 All ER 39, [1985] AC 58, [1984] 3 WLR 413, HL.
- e* *Constantine v Imperial Hotels Ltd* [1944] 2 All ER 171, [1944] 1 KB 693.
- Derbyshire CC v Times Newspapers Ltd* [1992] 3 All ER 65, [1992] QB 770, [1992] 3 WLR 28, CA; *rvsd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL.
- Emergency Powers Bill 1976, Re* [1977] IR 159, Ir SC.
- Floyd's Application, Re* [1997] NI 414, Ir QBD.
- f* *Maclin v Paulson* (1980) 627 F 2d 83, US Ct of Apps.
- McKerr v UK* (2002) 34 EHRR 553, [2001] ECHR 28883/95, ECt HR.
- Magee v UK* (2000) 8 BHRC 646, ECt HR.
- Moore v Chief Constable of the Royal Ulster Constabulary* [1988] NI 456, NI HC.
- Murray v Ministry of Defence* [1988] 2 All ER 521, [1988] 1 WLR 692, HL.
- O'Hara v Chief Constable of the Royal Ulster Constabulary* [1996] NI 8, HL.
- g* *O'Rourke v Camden London BC* [1997] 3 All ER 23, [1998] AC 188, [1997] 3 WLR 86, HL.
- People v Madden* [1977] IR 336, Ir CCA.
- Quinn v UK* (1997) 23 EHRR CD 41, E Com HR.
- R v Chief Constable, ex p McKenna* [1992] NI 116, Ir QBD.
- h* *R v Cosgrove* [1994] NI 182, Ir CCA.
- R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.
- R v Magee* [2001] NI 217, Ir CA.
- R v Samuel* [1988] 2 All ER 135, [1988] QB 615, [1988] 2 WLR 920, CA.
- j* *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
- Rantzen v Mirror Group Newspapers (1986) Ltd* [1993] 4 All ER 975, [1994] QB 670, [1993] 3 WLR 953, CA.
- Simmonds v Newport Abercarn Black Vein Steam Coal Co Ltd* [1921] 1 KB 616, CA.
- State (Harrington) v Comr of Garda Siochana* (14 December 1976, unreported), Ir HC.

Appeal

The claimant, James Bernard Cullen appealed with the permission of the House of Lords Appeal Committee given on 6 November 2000 from a decision of the Court of Appeal of Northern Ireland (Carswell LCJ, Nicholson and Campbell LJ) on 15 June 1999 ([1999] NI 237) dismissing the claimant's appeal from the decision of MacDermott LJ on 5 May 1998 whereby he held that the claimant did not in law have an actionable claim for damages against the defendant, the Chief Constable of the Royal Ulster Constabulary, for breaches of the provisions of s 15 of the Northern Ireland (Emergency Provisions) Act 1987. The facts are set out in the opinion of Lord Bingham of Cornhill and Lord Steyn.

Seamus Treacy QC and Fiona Doherty (both of the Northern Ireland Bar) (instructed by *Madden & Finucane*, Belfast) for the appellant.

Bernard McCloskey QC and Paul Maguire (both of the Northern Ireland Bar) (instructed by the *Treasury Solicitor*, Belfast) for the respondent.

Their Lordships took time for consideration.

10 July 2003. The following opinions were delivered.

LORD BINGHAM OF CORNHILL AND LORD STEYN.

I. THE QUESTION

[1] My Lords, on this appeal a question of law of considerable public importance arises, namely whether a breach of s 15 of the Northern Ireland (Emergency Provisions) Act 1987 may give rise to an action for damages. Subject to limited qualifications s 15 confers a right of access to legal advice on a detained person.

II. A NARRATIVE

[2] The context in which the issue arises is as follows. On 17 October 1989 a police officer arrested the appellant under s 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989, upon suspicion of having been concerned in the commission, preparation or instigation of an act of terrorism associated with the withholding of information in respect of a murder. He was taken to the Castlereagh Police Office. From 17–22 October 1989 the appellant was held in police custody. He wanted to see a solicitor. During this period, a police officer of the appropriate rank under s 15 issued four authorisations denying him a right of access to a solicitor. The appellant was permitted one unsupervised consultation and two supervised consultations with his solicitor. On 20 October 1989 the appellant made a statement which contained admissions. In due course he was charged with the offence of withholding information of a murder. He pleaded guilty, and he was sentenced to 160 hours' community service. The appellant then brought an action for damages against the respondent. The trial judge found that the police at all times had reasonable grounds to delay access to a solicitor as required by s 15(8) of the Act. But the trial judge held that the respondent had failed to comply with the requirements of s 15 in the following two respects. (a) Each of the decisions to deny the appellant access to a solicitor was anticipatory in nature in the sense of being made in advance of a request by the detainee. (b) The appellant had not at any stage been informed of the reasons for the decisions to deny him access to a solicitor. The trial judge concluded that none of the breaches of s 15

a conferred a right upon the appellant to claim damages in a civil case. The Court of Appeal ([1999] NI 237) dismissed an appeal against this conclusion.

III. THE LEGISLATIVE CONTEXT

b [3] The legislative context must now be explained. The long title of the 1987 Act describes it as, among other things, intended 'to confer certain rights on persons detained in police custody in Northern Ireland under or by virtue of Part IV of the Prevention of Terrorism (Temporary Provisions) Act 1984'. The critical provision, which is s 15, is contained in Pt II. The heading of Pt II is 'Rights of Persons Detained Under Terrorism Provisions in Police Custody'. The first provision in Pt II is s 14, which 'confers' on a detained person 'the right' to have someone informed of his detention under the terrorism provisions. The only c other substantive provision in Pt II is s 15. The marginal note to s 15 reads 'Right of access to legal advice'. Given its central importance we set out s 15 with emphasis added where appropriate:

d '(1) A person who is detained under the terrorism provisions and is being held in police custody *shall be entitled*, if he so requests, to consult a solicitor privately.

(2) A person shall be informed of *the right conferred on him by subsection (1)* as soon as practicable after he has become a person to whom that subsection applies.

e (3) A request made by a person under subsection (1), and the time at which it is made, shall be recorded in writing unless it is made by him while at a court after being charged with an offence.

(4) If a person makes such a request, *he must be permitted* to consult a solicitor as soon as is practicable except to the extent that any delay is permitted by this section.

f (5) Any delay in complying with a request under subsection (1) is only permitted if—(a) it is authorised by an officer of at least the rank of superintendent; and (b) it does not extend beyond the relevant time.

g (6) In subsection (5) "the relevant time" means—(a) where the request is the first request made by the detained person under subsection (1), the end of the period referred to in section 14(6); or (b) where the request follows an earlier request made by the detained person under that subsection in pursuance of which he has consulted a solicitor, the end of the period of 48 hours beginning with the time when that consultation began.

(7) An officer may give an authorisation under subsection (5) orally or in writing but, if he gives it orally, he shall confirm it in writing as soon as is practicable.

h (8) An officer may only authorise a delay in complying with a request under subsection (1) where he has reasonable grounds for believing that the exercise of *the right conferred* by that subsection at the time when the detained person desires to exercise it (a) will lead to interference with or harm to evidence connected with a scheduled offence or interference with or physical injury to any person; or (b) will lead to the alerting of any person suspected of having committed such an offence but not yet arrested for it; or (c) will hinder the recovery of any property obtained as a result of such an offence; or (d) will lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; or (e) by alerting any person, will make it more difficult—(i) to prevent an act of terrorism; or j (ii) to secure the apprehension, prosecution or conviction of any person in

connection with the commission, preparation or instigation of an act of terrorism. a

(9) If any delay is authorised, then, as soon as is practicable—(a) the detained person shall be told the reason for authorising it; and (b) the reason shall be recorded in writing.

(10) If an officer of at least the rank of Assistant Chief Constable has reasonable grounds for believing that, unless he gives a direction under subsection (11), the exercise by a person of *the right conferred* by subsection (1) will have any of the consequences specified in subsection (8), he may give a direction under subsection (11). b

(11) A direction under this subsection is a direction that a person desiring to exercise the right conferred by subsection (1) may only consult a solicitor in the sight and hearing of a qualified officer of the uniformed branch of the Royal Ulster Constabulary. c

(12) An officer is qualified for the purposes of subsection (11) if (a) he is of at least the rank of inspector; and (b) in the opinion of the officer giving the direction, he has no connection with the case.

(13) Any authorisation under subsection (5) or direction under subsection (11) shall cease to have effect once the reason for giving it ceases to subsist. d

The fate of s 15 was as follows. The 1987 Act came into operation on 15 June 1987. It was subsequently repealed by the Northern Ireland (Emergency Provisions) Act 1991, with effect from 27 August 1991. Section 45 of the 1991 Act became the operative provision regulating the right of access to legal advice. The 1991 Act in turn was repealed by the Northern Ireland (Emergency Provisions) Act 1996, with effect from 25 August 1996: see s 47 of the 1996 Act. The 1996 Act was repealed by the Terrorism Act 2000, which has been in force (except for s 100) since 19 February 2001. The extant equivalent of s 15 of the 1987 Act is paras 7 and 8 of Sch 8 to the 2000 Act. e

[4] The genesis of s 15 is important. It applies to '[a] person who is detained under the terrorism provisions' (s 15(1)). It was modelled on s 58 of the Police and Criminal Evidence Act 1984. In a new and remedial provision s 58 conferred a statutory right to legal advice on detained persons. It has been said that the right contained in s 58 'is arguably the most important protection conferred by the [1984] Act': *Current Law Statutes* (1984) vol 4, general note to s 58, para 60-105. f The Police and Criminal Evidence (Northern Ireland) Order 1989, SI 1989/1341, took effect on 1 January 1990. Article 59 of the latter instrument corresponds to s 58 of the 1984 Act. Article 59 of the 1989 order does not apply to terrorist arrests: see art 59(12). Section 15 applies only to terrorist arrests. But it corresponds to s 58 of the 1984 Act and cannot therefore be given any special interpretation on the basis of a terrorist dimension. g h

[5] It is now necessary to explain the law about a detained person's access to legal advice as it stood before the 1984 Act was enacted. The common law recognised a general right in an accused person to communicate and consult privately with his solicitor outside the interview room. This development is reflected in the Judges' Rules and Administrative Directions to the Police which were published as Home Office Circular No 89/1978. The text expressly provided that the Judges' Rules do not affect certain established legal principles which included the principle: j

'(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he

a is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so ...'

b In *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley* [1997] 4 All ER 833 at 837, [1997] 1 WLR 1475 at 1479 the House of Lords recognised this historical development. It follows that in 1984 the possibility of applying for relief in judicial review proceedings already existed in cases where there was a breach of the principle. On the other hand, experience in England and Wales showed that the protection so conferred was largely ineffective, notably because cross-examination on an application for judicial review, although not excluded, was in practice rarely permitted: *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1131, [1983] 2 AC 237 at 282–283; *Fordham Judicial Review Handbook* (3rd edn, 2001) 19.4.2–19.4.8, Martin Smith 'Cross-examination in Judicial Review under the CPR' [2001] JR 138. Against this background s 58 was an important piece of remedial legislation intended to make the legal right of a detainee to access to a solicitor more effective.

d [6] Section 58 of the 1984 Act was drafted and passed against the background of the report of the Royal Commission on Criminal Procedure (*The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (1981) (Cmnd 8092)) which was chaired by Sir Cyril Philips. The report recorded the great importance which the Royal Commission attached to securing that the right to legal advice was effective: para 4.95. In para 4.122 the Royal Commission observed:

e 'Civil actions

f Some of the witnesses to us have been critical of civil action as a remedy. They point to the difficulty of proving breaches of the rules and to the cost of such actions, and some doubt whether they have any impact on the individual police officer, since any award of costs is borne by police funds. Nonetheless they provide a means by which those who suffer substantial inconvenience, distress or other disadvantage as a result of unjustified police activity may gain some form of redress. It is the only means of redress for those who are not prosecuted and consequently have no opportunity to raise the matter during a trial. As we have already noted, we see this applying particularly in the case of unlawful arrest or unjustifiably prolonged detention. The arrangements we propose for recording decisions during the course of custody may assist in proving cases of unlawful action in these and other respects, for example in relation to improper refusal of access to legal advice, and the civil courts may therefore prove to have a useful role to play in the application of the statutory rules.'

h Several points in this paragraph merit emphasis. The Royal Commission considered the arguments for and against permitting civil actions in aid of rights to legal advice: para 4.122. The Royal Commission concluded that 'the civil courts may ... prove to have a useful role to play in the application of the statutory rules'.
j The Royal Commission gave the example of 'improper refusal of access to legal advice'. These observations made clear that the Royal Commission had in mind remedial legislation buttressing the right to legal advice by a private law action for damages. It is also relevant to note that the Royal Commission expressly mentioned redress for 'substantial inconvenience, distress or other disadvantage as a result of unjustified police activity'. In other words, the Royal Commission had in mind that a breach should be actionable per se, ie without proof of financial loss.

IV. THE NATURE AND SERIOUSNESS OF THE BREACHES

[7] There was some debate at the hearing of the appeal about the relative seriousness of the breaches that were established. The context was an observation of Carswell LCJ in the Court of Appeal that the breach in the present case—being a reference to all breaches found by the trial judge—‘might justifiably be termed technical’ ([1999] NI 237 at 254). Counsel for the respondent adopted this statement and suggested that it throws light on the point of statutory construction. For our part this observation is more realistic in so far as the police made decisions to delay access to a solicitor in advance of a request by the detainee. On the other hand, to describe the total failure to give reasons at any stage as ‘technical’ is at the least controversial. The difficulty is that in an objective sense such a view tends to undermine the importance of the statutory right to reasons. In the context of s 15 reasons promote several important objectives. First, they impose a discipline on the police (as in the case of other decision-makers) which may contribute to such refusals being considered with care. Secondly, reasons encourage transparency in an area closely connected with access to justice and increase confidence in the operation of the criminal justice system. Thirdly, they assist the courts in performing their supervisory function if judicial review proceedings are launched. It is, therefore, a complaint of substance that no reasons were ever given in the present case.

V. THE ISSUES

[8] The appellant’s claim was put forward in three alternative ways: (1) breach of statutory duty; (2) an action at common law for false imprisonment; (3) a new innominate tort. Against this background the agreed statement of facts and issues states the questions to be considered by the House as follows. (1) Where a police officer of the appropriate rank has reasonable grounds under s 15(8) of the 1987 Act for making an authorisation, but does so on an anticipatory basis and fails to inform the detainee of his reasons, is this actionable in tort at the suit of the detainee? (2) If the answer to the above question is Yes, does the detainee have to prove loss in order to recover damages? Two comments about the issues must be made. First, it is obvious that the House cannot sensibly confine itself to considering whether s 15 gives a right to claim damages for the particular breaches established in the present case. The House must approach the matter on a broader basis by considering the spectrum of the cases affected, ranging from what may be the truly trivial (eg a failure to record properly a request for access to a solicitor by a detainee) to very serious breaches (eg where access was denied without reasonable grounds). We will examine the point of construction in this way. Secondly, it is now common ground that ‘if either an action for damages for breach of statutory duty or an action for damages at common law exists, proof of [financial] loss is not an essential ingredient thereof’. This does not, however, mean that the sustainability in law of the cause of action may not be tested against the interests involved and the types of loss which may arise.

VI. BREACH OF STATUTORY DUTY

The Court of Appeal judgment

[9] It is necessary to consider why Carswell LCJ (with the agreement of Nicholson and Campbell LJ) held that there was no private law claim for damages. Carswell LCJ thought that the statute was ‘silent’ on the question ([1999] NI 237 at 245) and there was no sufficient basis to ‘infer’ that Parliament intended to allow a claim for damages (at 251). Secondly, given this hypothesis, Carswell LCJ

- a found guidance in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1991] 3 All ER 733, [1992] 1 AC 58, which turned on the interpretation of the Prison Rules. In *Hague's* case the House characterised the Prison Rules as regulatory in character, namely dealing with the management, treatment and control of prisoners. Carswell LCJ accepted that s 58 of the 1984 Act, and s 15 of the 1987 Act, were also regulatory or 'control' provisions: [1999] NI 237 at 249–250. Thirdly, Carswell LCJ
- b found assistance in decisions on social welfare legislation, where the statutes contained no language conferring rights and when the House considered that judicial review was the appropriate remedy: *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham LBC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633. Fourthly, Carswell LCJ stated that 'the fact that it is unlikely that personal injury, injury to property or economic loss could be proved tends to show that the breach
- c was not intended to be actionable': [1999] NI 237 at 257. Fifthly, at one stage Carswell LCJ described a breach of s 15 as 'a mistake in procedure' (at 255). And counsel for the respondent invoked this point on several occasions. These are the principal planks of the reasoning of the Court of Appeal on the issue of the recoverability of damages for breach of s 15. It will be necessary to examine them
- d in some detail. In doing so the arguments of counsel for the respondent, who supported the Court of Appeal judgment, will also be covered.

(i) *The language of the statute and its context*

- e [10] In respectful but firm disagreement with Carswell LCJ we would reject the idea that the statute is silent on the issue. The long title, the heading of Pt II, and the substantive provisions of ss 14 and 15 make clear that Parliament was passing a new and remedial provision for the conferment on detainees of a statutory right of access to solicitors. The statutory language is entirely apt to create private law rights. And on ordinary principles of statutory construction the language must be interpreted so as to give the effective protection which Parliament envisaged.

- f [11] This interpretation is reinforced by the fact, already explained, that before the enactment of s 58 of the 1984 Act the common law already recognised a legal principle entitling a detainee to legal advice: see *Ex p Begley* [1997] 4 All ER 833 at 837, [1997] 1 WLR 1475 at 1479. It could be the basis of judicial review proceedings. In enacting s 58 of the 1984 Act, and s 15 of the 1987 Act, the legislature clearly
- g intended to confer further protection on detainees. The only or virtually only way of doing so was to confer private law rights on them. While *Ex p Begley* was cited in the Court of Appeal, the significance of this point emerging from it may not have been placed squarely before the Court of Appeal.

- h [12] An even more important aid to construction is the report of the Royal Commission which formed the background to the enactment of s 58 of the 1984 Act. It reveals, as already explained, a clear view in favour of a right of access enforced by a private claim for damages. This contextual factor explains the purpose of s 58 of the 1984 Act on which s 15 of the 1987 Act was modelled. Unfortunately, this material was not placed before the Court of Appeal. It was also
- j not drawn to the attention of the House by counsel. Having now examined the Report of the Royal Commission, we question whether the Court of Appeal would have reached a decision that Parliament did not intend to create a right to civil damages if it had been alerted to it.

(ii) *The Hague decision*

- [13] It is true, of course, that in the *Hague* case prisoners were denied a right to claim damages for breach of the Prison Rules on the ground that the rules were not

intended to create private rights: the rules were regarded as concerned only with the management, treatment and control of prisoners. Section 58 of the 1984 Act, and s 15 of the 1987 Act, are quite differently worded and structured. They are specifically designed to protect individual rights of detained persons. This part of the reasoning of the Court of Appeal cannot be supported. a

(iii) *The decisions in X v Bedfordshire and O'Rourke* b

[14] In *X v Bedfordshire*, Lord Browne-Wilkinson observed ([1995] 3 All ER 353 at 365, [1995] 2 AC 633 at 732):

‘The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.’ c

While Carswell LCJ's quotation from this decision extended to this passage, he did not say that the rights conferred by s 15 do not come within this category. Counsel did, however, so submit. We would reject this argument. Section 15 protects the rights of a limited and specific class, i.e. detained persons. d

[15] On a broader basis it is difficult to compare the social welfare legislation in *X v Bedfordshire* and *O'Rourke*, with no express provision for individual rights, with s 58 of the 1984 Act and s 15 of the 1987 Act, which are redolent with the expression of individual rights. Those decisions do, of course, support the proposition that, where the statute is silent, the existence of an alternative remedy, such as judicial review, may be a relevant factor to take into account when considering what is the best interpretation: see, however, *Barrett v Enfield LBC* [1999] 3 All ER 193 at 228, [2001] 2 AC 550 at 589 per Lord Hutton. For Carswell LCJ this was the significance of these decisions. In the present context, however, such arguments are ruled out by a contextual interpretation of s 15. The Royal Commission did not treat judicial review as a sufficient and effective protection for detained persons. In England and Wales cross-examination on an application for judicial review is only permitted in exceptional cases. In any event, it has to be said that the more serious a breach of refusing access to a solicitor under s 15 the more difficult it will be for a detained person to launch judicial review proceedings. There will be cases in which it is not an effective remedy as envisaged by the Royal Commission. e

(iv) *No personal injury, property damage or financial loss* f

[16] Carswell LCJ regarded the fact that a breach of s 15 was unlikely to result in personal injury, injury to property or economic loss as pointing against a legislative intent to treat a breach of s 15 as giving rise to an action in damages: [1999] NI 237 at 257. We cannot accept this proposition. In the context of a breach of a right of access to a solicitor the natural and obvious solution is that the breach is actionable per se, i.e. without proof of special damage. That is what the Royal Commission contemplated and what Parliament must have intended. In any event Carswell LCJ ([1999] NI 237 at 257) rightly accepted and counsel for the chief constable conceded that, if a breach of duty under s 15 is indeed actionable, it would give rise to damages without proof of loss: [1999] NI 237 at 257. g

(v) *A Mistake in procedure* h

[17] To refer to a breach of s 15 as a mistake in procedure suggests that it is not of great importance. Such a view is understandable in respect of the anticipatory breaches but not warranted in respect of a total failure to give reasons. It is a j

- a sufficient answer to quote the observation of Frankfurter J in *McNabb v US* (1943) 318 US 332 at 347, that 'The history of liberty has largely been the history of observance of procedural safeguards'.

Comparative material

- b [18] It is of some significance that in the United States, Canada and Ireland it has been held that breaches of a detained person's constitutional right of access to a lawyer may found an action in damages: (1) decisions in the United States Court of Appeals: *Cinelli v City of Revere* (1987) 820 F 2d 474; *Williams v Liberty* (1972) 461 F 2d 325 and *Wounded Knee Legal Defense/Offense Committee v Federal Bureau of Investigation* (1974) 507 F 2d 1281; (2) the Irish Supreme Court: *The People v Healy* [1990] 2 IR 73. This decision approved the unreported decision of Finlay P in *The State (Noel Harrington) v The Commissioner of An Garda Síochána* in 1976. (3) A Federal Court in Canada: *Crossman v R* (1984) 9 DLR (4th) 588. Carswell LCJ thought that this line of decisions was distinguishable as being based on constitutional provisions. However, in *Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1, Lord Wilberforce described a right of access to justice as 'a basic right'. In *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198 the Court of Appeal described a prisoner's right to correspond with his solicitor in contemplation of litigation as follows: 'Even in our unwritten constitution it must rank as a constitutional right'; see also *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, [1998] QB 575. The distinction made by Carswell LCJ is fragile.
- c [19] The right conferred by s 15 is a fundamental right. The jurisprudence cited is relevant and at the very least demonstrates the importance and utility of a right to damages in aid of the rights of access to a solicitor.

VII. CONCLUSION

- f [19] We cannot accept the conclusions of the majority. We note that Lord Hutton concludes in [41]–[43], below that there should be no award of damages unless there has been harm as he sought to define it. While this conclusion accords some weight to the obvious legislative purpose, it weakens significantly the reasoning in principle of the majority.

- g [20] In our respectful view the majority has also failed to give sufficient weight to two factors. First, there are plainly formidable practical problems in a detainee applying for judicial review when he has been denied access to a solicitor. Secondly, in any event, it is not easy to know whether one has an arguable case for judicial review unless reasons have been given. If there are adequate answers to these points, we are not aware of them.

- h [21] We would hold that a breach of the right under s 15 is actionable per se. But, applying the test enunciated by the Court of Justice of the European Communities, we would be inclined to hold that proof of a serious breach is required for a damages action: Wyatt and Dashwood *European Union Law* (4th edn, 2000) pp 126–127; Craig *Administrative Law* (4th edn, 1999) p 849.

j VIII. DAMAGES

[22] It was agreed between counsel that in order to avoid yet further delay in this protracted litigation the House should settle the damages. In our view the breaches consisting of premature authorisations do not satisfy the threshold of seriousness. On the other hand, the failure to give reasons is a matter of substance. We would award £500 under this heading.

IX. DISPOSAL

[23] We would allow the appeal and award £500 damages to the appellant.

LORD HUTTON.

[24] My Lords, on 8 October 1989 Superintendent Harris of the Royal Ulster Constabulary was murdered when a bomb exploded under his car. On 17 October 1989 the appellant was arrested by a police officer under s 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 upon suspicion of having been concerned in the commission, preparation or instigation of an act of terrorism associated with the withholding of information in respect of that murder. He was then held in police custody from 17 October to 23 October 1989 and was interviewed by the police. About noon on 20 October he made a written statement containing admissions. On 23 October he was charged with the offence of withholding information in relation to a hijacking. He pleaded guilty on 8 June 1990 and was sentenced to 160 hours' community service.

[25] The appellant then brought an action for damages against the chief constable. The proceedings in Northern Ireland were protracted because there were three hearings before the High Court and two hearings before the Court of Appeal, and the appeal before the House is from the second judgment of the Court of Appeal delivered on 15 June 1999.

[26] In his action the appellant claimed damages for wrongful detention, false imprisonment and trespass to the person on the ground that his detention was unlawful from the outset. He further claimed damages for infringement of his right to consult a solicitor privately pursuant to s 15 of the Northern Ireland (Emergency Provisions) Act 1987. A schedule detailing the deferrals of access to the appellant's solicitor by a police chief superintendent and the nature of the solicitor's visits was put before the High Court and is as follows:

NO	DATE	TIME	DURATION OF DEFERRAL	RUNNING TIME
1	Tuesday 17/10/89 Wednesday 18/10/89	6.05 pm 7.25 pm– 7.50pm	24 hrs	5.30 pm 17/10/89 5.30 pm 18/10/89 SOLICITOR VISIT: UNSUPERVISED
2	Thursday 19/10/89 Friday 20/10/89	9 am 6.15 pm– 6.30 pm	48 hrs	7.25 pm 18/10/89 7.25 pm 20/10/89 SOLICITOR VISIT: SUPERVISED INSPECTOR CORDNER
3	Friday 20/10/89 Saturday 21/10/89	7.00 pm 7.50 am [sic] 6.35 pm– 6.55 pm	24 hrs	6.15 pm 20/10/89 6.15 pm 21/10/89 SOLICITOR VISIT: SUPERVISED INSPECTOR CORDNER
4	Sunday 22/10/89	am [sic]	48 hrs	6.35 pm 21/10/89 6.35 pm 23/10/89

[27] At the outset of the first hearing before the High Court the appellant withdrew his claim for damages for wrongful detention, false imprisonment and trespass to the person and proceeded only on the claim for damages for breach of

a statutory duty under s 15 of the 1987 Act in respect of denial of access to consult a solicitor. The full terms of s 15 have been set out in the judgment of my noble and learned friends Lord Bingham of Cornhill and Lord Steyn (at [3], above).

[28] In the High Court before MacDermott LJ the appellant advanced two principal submissions. The first was that the chief superintendent who authorised the delay in access to a solicitor did not have reasonable grounds for believing
b that the exercise of the right to consult would—

‘(d) lead to interference with the gathering of information about the commission, preparation or instigation of acts of terrorism; and (e) by alerting any person, would make it more difficult ... (ii) to secure the apprehension, prosecution or conviction of any person in connection with
c the commission, preparation or instigation of an act of terrorism.’

The second submission was that a number of the requirements set out in s 15 had not been complied with.

[29] MacDermott LJ rejected the first submission. He held that he was
d satisfied that fresh intelligence received by the police during the appellant’s detention had caused the superintendent to fear that the matters which would be put at further interviews indicating the level of police knowledge about the murder of Superintendent Harris might leak out through the appellant’s solicitor to associates or those involved with the murder. He therefore held that the superintendent had reasonable grounds for believing under s 15(8)(d) and (e) that
e there was a real risk of valuable information reaching those involved in the murder. In relation to the second submission MacDermott LJ found that there were breaches of the requirements of s 15 in two respects. First, the superintendent had made the decision to defer access to a solicitor before the appellant requested access and, secondly, the police had not informed the
f appellant of the reasons for delaying access to a solicitor as required by s 15(9)(a).

[30] MacDermott LJ held that the appellant had no right to claim damages for the two breaches of s 15 and an appeal against this decision was dismissed by the Court of Appeal. In the Court of Appeal the appellant was permitted to advance a new claim of false imprisonment on the ground that his detention became unlawful by reason of the breaches of s 15 and this claim was also dismissed by
g the court.

[31] Before turning to consider the issues which arise on this appeal it is relevant to make three observations. (1) The right given by s 15 to a person detained by the police to consult a solicitor is an important right which Parliament has expressly given to him. But Parliament has qualified the right by
h providing that access may be delayed by a senior police officer if he has reasonable grounds for believing that one of the consequences set out in s 15(8) will ensue. In the present case a senior officer did have reasonable grounds for so believing. Therefore if the requirements laid down by s 15 had been fully complied with by the police, access by the appellant to a solicitor could have been
j lawfully deferred. (2) The appellant made no admissions to the police until after he had had an unsupervised consultation with his solicitor on the evening of 18 October, the admissions being made on 20 October. This is not a case where a person in custody made admissions before he had the benefit of a consultation with a solicitor. Moreover at his trial the appellant pleaded guilty and raised no objections that admissions had been improperly obtained from him. (3) It is clear that the breach of the requirements imposed on the police by s 15 caused no

physical injury or financial loss to the appellant, and there was no evidence that he suffered any distress or harm. a

[32] The main submission advanced on behalf of the appellant was that he was entitled to recover damages for breaches of the statutory duties imposed on the police by s 15 without proof of damage. He further submitted that he was entitled to damages at common law for false imprisonment or for an innominate tort. b

BREACH OF STATUTORY DUTY

[33] My Lords, I consider that the principal question which falls to be considered on this appeal is the following one: Where a person is detained in custody by the police and a duty imposed on the police by one of the provisions of s 15 is breached but the person detained suffers no harm in consequence of the breach, can he recover damages in respect of that breach? In referring to 'harm' in this question and subsequently in this opinion I mean some substantial detriment or distress which calls for an award of damages to compensate him for that harm. In order to answer this question I consider that there are two factors to be taken into account. c d

(i) *The availability and effectiveness of judicial review*

[34] The availability and effectiveness of an existing remedy for a breach of statutory duty may be a strong indication that damages should not be awarded for that breach. In *Olotu v Home Office* [1997] 1 All ER 385, [1997] 1 WLR 328 the Crown Prosecution Service was under a statutory duty to bring the plaintiff before the Crown Court before the expiry of a customary time limit. The Crown Prosecution Service failed to perform this duty with the result that the plaintiff spent much longer in prison on remand than she should have done. The Court of Appeal held that the plaintiff did not have a private law right to recover damages for the breach of the statutory duty. Lord Bingham CJ stated ([1997] 1 All ER 385 at 393, [1997] 1 WLR 328 at 336, 337): e f

'In seeking to understand the intention of Parliament and the Secretary of State, regard must be paid to the object and scope of the provisions, the class (if any) intended to be protected by them, and the means of redress open to a member of such a class if the statutory duty is not performed.' g

And:

'It was no doubt assumed, as it was plainly intended, that the Crown Prosecution Service would perform its duty. If for any reason it did not, a defendant injured by its failure was doubtless expected to apply for a release on bail at once, such application being assured of success.' h

Mummery LJ stated ([1997] 1 All ER 385 at 395, [1997] 1 WLR 328 at 338): i

'It is a question of available remedies. The plaintiff was undoubtedly entitled to remedies in the criminal proceedings (bail) and in judicial review proceedings. The issue is whether she is entitled to an additional remedy against the CPS by way of a civil law claim for damages ...'

There are strong indicators against the implied creation of a statutory tort of strict liability in a case such as this: the availability to the plaintiff of other

a remedies both in the criminal proceedings (bail) and in public law proceedings (habeas corpus and mandamus) ...'

[35] It is relevant to observe that in England, when an issue relating to denial to a person in police custody of access to a solicitor's clerk arose, the proceedings were brought by way of judicial review. In *R v Chief Constable of Avon and Somerset Constabulary, ex p Robinson* [1989] 2 All ER 15, [1989] 1 WLR 793 the chief constable issued instructions to his police force to the effect that the character and antecedents of various unqualified clerks employed by the applicant, who was a solicitor, were such as to make their presence at police interviews with suspects undesirable. In subsequent instructions he further stated that it was his opinion that there would be very few occasions on which it would be appropriate to allow certain named clerks access to persons in custody. The applicant applied for judicial review of the chief constable's instructions, contending that they were in breach of para 6.9 of the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Code C) issued by the Secretary of State under s 66 of the Police and Criminal Evidence Act 1984. Paragraph 6.9 provided that a solicitor's clerk was to be admitted to a police station for the purpose of seeing a person held in custody unless a police officer of the rank of inspector or above considered 'that such a visit will hinder the investigation of crime'. The application was dismissed by the Divisional Court which held that since the chief constable had left the actual decision whether to deny the applicant's clerk's access to persons in custody to individual custody officers or their inspectors and had not imposed a blanket ban on the applicant's clerks, the chief constable's instructions were not contrary to para 6.9. However, it is clear that the Divisional Court accepted that it was appropriate for the applicant to seek to challenge the chief constable's instructions by way of judicial review.

[36] The effectiveness of an application for judicial review by or on behalf of a person detained by the police and the expedition with which it can be heard has been frequently demonstrated in Northern Ireland. In *R v Chief Constable of the RUC, ex p McKenna* [1992] NI 116 the two applicants were arrested on the morning of 20 November 1991 on suspicion of involvement in acts of terrorism and were taken to a police station to be interviewed. They both made a request to consult with a solicitor but a detective superintendent deferred consultation pursuant to s 45 of the Northern Ireland (Emergency Provisions) Act 1991 which had replaced s 15 of the 1987 Act. On the evening of 20 November the applicants sought leave to apply for judicial review claiming (1) an order of certiorari to quash the decision by the superintendent to defer access to a solicitor and (2) an order suspending all interviews by the police with the applicants until the application for judicial review had been heard and determined. A judge in the High Court heard the ex parte application for leave to apply for judicial review that evening and granted leave. The judge ordered that the hearing of the motion on notice should take place the next day, 21 November, at 11am and further ordered by way of interim relief that interviewing of the applicants by the police should be suspended until that time, unless the applicants were permitted to consult with their solicitor. The chief constable thereupon applied later on the evening of 20 November to the judge for an order revoking the suspension of interviews. On the hearing of that application the judge heard oral evidence from the detective superintendent who had deferred consultation and who was examined in chief and cross-examined. Having heard that evidence the judge made the order of revocation.

[37] Thereupon the applicants applied to the Court of Appeal for an order that all interviews of the applicants by the police be suspended until the application for judicial review had been heard and determined. The Court of Appeal sat at 1.30 am on the morning of 21 November and heard oral evidence from the detective superintendent who was again cross-examined and the court ordered that all interviews with the applicants by the police be suspended until the determination of the judicial review.

[38] A Divisional Court then sat at 11.45am on 21 November to hear the application for judicial review but were informed by counsel for the chief constable that at 10 am that morning the decision had been taken by the detective superintendent to permit the applicants to consult with their solicitor. Thereupon the Divisional Court adjourned the hearing of the application and sat again on 9 December 1991 when it heard submissions on behalf of the chief constable that the applicants had not been entitled to seek judicial review in respect of the decision to delay access to the solicitor, which submissions were rejected by the court. It appears from the report ([1992] NI 116 at 122) that in the weeks prior to 20 November a number of similar applications for judicial review had been brought by persons arrested as terrorist suspects and had been heard without delay: see also *Re Russell's Application* [1996] NI 310 at 315.

[39] In my opinion the speedy hearing of an application for judicial review (which could be brought on the grounds, inter alia, of a failure to give reasons for authorising a delay in complying with a request to consult a solicitor) is a much more effective remedy for a claimant to seek than the bringing of an action for nominal damages months or years after the period of detention has ended, and I do not doubt that judicial review can be employed as effectively in England as in Northern Ireland to uphold the rights of a suspect under s 58 of the Police and Criminal Evidence Act 1984. In many cases where judicial review is sought of an administrative decision cross-examination is unnecessary and is not permitted but there is power to allow it whenever it is necessary for justice to be done. In *O'Reilly v Mackman* [1982] 3 All ER 1124 at 1129, [1983] 2 AC 237 at 282 Lord Diplock stated:

‘... your Lordships may think this an appropriate occasion on which to emphasise that, whatever may have been the position before the rule was altered in 1977, in all proceedings for judicial review that have been started since that date the grant of leave to cross-examine deponents on applications for judicial review is governed by the same principles as it is in actions begun by originating summons; it should be allowed whenever the justice of the particular case so requires.’

In *R (on the application of PG) v London Borough of Ealing* [2002] EWHC Admin 250, [2002] 1 WLR 65 Munby J held that this power of the court to hear oral evidence and to direct cross-examination on judicial review has not been affected by r 54.16(1) of the Civil Procedure Rules 1998.

[40] In the present case it is clear that an application for judicial review could have been made from an early stage in the appellant's detention. There may be cases where a person detained and denied access to a solicitor will himself face considerable difficulties in initiating an application for judicial review. But, in my opinion, there is little risk that a member of the family of such a person or a friend would be unaware of his detention and would be unable to instruct a solicitor on

a his behalf who could apply for judicial review if refused access to the person detained.

(ii) *The need to prove harm*

b [41] In my opinion damages are awarded for a breach of statutory duty in order to compensate a person for loss or damage suffered by him by reason of the breach of that duty. This principle was stated by Lord Bridge of Harwich (with whose speech the other members of the House concurred) in *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622 at 632, [1991] 2 AC 370 at 420 where he said that in order to award damages for breach of statutory duty—

c 'it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach. In the well-known passage in the speech of Lord Simonds in *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544 at 547–548, [1949] AC 398 at 407–409, in which he discusses the problem of determining whether a statutory obligation imposed on A should be construed as giving a right of action to B, the whole discussion proceeds upon the premise that B will be damnified by A's breach of the obligation. I know of no authority where a statute has been held, in the application of Lord Diplock's principle, to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages.'

[42] Therefore in the present case where, not only did the appellant suffer no personal injury, injury to property or economic loss, but there was no evidence of any harm sustained by him and where judicial review would have afforded an effective and speedy remedy, I consider that the law should not award him nominal damages for the breaches of the duties imposed by s 15.

g [43] In its discussion of the methods of enforcing rules to ensure that a suspect in custody is not denied his rights the Royal Commission on Criminal Procedure stated in para 4.122 of their report *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure* (1981) (Cmnd 8092):

h 'Some of the witnesses to us have been critical of civil action as a remedy. They point to the difficulty of proving breaches of the rules and to the cost of such actions, and some doubt whether they have any impact on the individual police officer, since any award of costs is borne by police funds. Nonetheless they provide a means by which those who suffer substantial inconvenience, distress or other disadvantage as a result of unjustified police activity may gain some form of redress. It is the only means of redress for those who are not prosecuted and consequently have no opportunity to raise the matter during a trial. As we have already noted, we see this applying particularly in the case of unlawful arrest or unjustifiably prolonged detention. The arrangements we propose for recording decisions during the

course of custody may assist in proving cases of unlawful action in these and other respects, for example in relation to improper refusal of access to legal advice, and the civil courts may therefore prove to have a useful role to play in the application of the statutory rules.' (My emphasis.) a

In my opinion these observations suggest that the commission considered that a person detained should recover damages where he has suffered harm, as I have sought to define it, but do not suggest that the commission considered that there should be an award of nominal damages where no harm had been suffered as the result of a breach of a rule. Moreover the commission does not appear to have considered judicial review and there is no indication in its report that it took into account the effectiveness of judicial review as a remedy for a breach of the statutory rules. b c

[44] In their judgment the Court of Appeal considered that the application of the principle stated by the House in *Pickering's* case led to the conclusion that there should be no award of damages for breach of the statutory duties imposed by s 15 unless the claimant had suffered personal injury, injury to property or economic loss. However, the right expressly given to a person held in police custody by s 15 was given to him for his protection and the Royal Commission considered that a person who suffered substantial inconvenience, distress or other disadvantage as a result of a breach of such a right should be able to obtain damages. The decisions of the House in *Ex p Hague* and *X v Bedfordshire CC* are, in my respectful opinion, distinguishable as applying to statutory provisions which are regulatory as opposed to s 15 which is intended to give an express and specific right to a person in police custody. Therefore I am of opinion that in relation to a breach of s 15 it would be right to extend the principle stated by Lord Bridge and to regard harm, as I have defined it, as 'loss or injury of a kind for which the law awards damages'. But I consider that to award damages for an infringement of a statutory right which has resulted in no harm to the claimant and for which judicial review would have constituted an effective remedy would be an unjustifiable extension of the principle stated in *Pickering's* case. Moreover if damages were to be awarded when the claimant had suffered no harm, it is difficult to discern a principle which would enable a court to distinguish between a trivial breach for which no damages should be awarded and a breach of sufficient seriousness to call for an award of nominal or virtually nominal damages. d e f g

CONSTITUTIONAL RIGHTS

[45] The appellant sought to rely on decisions in other jurisdictions where it has been held that damages can be awarded for breach of a right contained in a written constitution even though no actual damage or harm has been suffered by the claimant. In *Ex p Leech* and *Ex p Witham* certain rights possessed by citizens of the United Kingdom have been described as 'constitutional rights' even though there is no written constitution in this country (I leave aside any question whether since 2 October 2000 by virtue of the Human Rights Act 1998 the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 can be regarded as, in part, a written constitution). However, as Laws J observed in *Ex p Witham*, the term 'constitutional right' in the United Kingdom has a limited meaning. He said ([1997] 2 All ER 779 at 783-784, [1998] QB 575 at 581): h j

a 'In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate.'

b [46] In the present case the appellant does not use the term 'constitutional right' in this limited sense. He cites decisions in other jurisdictions with written constitutions as establishing that a breach of a 'constitutional right' can give rise to a claim for damages without proof of damage or harm. In the sense in
c which the appellant seeks to rely on it, a 'constitutional right' is a right which a democratic assembly representing the people has enshrined in a written constitution. As the Judicial Committee of the Privy Council stated in *Mohammed v State* (1999) 6 BHRC 177 at 185–186, [1999] 2 AC 111 at 123:

d 'It will be recalled that in *King v R* ([1968] 2 All ER 610, [1969] 1 AC 304) Lord Hodson observed that it matters not whether the right infringed is enshrined in a constitution or is simply a common law right (or presumably an ordinary statutory right). Their Lordships are satisfied that in *King v R*, which was decided in 1968, the board took too narrow a view on this point. It is a matter of fundamental importance that a right has been considered
e important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right.'

f See also *Darmalingum v State* [2000] 1 WLR 2303 at 2308.

[47] Therefore where a right is contained in a written constitution it is accorded a special value by the courts and a breach of that right without damage or harm can lead to an award of damages. In this case which relates to a provision in an ordinary statute I consider that the decision of the House in *Pickering's* case
g affords clearer guidance than decisions in other jurisdictions relating to rights set out in written constitutions.

THE CLAIM FOR FALSE IMPRISONMENT

h [48] I consider that there is no substance in the submission that the appellant was falsely imprisoned during his detention by the police. He was lawfully arrested pursuant to s 14(1)(b) of the Prevention of Terrorism (Temporary Provisions) Act 1989 and after his arrest he was lawfully detained pursuant to s 14 (4) and (5) of that Act. I do not express an opinion on the correctness of the judgment which I delivered in the Divisional Court in *Re Gillen's Application*
j [1988] NI 40 and on whether that case is distinguishable from *Ex p Hague* where the two persons detained were both serving sentences of imprisonment, but the alleged facts considered by the court in *Re Gillen*, where it was claimed that police officers seriously assaulted a person in custody to try to extract a confession from him, are far removed from the present case, and I consider that the premature authorisation and the breach by the police of s 15(9)(a) of the 1987 Act did not render the detention of the appellant unlawful.

THE CLAIM FOR A NEW INNOMINATE TORT

[49] It was submitted that if the appellant was not entitled to damages for breach of statutory duty or for false imprisonment, he would be left without a remedy for a breach of s 15, and therefore the common law should give him a cause of action for that breach. I do not accept this submission because if there is no right to recover nominal damages for a breach of statutory duty I consider that there is no reason for the common law to give a cause of action for such breach. Moreover, judicial review affords an effective remedy for a breach of s 15. Accordingly for the reasons which I have given I would dismiss this appeal.

LORD MILLETT.

[50] My Lords, access to legal advice and the independence and integrity of the legal profession are cornerstones of a free society under the rule of law. They are guarantees against the practice of holding undesirables incommunicado, which is a hallmark of a totalitarian regime. Yet they are of little intrinsic value in themselves. For most people and for most of the time there is no need of them. What matters is that they should be there when needed. Their importance lies in the potential seriousness of the consequences if they are not.

[51] The right of a person detained in custody on suspicion of an offence to have access to a lawyer at any stage of an investigation has long been recognised by our domestic law and is implicit in art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Serious consequences may follow the denial of the right. A suspect's detention may be unjustifiably prolonged in breach of art 5 of the convention; or his defence to a criminal charge may be compromised with the result that he is deprived of his right to a fair trial in breach of art 6. Although in criminal cases this article applies only 'in the determination of a criminal charge', it casts its shadow before it. It is engaged in relation to events which take place even before a charge is brought if they may affect the fairness of the trial. As the Strasbourg court has observed, national law may attach consequences to the attitude of the accused at the initial stages of police interrogation which affect his subsequent defence; and accordingly art 6 normally requires that the accused be afforded access to a lawyer at the earliest stages of his interrogation: see *Murray v UK* (1996) 22 EHRR 29 at para 63. But the right, which is not set out expressly in the convention, may be subject to restrictions for good cause. The question in every case is whether the restriction, in the light of the entirety of the proceedings, has deprived the accused of a fair hearing. If it has not, the consistent case law of the Strasbourg court is that art 6 is not infringed.

[52] Mr Cullen was detained in police custody in Northern Ireland on suspicion of having committed an offence under the provisions of the anti-terrorism legislation. By virtue of s 15(1) of the Northern Ireland (Emergency Provisions) Act 1987 he was entitled at any time at his request to consult a solicitor privately. As my noble and learned friends Lord Bingham of Cornhill and Lord Steyn have observed, comparable statutory provisions apply generally to other offences, so the case is of general importance and is not limited to persons suspected of a terrorist offence.

[53] Section 15 does not, however, give a detainee an unqualified right to request an immediate consultation with a solicitor. In prescribed circumstances a senior officer may lawfully delay compliance with his request. It is common ground that those circumstances were present in Mr Cullen's case. Accordingly, although his request was not acceded to straightaway and he was not allowed to

a see a solicitor for some 24 hours, his important substantive right to consult a solicitor was not unlawfully denied or delayed.

[54] Denial or deferment of the right is attended by a number of procedural safeguards. Their importance varies. Section 15(2) entitles a detainee to be informed of his right as soon as practicable after he is detained. This is obviously of cardinal importance to the exercise of the right; but it was not infringed in b Mr Cullen's case. Section 15(3) requires the detainee's request and the time at which it is made to be recorded in writing. This requirement is imposed in the interests of good administration but it does not affect the exercise of the right: it too was not infringed in Mr Cullen's case. But two procedural irregularities did occur. Each of the decisions to deny Mr Cullen's access to a solicitor was made in advance of his request; and he was not informed of the reasons for the c decisions.

[55] I am not myself persuaded that on the facts of this case the first of these was an irregularity. Each of the decisions must have been made very shortly indeed before the request, and since there was no time for circumstances to change in the meantime and no indication that the officer concerned did not d maintain his opinion that access should be delayed, I would have thought that there was sufficient compliance with the statute. But little if any reliance was placed in argument on this failing which, if it was an irregularity at all, was trivial; and I need say no more about it.

[56] The other failing cannot be so easily disposed of. The importance of the right to be given reasons for an adverse decision should not be underestimated, e since in their absence the person affected may be unable to judge whether to challenge it. Moreover, as my noble and learned friends Lord Bingham and Lord Steyn have emphasised, the obligation to give reasons serves other important functions as well. On the other hand, the failure to give reasons had no adverse consequences in Mr Cullen's case, since good reasons could (and no doubt f would) have been given if anyone had remembered to give them. There is no suggestion that the omission to do so was deliberate or in bad faith, which would be a very different case.

[57] I do not think that the failure to give reasons rendered the decision itself unlawful. The one is not a condition of the other. But it does not matter. Whether or not the failure to allow immediate access to a solicitor was g technically lawful, it was legally justifiable.

[58] Mr Cullen's right to consult his solicitor, then, was briefly but justifiably delayed. Neither the delay itself nor the failure to explain the reasons for it occasioned him any prejudice or adversely affected his trial. The delay was very short and nothing of any consequence occurred during it. He made no h admissions to the police until after he had enjoyed an unsupervised consultation with his solicitor. Thereafter he freely admitted his guilt, and in due course pleaded guilty to the charges against him. It is not and could not properly be alleged that Mr Cullen was denied a fair trial, and if on a scrutiny of the proceedings as a whole the Strasbourg court agreed that this was the case it j would be bound to conclude that there was no breach of art 6(1) or (3)(c) of the convention: see *Imbrioscia v Switzerland* (1993) 17 EHRR 441.

[59] Accordingly the question for decision is whether a person who is detained by the police and briefly but lawfully or at least justifiably denied access to a solicitor is entitled as of right as a matter of English law to damages (be they small or nominal) for a procedural irregularity made in good faith and which, though important, had no adverse consequences of any kind, neither prolonging his

detention nor prejudicing the conduct of his defence and rendering his trial unfair, and causing him neither financial loss nor physical harm or mental distress. a

[60] Mr Cullen's primary claim is that he has a private law claim to damages for breach of statutory duty. Alternatively he contends that he is entitled to damages at common law for false imprisonment or for a new innominate tort. b

FALSE IMPRISONMENT

[61] I can dispose of Mr Cullen's claim to damages for false imprisonment quite shortly. In my opinion it is hopeless. His detention was lawful at its inception, and nothing that took place thereafter made his continued detention unlawful. Compliance with the requirements of s 15 is not a condition of lawful detention. Even if there were no good reasons for delaying Mr Cullen's consultation with his solicitor, the breach of duty would not have gone to the basis of his detention or the legality of the detention itself: see *Ex p Lynch* [1980] NI 126; *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1991] 3 All ER 733, [1992] 1 AC 58. In saying this I do not wish to cast any doubt on the correctness of the decision in *Re Gillen's Application* [1988] NI 40, which was a very different case. The basis of the decision in that case was that the power to hold a suspect in detention may be exercised only for the purpose of lawful questioning; and that to exercise the power for a different and wrongful purpose makes the exercise of the power unlawful (at 53). By the same reasoning, I would have no difficulty in holding that a person may not be detained in custody in order to keep him incommunicado or to prevent him from participating in political activities of which the authorities disapprove. c d e

BREACH OF STATUTORY DUTY

[62] In *X and ors (minors) v Bedfordshire CC*, *M (a minor) v Newham LBC*, *E (a minor) v Dorset CC* [1995] 3 All ER 353 at 363, [1995] 2 AC 633 at 730 Lord Browne-Wilkinson emphasised that an action for breach of statutory duty is a private law action. He said: f

'It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages.' g

[63] Accordingly the question is whether the statutory right of person in custody to be afforded access to a solicitor (or to be informed of the reasons why such access is being denied or delayed) is a private law right enforceable by an action for damages. If it is, then damages are not discretionary; if loss is established, damages are as of right. But if it is a public law right, it is not enforceable by an action for damages, though it may be enforceable by other means which, prior to the 1998 Act, did not lead to an award of damages. h

[64] Lord Browne-Wilkinson summarised the principles which are applicable in determining whether a cause of action for breach of statutory duty exists. He said ([1995] 3 All ER 353 at 364, [1995] 2 AC 633 at 731): j

'The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give

a rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides b no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer.'

c [65] In that case Lord Browne-Wilkinson was considering the effect of statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large. He observed that the House had not been referred to any case where a statute of this kind had been held to give rise to a private right of action for damages for breach of statutory duty. He d acknowledged the fact that regulatory or welfare legislation affecting a particular area of activity did in fact give protection to individuals particularly affected by that activity, but said that such legislation was not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Such legislation may be contrasted with the kind referred to by Lord Diplock in *Lourho Ltd v Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456 at 461, [1982] AC 173 at 185:

e '...where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation.'

f [66] Although not referred to by Lord Browne-Wilkinson, the cases show that there is a further aspect to be considered before a cause of action for breach of statutory duty can arise. It is not enough that Parliament shall have imposed the duty for the protection of a limited class of the public. It must also be shown that breach of the duty is calculated to occasion loss of a kind for which the law normally g awards damages. In *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622 at 632, [1991] 2 AC 370 at 420 Lord Bridge of Harwich said:

h 'But in order to fall within the principle which Lord Diplock had in contemplation it must, in my opinion, appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach. In the well-known passage in the speech of Lord Simonds in *Cutler v Wandsworth Stadium Ltd (in liq)* [1949] 1 All ER 544 at 547-548, [1949] AC 398 at 407-409, in which he discusses the problem of determining whether a j statutory obligation imposed on A should be construed as giving a right of action to B, the whole discussion proceeds upon the premise that B will be damnified by A's breach of the obligation. I know of no authority where a statute has been held, in the application of Lord Diplock's principle, to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was

imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages. Hence Lord Diplock's principle seems to me to be incapable of application...

[67] In my opinion Mr Cullen's claim does not satisfy these tests. The right of access to a solicitor affords a vital protection for persons in custody, but I do not think that such persons constitute a limited class of the public in the sense in which that expression is used in the present context. It is a quasi-constitutional right of fundamental importance in a free society—indeed its existence may be said to be one of the tests of a free society—and like habeas corpus and the right to a fair trial it is available to everyone. It is for the benefit of the public at large. We can all of us, the innocent as well as the guilty, sleep more securely in our beds for the knowledge that we cannot be detained at any moment at the hands of the state and denied access to a lawyer.

[68] If Mr Cullen had been deprived of access to a lawyer in a country with a written constitution on the Westminster model, his remedy would not lie in a private law action for damages, but in a motion for constitutional redress. In *Maharaj v A-G of Trinidad and Tobago (No 2)* [1978] 2 All ER 670, [1979] AC 385 Lord Diplock explained that this was the means by which the subject could seek redress from the Crown for a contravention of his constitutional rights by an arm of the state. In an appropriate case redress could be made by an award of damages, but the state's liability, he said 'is not a liability in tort at all; it is a liability in the public law of the state' (see [1978] 2 All ER 670 at 679, [1979] AC 385 at 399). If the events of which Mr Cullen complains had occurred after the 1998 Act had come into force, his proper course would have been to bring a claim under s 8 of that Act.

[69] These considerations alone persuade me that Mr Cullen's right of access to a lawyer was a public law right incapable of forming the basis of a private law action for breach of statutory duty. But they are reinforced by the reflection that denial of the right by itself (that is to say where it does not cause or prolong unlawful detention) is incapable of causing loss or injury of a kind for which the law normally awards damages. I agree with my noble and learned friend Lord Hutton that this may be wider than the formulation adopted by the Court of Appeal that the claimant must have suffered personal injury, injury to property or economic loss. But even on the wider formulation Mr Cullen suffered no damage. He was constrained to argue that an action for breach of statutory duty is actionable per se, that is to say without proof of damage. I do not think that the submission can stand with Lord Bridge's statement of principle in *Pickering's* case.

[70] I would therefore reject Mr Cullen's claim to damages for breach of statutory duty.

A NEW INNOMINATE TORT

[71] Mr Cullen invites the House to create a new innominate tort in order to fill what he submits would otherwise be a serious lacuna in our law. Absent a cause of action for breach of statutory duty or false imprisonment, he says, he would be left without redress for a breach of a fundamental and quasi-constitutional right implicitly guaranteed by art 6 of the convention. In my opinion the submission fails for the reason already given, that the duty which it

a is sought to enforce is a public law duty. If there is a lacuna to be filled, it must be filled by expanding the scope of our public law remedies. There is no lacuna in private law. The common law provides adequate private law remedies in tort if the detention is or becomes unlawful (false imprisonment) or access to a lawyer is deliberately and improperly denied in bad faith (misfeasance in public office). I would decline the invitation to create an additional private law action for damages to deal with a case of inadvertent failure on the part of the authorities which occasions no loss or damage to the claimant.

b [72] Whether there is a need to fill a lacuna in our public law remedies to deal with such a situation can be judged by considering whether the 1998 Act would have provided Mr Cullen with a claim for damages had the events in question occurred after the 1998 Act had come into force. I shall return to this question later.

JUDICIAL REVIEW

d [73] There is no doubt that an unlawful denial of access to a lawyer is remediable by judicial review. Moreover, the failure to give reasons for an adverse decision is a paradigm example of a procedural defect which can form the basis of a challenge by way of such review. Mr Cullen's difficulty is that he seeks an award of damages. The court has power to award damages on an application for judicial review, but only if it is satisfied that the applicant would have been entitled to such damages if he had made the claim in a separate action instead of by way of judicial review: see s 20 of the Judicature (Northern Ireland) Act 1978. e In England s 31(4) of the Supreme Court Act 1981 is to the same effect. Mr Cullen's claim cannot, therefore, be satisfied by this means.

f [74] I am, of course, sensible of the practical difficulties which may face an applicant for judicial review who has been denied access to a solicitor, particularly when he has not been told why. This may well mean that he cannot bring proceedings at the time and must be content with doing so after the event. But I am at a loss to understand why it should be thought that this is reason for awarding compensation for a loss which he has not suffered. It is hardly a sufficient answer to say that the damages should be modest when there is no obvious justification for awarding any.

g SECTION 8 OF THE HUMAN RIGHTS ACT 1998

h [75] Mr Cullen cannot bring proceedings under s 8 of the 1998 Act since the 1998 Act was not in force when the events giving rise to his claim took place. But it is helpful to test the validity of his claim that there is a lacuna in our public law by considering whether he would have been entitled to recover damages by proceedings under the section if those events occurred today.

[76] Section 8 of the 1998 Act needs to be read with s 6(1). This provides: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' So far as material s 8 provides:

- j
- (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
 - (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case ... the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. a

(4) In determining—(a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention. b

(6) In this section...

“unlawful” means unlawful under section 6(1).’

[77] If Mr Cullen were to bring his claim for damages under s 8 (assuming that this was open to him) he would face two insuperable difficulties. The first is that, as I have already pointed out, the police did not act in a way which was incompatible with his convention rights. They did not unlawfully deprive him of his liberty contrary to art 5, and their refusal to allow him immediate access to a lawyer (and still less their failure to advise him of the reasons for doing so) did not deprive him of a fair trial contrary to art 6. It follows that there is no basis for a claim to damages under s 8 on the ground that the police acted unlawfully under s 6. c
d

[78] The second difficulty stems from the fact that the court is directed by s 8 to take account of the principles applied by the Strasbourg court in relation to an award under art 41 of the convention. The Law Commission has published an article-by-article analysis of awards by the Strasbourg court of damages by way of just satisfaction: see Pt VI of *Damages Under the Human Rights Act 1998* (Law Com no 266), helpfully summarised by Sir Robert Carnwath CVO, then Chairman of the Law Commission, in his Grotius Lecture for 2000. e

[79] The Law Commission reported that the most striking feature of Strasbourg case law to lawyers from the United Kingdom is the lack of clear principles as to when damages should be awarded and how they should be measured. This may be because within Europe there are divergent traditions as to the assessment of damages. German and Dutch systems, like ours, have developed detailed rules for this purpose. French and Belgian courts, by contrast, proceed relatively empirically, particularly in matters of causation. As a result, one commentator has written of the Strasbourg jurisprudence: f
g

‘It is rare to find a reasoned decision articulating principles on which a remedy is afforded.’ (See Dinah Shelton *Remedies in International Human Rights Law* (1999) p 1.)

[80] In this situation, we may have to develop our own jurisprudence, while keeping an eye open on the case law of the Strasbourg court to ensure that we do not stray too far from the principles which that court may lay down. There is, of course, no convention reason why we may not be more generous than the Strasbourg court. The United Kingdom’s duty is to ensure that the complainant receives not less than ‘full reparation’ for the breach of his convention rights; the convention leaves us at liberty to award him more. Whether Parliament has given the court power to do so is another matter. h
j

[81] According to the case law of the Strasbourg court, the status of ‘victim’ may exist even where there is no damage; but there can be no question of compensation where there is no pecuniary or non-pecuniary damage to compensate: see *Wassink v Netherlands* [1990] ECHR 1253/86. Moreover, as the

a Law Commission reported at para 4.74, awards of nominal damages have not featured in the practice of the Strasbourg court, and in a number of cases the court has explicitly refused to make such an award. Where neither pecuniary nor non-pecuniary loss is established, the decision of the court that the conduct complained of constitutes a breach of a convention right is generally regarded as 'sufficient just satisfaction' for the breach. I agree with the conclusion of the Law Commission that, given the power of our domestic courts to make an appropriate declaration under the 1998 Act, there seems little reason for making an award of nominal damages. Indeed, a former Law Commissioner has suggested that, since nominal damages at common law perform the same function as a declaration in acknowledging that the defendant's conduct was wrongful, they should be abolished: see Professor Andrew Burrows QC *Remedies for Torts and Breach of Contract* (2nd edn, 1994) pp 269–270.

b [82] The practice of the European Court is therefore inconsistent with an award of either modest or nominal damages in a case where neither pecuniary nor non-pecuniary damage is established. It follows that such an award cannot be justified by a supposed need to deter the authorities of the state or to vindicate a convention right.

d [83] This does not mean that we have no power to make such an award for those purposes, but it does mean that we should be departing from the jurisprudence of the Strasbourg court in doing so. I am firmly of the view that we should not take such a course. Moreover, I doubt that it would be consistent with s 8(3) of the 1998 Act to do so.

e [84] Section 8(3) authorises the court to award damages for breach of a convention right only where the court is satisfied that this is necessary. The significance of this limitation should not be overlooked. It means that Parliament contemplated that there would be cases where a breach of a convention right did not automatically give rise to an award of damages, and this is inconsistent with the notion that such an award is necessary to vindicate the right. The most obvious case where an award of damages is not necessary is where there is no damage to compensate. In such a case it is not necessary to conform to the principles laid down by the Strasbourg court. It is not necessary in the interests either of corrective or of distributive justice. Nor is it necessary to make the right effective. Where the right is contested, a declaration is sufficient; it is not necessary to give the claimant a windfall, however modest, in addition. Moreover, it would seriously undermine public confidence in the administration of criminal justice if an offender who pleaded guilty to a criminal offence and received an appropriate sentence, after having already had the costs of his defence funded by the state, were in addition to receive a monetary award because of an error on the part of the police which had no adverse consequences to him. I think that the public would see the payment as rewarding the offender for his offence, and would ridicule a justice system which tended to be more solicitous of the offender than of his victim.

j CONCLUSION

[85] For these reasons, and in agreement with my noble and learned friend Lord Hutton, I would dismiss this appeal.

LORD RODGER OF EARLSFERRY.

[86] My Lords, I have had the privilege of considering the speeches of my noble and learned friends Lord Hutton and Lord Millett in draft. I agree with

them and, for the reasons they give, I too would dismiss the appeal. In brief, while the duty of the police under s 15(9)(a) of the Northern Ireland (Emergency Provisions) Act 1987 to tell a detainee, such as the appellant, the reason for authorising a delay in complying with his request for access to a solicitor is specific, it is a public law duty. Its principal purpose is to ensure that, in an appropriate case, a detainee can challenge an improper decision under sub-s (5) to authorise a delay. The appropriate civil remedy for its breach is by judicial review. Having regard to the guidance given by Lord Bridge of Harwich in *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622 at 632, [1991] 2 AC 370 at 420, I see no basis for concluding that s 15(9)(a) is intended to give a detainee, such as the appellant, a private law cause of action sounding in damages where, as here, he has suffered no harm as a result of its breach. I add two footnotes.

[87] The right of a detainee to consult a solicitor under s 15 of the 1987 Act and equivalent provisions in other statutes is clearly of great importance in the overall legislative scheme which they establish for the fair investigation of crime. In conformity with the approach of Laws J in *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779 at 783–784, [1998] QB 575 at 581, however, I would hesitate to apply the adjective ‘constitutional’ to a statutory right of that kind. In the case of s 15 that hesitation is reinforced by the fact that, within the United Kingdom, Parliament has conferred different rights on detainees in Northern Ireland and England and Wales on the one hand, and in Scotland on the other. In particular, in Scotland those detained for questioning by the police have no right to consult a solicitor. This difference may well be explicable by reference to the much more restricted powers that are given to the police in Scotland to detain people for questioning. In the ordinary case a person can be detained for that purpose for a maximum of six hours, with no possibility of any extension: s 14(2) of the Criminal Procedure (Scotland) Act 1995. Within that scheme, in terms of s 15(1)(b) the detainee is entitled—

‘to have intimation of his detention and of the police station or other premises or place sent to a solicitor and to one other person reasonably named by him, without delay or, where some delay is necessary in the interest of the investigation or the prevention of crime or the apprehension of offenders, with no more delay than is so necessary.’

So, broadly speaking, in Scotland detention is limited to six hours and the person detained has a qualified right to have intimation of his detention sent to a solicitor, while in the other jurisdictions detention can go on for much longer but detainees have a qualified right to consult a solicitor. As it is entitled to do, Parliament has thus struck the balance differently and established two distinct systems of powers and rights within the same overall constitutional framework of the United Kingdom. In these circumstances, in considering the proper approach to the interpretation of s 15(9)(a) of the 1987 Act, I have not been assisted by the constitutional jurisprudence of other countries.

[88] Since detainees have no right to consult a solicitor in Scotland, it follows, of course, that at trial the Crown regularly leads evidence of incriminating statements made by the accused while he was detained and before he had consulted a solicitor. Inevitably, when the Scotland Act 1998 made it possible for accused persons to invoke their rights under the European Convention on Human Rights and Fundamental Freedoms 1950 in the Scottish courts, they mounted

- a* challenges on the basis that, in itself, the leading of such evidence constituted a breach of their rights under art 6. In rejecting these challenges, the High Court of Justiciary has adopted the approach envisaged by Lord Millett and has held that the failure to grant an accused person access to a solicitor before or during questioning by the police does not, in itself, involve a breach of art 6 unless it can be said that, as a result of the failure, he did not have a fair trial: see *Paton v Ritchie* 2000 JC 271 and *Dickson v HM Advocate* 2001 JC 203 at 224–225 per Lord Macfadyen. Here, as Lord Millett points out, even if the Human Rights Act 1998 had applied, the appellant would have been unable to show that his art 6 right to a fair hearing had been impaired by the refusal of the police to allow him immediate access to a solicitor—far less by their failure to tell him their reasons for doing so.
- c* *Appeal dismissed.*

Celia Fox Barrister.

Lennon v Metropolitan Police Commissioner

[2004] EWCA Civ 130

COURT OF APPEAL, CIVIL DIVISION

WARD, MUMMERY AND RIX LJ

22 JANUARY, 20 FEBRUARY 2004

Negligence – Duty to take care – Existence of duty – Parties in non-contractual relationship akin to employment – Whether such relationship precluding existence of duty of care arising from voluntary assumption of responsibility.

In 1990 the claimant joined the Metropolitan Police Service (MPS). As a member of a police force, he did not have a contract of employment. Instead, he was in a non-contractual relationship, akin to that of employment, with the commissioner of the MPS. In 1998 the claimant successfully applied to join the Royal Ulster Constabulary (RUC). The arrangements for the claimant's transfer to the RUC were handled by B, a personnel executive officer employed in the MPS, who told the claimant to leave everything to her. The RUC informed B that the claimant's service would commence on 31 January 1999. In response to a specific inquiry from the claimant, B told him that his MPS allowances would not be affected by taking time off work before he started with the RUC. Under the arrangements made by B for the transfer, the claimant's service with the MPS ceased on 11 January 1999. During the following three weeks, the claimant was not at work, erroneously believing that he was on unpaid leave from the MPS. In fact, he had left the service of the MPS on 11 January, and accordingly there was a break in the continuity of service. If the transfer had been arranged, as it could have been, so as to preserve the continuity of his service, the claimant would have been entitled to retain in his future service with the RUC the benefit of a monthly housing allowance paid by the MPS in the past. Instead, the short gap in continuity of service with the two forces meant that he lost the housing allowance completely. In subsequent proceedings for negligence against the commissioner, the claimant contended that he had suffered economic loss in consequence of a breach of a duty of care owed to him by the commissioner, arising from an assumption of responsibility to him for the handling of the transfer arrangements. In particular, he complained that the MPS had failed to advise him of the adverse financial consequences of inserting 11 January 1999 on the form giving notice of intention to transfer. Judgment was given for the claimant. The commissioner appealed, contending that no duty of care had been owed to the claimant. In dealing with that submission, the Court of Appeal considered whether there was anything in the case which precluded the application of the principle that liability in tort for pure economic loss could arise from the negligent performance of a task undertaken pursuant to an express voluntary assumption of responsibility, on which a claimant had relied (the voluntary assumption of responsibility principle).

Held – Even where the parties were in a relationship of employer and employee, or in a situation akin to employment or equivalent to another kind of contract,

a there was nothing to prevent the voluntary assumption of responsibility principle applying to an omission to give advice in circumstances where, if not handled carefully, the matter for which the defendant had voluntarily assumed responsibility could result in the claimant suffering economic loss. In the instant case, a duty of care had arisen from an express assumption of responsibility by the commissioner for a particular matter, on which the claimant had relied. The commissioner, acting through B, had undertaken responsibility for the handling of the transfer arrangements. B had expressly assumed responsibility for giving advice to the claimant in relation to a particular type of loss, namely the loss of the housing allowance, which he had expressly raised with her. She had, or had access to, special complex knowledge concerning the effect of transfers on service allowances of that kind. She had led the claimant to believe that he could leave it to her and rely on her to be responsible for handling the arrangements. Those features were sufficient to attract the duty to give him advice in respect of the very type of loss about which he had expressed concern to her and which he actually suffered as a result of her failure to inform him of the implications of inserting 11 January 1999 as his leaving date on the relevant form. Accordingly, the appeal would be dismissed (see [28], [34]–[37], below).

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575 and *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506 applied.

Outram v Academy Plastics [2000] IRLR 499 distinguished.

Notes

e For pure economic loss, see 33 *Halsbury's Laws* (4th edn reissue) para 613.

Cases referred to in judgments

Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse [1998] Lloyd's Rep Bank 85, CA.

f *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Hagen v ICI Chemicals and Polymers Ltd [2002] IRLR 31.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

g *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, [1979] Ch 384, [1978] 3 WLR 167.

h *Newell v Ministry of Defence* [2002] EWHC 1006 (QB), [2002] All ER (D) 341 (May). *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367, CA.

Scally v Southern Health and Social Services Board (British Medical Association, third party) [1991] 4 All ER 563, [1992] 1 AC 294, [1991] 3 WLR 778, HL.

Spring v Guardian Assurance plc [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.

j *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.

Appeal

The defendant, the Commissioner of Police of the Metropolis, appealed with permission of Laws LJ from the order of Judge Faber in the Central London

County Court on 24 June 2003 giving judgment for the claimant, Kevin Lennon, in the sum of £43,810.59, together with interest and costs, in his proceedings for negligence against the commissioner. The facts are set out in the judgment of Mummery LJ.

Timothy Pitt-Payne (instructed by *David Hamilton*) for the commissioner.

Gavin Millar QC and *Anthony Hudson* (instructed by *Russell, Jones & Walker*) for Mr Lennon.

Cur adv vult

20 February 2004. The following judgments were delivered.

MUMMERY LJ (giving the first judgment at the invitation of Ward LJ).

THE ISSUE

[1] The issue in this appeal is whether a duty of care was owed in respect of pure economic loss flowing from a failure to give advice. The parties were in a non-contractual relationship akin to that of employment. The claimant contended that he suffered financial loss as the result of a breach of duty to give him advice; that the duty situation arose from an express voluntary assumption of responsibility for handling specific transfer arrangements and continued entitlement to service allowances after transfer; and that he relied upon the defendant to perform, with due care and skill, the responsibility which was undertaken.

[2] The claimant is a serving police officer pursuing a complaint of continuing economic loss against the Commissioner of Police of the Metropolis (the commissioner). The case rests on the vicarious liability of the commissioner for the handling of the arrangements for the transfer of the claimant to another force and for the failure of the commissioner's staff to give advice to the claimant about the preservation of his housing allowance entitlement.

THE PROCEEDINGS

[3] In 1990 Mr Kevin Lennon, who was born in Northern Ireland in 1971, joined the Metropolitan Police Service (the MPS), for which the commissioner is responsible. Mr Lennon was posted to Plaistow Police Station. In 1998 he successfully applied to join the Royal Ulster Constabulary (RUC), now known as the Police Service of Northern Ireland. In December 1998 Mrs Pam Bewley, a grade 10 personnel executive officer employed in the MPS at Plaistow Police Station, handled the arrangements for Mr Lennon's transfer to the RUC. Her unit was primarily responsible for the administration of personnel functions within the division.

[4] Mrs Bewley was informed by the RUC that Mr Lennon's service with it would begin on 31 January 1999. Her response to a specific inquiry by Mr Lennon about his MPS allowances was that they would not be affected by his 'taking time off work'. Under the arrangements made by Mrs Bewley for the transfer, Mr Lennon's service with the MPS ceased on 11 January 1999. During the following three weeks Mr Lennon was not at work, believing that he was on unpaid leave from the MPS. But he was not on unpaid leave. He had left

a the service of the MPS on 11 January. There was a break in the continuity of his service.

b [5] If Mr Lennon's transfer to the RUC had been arranged, as it could have been, so as to preserve continuity of his service over that period, he would have been entitled to retain in his future service with the RUC the benefit of a monthly housing allowance of £134.61 paid by the MPS in the past. Similarly, if he had been granted unpaid leave from the MPS for the period from 12 to 30 January 1999, he would have had a continuing entitlement to the housing allowance on transferring to the RUC. As matters turned out, however, the short gap in continuity of service with the two forces meant that he lost the housing allowance for all time.

c [6] In proceedings started against the commissioner on 3 April 2002 Mr Lennon made a 'claim in negligence arising from the manner in which [his] move from the MPS to the RUC was handled, leading to loss of housing allowance and other benefits'. He was unable to sue the commissioner for breach of contract, as a member of a police force does not have a contract of employment: at common law he acts as an officer of the Crown and as a public servant who carries out his duties by virtue of his office as a constable. Mr Lennon sued in tort, contending that he had suffered economic loss in consequence of a breach of the duty of care owed to him by the commissioner, arising from an assumption of responsibility to him for the handling of the transfer arrangements. Neither Mrs Bewley nor anyone else in the MPS had advised him of the adverse financial consequences of inserting the date, 11 January 1999 on a form giving notice of intention to transfer. There was a failure to give advice, which would have protected him from loss of his housing allowance resulting from an avoidable break in service continuity. Mr Lennon also claimed that express negligent misrepresentations had been made to him about the allowance position on a transfer.

f [7] Judge Faber, sitting in the Central London County Court, gave judgment for Mr Lennon in the sum of £43,810.59, together with interest and costs, and refused permission to appeal. She held that the commissioner had acted in breach of a duty of care owed to Mr Lennon. She rejected his claim that specific representations had been made to him by Mrs Bewley as to the effect on his allowances of his transfer to the RUC. An additional claim in respect of a reduced holiday entitlement was also dismissed and is not appealed by Mr Lennon.

g [8] This is an appeal by the commissioner against the judge's order dated 24 June 2003. Laws LJ granted permission on the basis that the points taken by the commissioner on the issue of liability were 'eminently arguable, and the case is of some importance'. Mr Pitt-Payne, appearing for the commissioner, argued the appeal solely on the question whether, in connection with the transfer to the RUC, the commissioner owed a duty to give advice to Mr Lennon about his housing allowance. The commissioner has not appealed against any of the judge's detailed findings of facts or against any of her rulings on the questions of breach of duty, causation, contributory negligence or quantum.

j [9] The high quality of the arguments on each side and the excellence of the judgment under appeal deserve to be mentioned. The hearing, which was completed comfortably within a day, was the adversarial system and the case law method seen at its best. The concise, well-crafted legal arguments evidenced 'the rational strength of English law' (Professor FH Lawson's phrase) in its cautious

approach to, and commonsense treatment of, claims in negligence for pure economic loss. a

THE FACTS: CHRONOLOGICAL

[10] In March 1998 Mr Lennon applied to join the RUC. In the course of a two-day assessment in November 1998 he was told by an RUC recruiting sergeant, to whom he put the question, that he would be entitled to keep his allowances, as he would be transferring from the MPS to the RUC. By a letter in mid-December the RUC informed Mrs Bewley that Mr Lennon had been provisionally accepted and that he would enter the training centre on 31 January 1999. When she informed Mr Lennon of the position on 15 December, he asked her what he had to do. She told him to 'leave everything to her'. She also told him that he should establish with the line managers, Sgt Plaskett and Insp Faulkner, what annual leave and rest days he had left and what his leaving date should be. He saw them later on the same day. He explained the practical arrangements that he had to make for the move. He had no annual leave left. Sergeant Plaskett suggested he might consider taking unpaid leave. He told him that he should deal with Mrs Bewley in relation to his transfer, as he believed that that was one of her areas of responsibility. Mr Lennon was not advised to apply for unpaid leave and he did not do so. b
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[11] A few days before 23 December 1998 Mr Lennon had a short discussion with Mrs Bewley about the practicalities of his move. She told him that he could leave the MPS whenever he wanted to. Knowing that he needed some days off to make the move, he asked her whether 'taking time off work' would affect his allowances. She told him (he said) not to worry, to leave it to her, she had done hundreds of transfers and to go ahead and make his arrangements. She told him that the time off would not affect his allowances, as he was transferring to another force. She did not advise him to make a formal request for unpaid leave nor did she advise him of the consequences of a break in the continuity of service with the MPS and RUC. e
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[12] By a letter of 21 December 1998 Mrs Bewley informed the RUC that Mr Lennon would be transferring from the MPS to the RUC on 11 January 1999. The same date was also given by her in a fax on 21 December to the MPS finance department. Mrs Bewley was unable to explain at trial why that date, rather than 31 January 1999, was given. In fact during a discussion between Mrs Bewley and Mr Lennon to sort out the details of the transfer Mr Lennon signed a form dated 23 December, giving midnight on 11 January as the date for which he gave notice of his intention to leave the MPS to join the RUC. In the discussion Mr Lennon had asked Mrs Bewley when he should return his warrant card, uniform and radio to her. She told him he could return them whenever he wanted to. He suggested 11 January, which would give him several weeks to get sorted out in Northern Ireland prior to joining the RUC. She gave him form no 8485 (notice of intention to transfer to another home/police force) to sign. She advised him to put 11 January as his leaving date. She did not advise him of the effect that the insertion of that date would have on the continuity of his service or on his housing allowance. Mr Lennon's understanding was that he was no longer required to turn up at Plaistow Police Station. He mistakenly believed that he was still a member of the MPS until he joined the RUC on 31 January and that he would not lose his housing allowance. If he had been told that he would lose his housing allowance, he would not have left the MPS on 11 January. On that day g
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- a he returned his warrant card and said goodbye to his work colleagues before sailing for Northern Ireland on 15 January.

[13] It was not until April 1999 that he discovered that there was a problem with his housing allowance because of a gap in service. When he asserted that he believed that unpaid leave had been agreed, it was pointed out that an application for unpaid leave had to be made in writing and that he had not made any such application. It was accepted that, if he had applied, his application would have been considered and it would have been granted. The MPS pointed out that it was the fixing of 11 January 1999 as his leaving date that caused all the difficulties.

RELEVANT FINDINGS

- c [14] In her full and careful judgment the judge identified the areas in which there was a difference in recollection between Mr Lennon and Mrs Bewley. She found Mr Lennon to be 'a much more credible witness' than Mrs Bewley. The judgment set out the evidence summarised in the above chronology and contained the following key findings. The MPS does not appeal against any of them.
- d (1) Mr Lennon believed that his housing allowance would not be affected by the transfer. When he asked Mrs Bewley if his allowances would be affected by his taking time off work, she said they would not, because he was transferring to another force.
- e (2) Mrs Bewley knew, or ought to have known, that Mr Lennon would rely on her to arrange and organise the transfer. She told him to leave everything to her.
- (3) When asked by Mr Lennon for advice as to how to progress the transfer, Sgt Plaskett referred him for that advice to Mrs Bewley, believing that it was one of her areas of responsibility.
- f (4) Mr Lennon did not appreciate the effect of signing form 8485, in which Mrs Bewley told him to insert the date 11 January, or address his mind to the consequences of the dates at all, as he did not consider that there would be a break in service or that he was leaving the MPS on 11 January.
- (5) Mrs Bewley knew that Mr Lennon was relying on her to provide him with advice as to the steps necessary to effect his transfer and to preserve his allowances. If he had asked her for advice as to the consequences of what he was doing, she would have made inquiries about matters to which she did not know the answer to find out the answer on his behalf. She would not have put the onus on him to find out the answer. She knew that continuity of service was important, but she failed to give any consideration to that issue.
- g (6) The text of the Police Personnel Manual dealing with 'Leaving the Service' (ch 7.8, para 33) did not warn that, if there was a gap in the officer's continuity of service, allowances would be threatened, and did not deal with the effect of a break in service, though most officers would be aware of the need for continuity of service to preserve allowances.
- h (7) It would have been possible for 30 January 1999 to have been Mr Lennon's leaving date and so avoid the break in service. He could actually have worked until that date. He would have done so, had he known that the alternative was a break in service depriving him of his housing allowance.
- j (8) It was plain to Sgt Plaskett and higher line management (Insp Faulkner and Chief Supt Boylin) that Mr Lennon did not intend there to be a break in his

service. All of them knew the risk of losing allowances, if there was a break in service.

CONCLUSIONS ON LIABILITY

[15] On each aspect of liability the judge summarised the submissions on law and fact and stated her conclusions. Although the appeal is confined to the duty of care issue, reference to the relevant conclusions on the other aspects of liability puts the issue in its proper context.

(1) *Duty of care*

The judge rejected the allegation that Mrs Bewley made a specific misstatement, relied on by Mr Lennon, that Mr Lennon's entitlement to allowances would not be affected, if he left the MPS on 11 January 1999 and did not join the RUC until 31 January 1999. The judge also rejected allegations that Mrs Bewley had made representations informing Mr Lennon that he need not take any steps in relation to his transfer or in relation to taking time off to preserve his entitlement to allowances. He had taken steps, such as seeing Sgt Plaskett and giving her the 11 January date, and he was under the impression that he had taken all the necessary steps for unpaid leave. The judge correctly identified the relevant duty of care to be considered: it related to a negligent omission to warn Mr Lennon of the consequences of inserting 11 January as his leaving date on the form no 8485. The judge found that there was a proximate relationship between Mr Lennon and the commissioner; that there was a voluntary assumption of responsibility by the commissioner for administering the transfer and in tendering the service of advising on and arranging and organising the transfer in the knowledge that Mr Lennon would rely on the answers and advice; that the imposition of a duty of care in this case would not be a new departure in the law; and that it was fair, just and reasonable that the commissioner owed a duty of care to Mr Lennon to arrange and organise the transfer, including the giving of advice, so as to ensure that he did not lose his allowances in transferring to the RUC.

(2) *Breach of duty*

The duty of care to ensure that Mr Lennon did not lose his allowances in transferring to the RUC was breached by the commissioner, whose staff had undertaken to advise him on his transfer and to arrange and organise it; they had specialist knowledge, or access to such knowledge, about transfers; they knew the risk to allowances of a break in service; and they had led him to believe that he had taken unpaid leave. The MPS staff had failed to consider whether or not the arrangements would result in a break in service and failed to advise him to consider whether the dates under discussion (11 and 31 January) would result in a break in service.

(3) *Causation*

The break in service that caused the lost entitlements was itself caused by the breaches of duty by MPS staff.

(4) *Contributory negligence*

- a There was no fault on the part of Mr Lennon. He did not realise that there would be a break in service. He believed that he had unpaid leave. He completed form no 8485 believing that it dealt only with the date when he would hand in his warrant card and stop work. He was not advised by Mrs Bewley as to the effect of the form. He relied on her for advice and there was no fault on his part in
- b failing to read the form and appreciate its effect.

LIABILITY IN NEGLIGENCE FOR PURE ECONOMIC LOSS

- [16] The general principles governing the existence of a duty of care not to cause pure economic loss to another by careless acts or omissions are laid down in the following cases cited in argument: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571, [1979] Ch 384, *Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563, [1992] 1 AC 294, *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296; *White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, [1995] 2 AC 145, *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse* [1998] Lloyd's Rep Bank 85, *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367; *Newell v Ministry of Defence* [2002] EWHC 1006 (QB), [2002] All ER (D) 341 (May) and *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31.

- e [17] The position taken by Mr Millar QC on behalf of Mr Lennon was that this case is clearly covered by the principles laid down nearly 40 years ago by the House of Lords in the *Hedley Byrne* case and that the opposing arguments of the commissioner were aimed at a case, which had never been advanced on
- f an employer, or similarly placed person, to take the positive step of giving advice to protect an employee, or similarly placed person, from economic loss.

THE HEDLEY BYRNE PRINCIPLE

- [18] In the *Hedley Byrne* case [1963] 2 All ER 575 at 594, [1964] AC 465 at 502–503 Lord Morris of Borth-y-Gest laid down the governing principle in these terms:

- h '... it should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of, or by the instrumentality of, words can make no difference. Furthermore if, in a sphere in which a person is so placed that others could reasonably rely on his judgment or his skill or on his ability to make careful inquiry, a person takes it on himself to give information or advice to, or allows his information or
- j advice to be passed on to, another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.'

[19] In such cases the starting point, as indicated by Lord Browne-Wilkinson in *White v Jones* [1995] 1 All ER 691 at 714, [1995] 2 AC 207 at 272, is to ask the question:

‘... in the absence of any contractual or fiduciary duty, what circumstances give rise to a special relationship between the plaintiff and the defendant sufficient to justify the imposition of the duty of care in the making of statements?’ a

[20] Lord Browne-Wilkinson explained that such circumstances can include reliance in cases of negligent statements of advice and the assumption of responsibility for the task. He said: b

‘The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff’s affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in *Hedley Byrne v Heller* [1963] 2 All ER 575 at 583, [1964] AC 465 at 486, he has “accepted a relationship ... which requires him to exercise such care as the circumstances require,” ie although the extent of the duty will vary from category to category, *some* duty of care arises from the special relationship.’ (See [1995] 1 All ER 691 at 716–717, [1995] 2 AC 207 at 274.) c
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[21] As was held by Oliver J in the *Midland Bank* case [1978] 3 All ER 571 at 596, [1979] Ch 384 at 417 and by Lord Goff of Chieveley in *Henderson’s* case [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 the duty of care arising in special relationship covers acts of omission, as well as acts of commission. *Midland Bank* was a case of a claim in tort brought by a client against his solicitor for failing to register an option as a land charge. Oliver J referred to ‘[a] common law duty ... not to injure their client by failing to do that which they had undertaken to do and which, at their invitation, he relied on them to do’. f
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[22] Mr Millar submitted that the judge correctly applied the *Hedley Byrne* principle: the commissioner injured Mr Lennon financially by failing to handle with due skill and care the arrangements for his transfer to the RUC which, through Mrs Bewley, he had undertaken to handle and on which, at her suggestion, Mr Lennon had relied. There was a special relationship between Mr Lennon and the commissioner. There was an express voluntary assumption of responsibility by the commissioner, acting through staff with, and with access to, special knowledge and skill, and on whom Mr Lennon relied to carry through the particular matter undertaken with due skill and care. This case was not complicated by policy considerations, such as the spectre of indeterminate liability to an indeterminate number of persons which has led the courts to proceed with caution in imposing a general duty of care in cases of pure economic loss. h
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a [23] Mr Pitt-Payne challenged the judge's conclusion on the duty of care point on a number of grounds.

A. Novelty

b [24] Mr Pitt-Payne's main criticism was that the judge's decision broke new ground and that it involved a radical departure from the existing law. I do not agree. No new category of duty situation is created by the decision. The particular facts found by the judge bring the case within the *Hedley Byrne* principle, as applied in later decisions of the highest authority. It is now well established that liability in tort for pure economic loss can arise from the negligent carrying out of a task undertaken pursuant to an express voluntary assumption of responsibility, on which the claimant has relied. In those

c circumstances it is unnecessary for the court to consider specifically whether it would be fair, just or reasonable to impose a duty of care. The test laid down for the existence of a duty has already been passed by judicial decisions admitting such cases to the category of recognised duty situations (see *Henderson's case* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 per Lord Goff).

d B. Professional adviser

[25] Mr Pitt-Payne pointed out that this was not a case of an undertaking of responsibility for the giving of advice by, or of reliance on, a person in a calling or profession. That was an important feature of the facts in the *Midland Bank case*, which was heavily relied on by the judge, and it was singled out for particular

e mention by Lord Bridge of Harwich in the *Caparo Industries case* [1990] 1 All ER 568 at 574–575, [1990] 2 AC 605 at 619. Mrs Bewley was not a professional adviser. She was not employed in the MPS to give advice to others in the MPS about terms and conditions of service, service allowances or transfers. She had been cleared of the charge of making a positive negligent misstatement that the

f choice of 11 January would preserve Mr Lennon's entitlement to housing allowance with the RUC. She had not received any positive request from Mr Lennon for advice about the choice of 11 January as his leaving date and she was not under any positive duty to give him advice as to the choice of leaving date. The case accordingly fell outside the *Hedley Byrne* principle.

g [26] Lord Goff decisively disposed of the professional adviser point in *Spring's case* (the case of an employer's duty of care in relation to the giving of a character reference) when he held ([1994] 3 All ER 129 at 145, [1995] 2 AC 296 at 318) that the principle recognised in the *Hedley Byrne* case rested—

h 'upon an assumption or undertaking of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due care and skill.'

j [27] Lord Goff held that the duty of care was not even limited to the provision of information and advice. The 'special skill' spoken of in the *Hedley Byrne* case was 'to be understood in a broad sense, certainly broad enough to include special knowledge'. The principle may apply to a case in which the defendant has access to information and fails to exercise due care and skill in 'drawing on that source of information for the purposes of communicating it to another' (see [1994] 3 All ER 129 at 146, [1995] 2 AC 296 at 318). Similar points on the breadth of 'the governing principle' of assumption of responsibility underlying the *Hedley Byrne*

case and the broad approach to the concept of 'special skill' were made by Lord Goff in his speech in *Henderson's* case delivered later in the same month as *Spring's* case (see [1994] 3 All ER 506 at 518–521, [1995] 2 AC 145 at 178–181). a

[28] In my judgment, Mrs Bewley expressly assumed responsibility in a particular transaction, namely the transfer of Mr Lennon from the MPS to the RUC, for giving advice to Mr Lennon in relation to a particular type of loss, namely the loss of the housing allowance, which he had expressly raised with her. b Although she was not a professional person or a professional adviser, she occupied a managerial position in the MPS. She had, or had access to, special complex knowledge concerning the effect of transfers on service allowances of that kind. She led Mr Lennon to believe that he could leave it to her and rely on her to be responsible for handling the arrangements. She did not tell him, as she could easily have done if the matter was outside her area of responsibility, to seek advice elsewhere, such as the Police Federation. Those features of the case were sufficient to attract the duty to give him advice in respect of the very type of loss about which he had expressed his concern to her and which he actually suffered as a result of her failure to advise him of the implications of completing form no 8485 by inserting 11 January 1999 as his leaving date. c

C. Employment relationship analogy d

[29] The commissioner's remaining arguments skirted around the edges of employment law. As there was no contract of employment between Mr Lennon and the commissioner it was impossible to imply a contractual term putting the commissioner under a duty to provide advice to Mr Lennon about his housing allowance (cf *Scallly v Southern Health and Social Services Board* [1991] 4 All ER 563, [1992] 1 AC 294 where the House of Lords implied a term in the contracts of employment of junior doctors that they would be informed of changes to their statutory superannuation scheme of which they could not be expected to be aware). It was also said by Lord Bridge in that case ([1991] 4 All ER 563 at 568, [1992] 1 AC 294 at 303) that 'If a duty of the kind in question is not inherent in the contractual relationship, I do not see how it could possibly be derived from the tort of negligence'. e

[30] The relationship between Mr Lennon and the commissioner was analogous to that created by a contract of employment. Mr Pitt-Payne argued that it was not fair, just or reasonable to impose on an employer a general duty of care to give advice to an employee in order to protect him from economic loss. The same should apply between the commissioner and Mr Lennon. In financial matters the relationship was, as in the case of employment, essentially antagonistic. An employer is concerned with the protection of his own economic interests. In general the normal and reasonable expectation is that an employee would look after his own economic interests. If he needed advice on financial matters, he would not normally expect to obtain it from his employer, but would look in other directions, such as to his trade union. g

[31] Mr Pitt-Payne relied strongly on the decision of this court in *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367. The defendant company was both the employer and the trustee and administrator of the company pension scheme. It failed to give advice to an employee, who had resigned from the company and ceased to be a member of the scheme, about his option to rejoin the pension scheme when he was re-employed by the company. It was held, dismissing a claim by the employee's widow for financial loss, that there was no h

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a general duty on the employer (or on the trustee) to provide information or advice to an employee about his rights under the pension scheme, such as whether or not to apply to rejoin the scheme, in order to prevent economic loss. Tuckey LJ, with whom the other two members of the court agreed, said:

b 'Looking more generally at the nature of the duty alleged, it is, of course, a duty to avoid causing economic loss. Secondly, if there is a duty, breach of it will result in liability for an omission (failure to advise) in circumstances where it is not alleged that the Company were asked or expressly or impliedly assumed any contractual responsibility to give such advice. As a
c general rule, the common law does not impose liability in tort for what are called "pure omissions". In this respect it should be noted that in all the "advice" cases some advice had been given. The courts have had to decide whether it was given in circumstances which required the adviser to take care or whether a duty to do so, which was admittedly owed to some, was also owed to others. When advice has been given and a duty is owed the
d duty may be breached by omission, but our case is one where no advice was given, so it is one of pure omission.' (See [2000] IRLR 499 at 501, [2001] ICR 367 at 372 (para 19).)

[32] Tuckey LJ went on to hold ([2000] IRLR 499 at 501, [2001] ICR 367 at 373 (paras 21–24)) that the claim was bound to fail, as it was not alleged that the duty
e of care was contractual and, following *Scally's* case, a duty of care in tort is only co-extensive with the contractual duty. The company had not held itself out to give pension advice to the employee and was not asked to do so. It was not under a duty to tender advice of its own volition. It had not assumed responsibility to provide pension advice. No duty to give advice had been held to exist in analogous circumstances.

f [33] *Outram's* case is, in my judgment, distinguishable. It was not claimed that the employer in *Outram's* case was under a contractual duty to give pension advice or that the employer had, either expressly or impliedly, made an assumption of responsibility to give pension advice, on which the employee would rely (see [2000] IRLR 499 at 501, [2001] ICR 367 at 372 (para 19)). It was
g not even alleged that the employee had ever asked the employer company for advice about his pension or that the company had made a negligent misstatement about it.

[34] Mr Lennon does not invoke a general non-contractual duty of care positively to give advice to protect him from economic loss. The striking feature
h of this case is that the duty of care arises from an express assumption of responsibility for a particular matter, on which Mr Lennon relied. Responsibility was undertaken by the commissioner, acting through Mrs Bewley, for the handling of the transfer arrangements. If not carefully handled, the transfer could have an adverse impact on the housing allowance, to which Mr Lennon was entitled while he had continuity of service. In my judgment, there is nothing in
j this case to prevent the *Hedley Byrne* principle from applying to an omission to give advice in such circumstances, even where the parties are in the relationship of employer and employee or in a situation akin to employment or equivalent to another kind of contract (see for example, *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 at 43–44 (paras 84–89), where it was held that there was a tortious as well as contractual duty of care in connection with information supplied

to employees regarding the transfer of the undertaking in which they were employed). a

RESULT

[35] For the above reasons I would dismiss the appeal.

RIX LJ.

[36] I agree. b

WARD LJ.

[37] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

GMB and others v Susie Radin Ltd

[2004] EWCA Civ 180

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, LAWS AND LONGMORE LJJ

10 FEBRUARY, 20 FEBRUARY 2004

Redundancy – Employer’s duty to consult appropriate trade union – Failure to consult union – Protective award against employer – Period of award – Factors to be considered in assessing period – Whether purpose of award compensatory – Trade Union and Labour Relations (Consolidation) Act 1992, ss 188, 189.

The defendant company employed 108 employees at its factory. It had a recognition agreement with the claimant trade union. In March 2000, a director of the company wrote to the union official responsible for the company’s employees, rejecting a pay claim for April 2000, and saying that keeping the factory open was being continually reviewed. On 6 April, the company’s solicitor wrote to the union, and to the employees not represented by the union, informing them of impending redundancies. On 19 April, the directors and the solicitor had a meeting with the union official and later met with all the employees. Shortly thereafter letters of dismissal were sent to all employees. On 13 June, a director and the solicitor met first the non-union representatives and then the union official and a shop steward and discussed possibilities to save the factory. There was no further contact between the union and the company. The factory closed on 14 July. Section 188(1)^a of the Trade Union and Labour Relations (Consolidation) Act 1992 provided that where an employer was proposing to dismiss as redundant 20 or more employees within a period of 90 days or less, the employer was required to consult all the persons who were appropriate representatives of any of the affected employees about the dismissals, and under s 188(1A), to begin the consultation in good time and in any event, where the employer was proposing to dismiss 100 or more employees, at least 90 days before the first of the dismissals took effect. Under s 188(2) the consultation had to include consultation about ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals and under s 188(4) the employer had to disclose certain information in writing for the purposes of the consultation. Where an employer failed to comply with a requirement of s 188, a complaint could be presented, under s 189^b, to an employment tribunal, which had the power to make a protective award ordering the employer to pay remuneration to the affected employees for the protected period. Under s 189(4)(b) the protected period was to be of such length as the tribunal determined to be just and equitable having regard to the seriousness of the employer’s default, but was not to exceed 90 days. The tribunal found that the company had ‘gone through the motions of consultation’ but that no consultation had been carried out, and made a protective award for the maximum period of 90 days. The company appealed against that decision and the Employment Appeal Tribunal upheld the tribunal’s award, finding that it was one which could properly be considered just and

a Section 188, so far as material, is set out at [14]–[17], below

b Section 189, so far as material, is set out at [18], below

equitable in the circumstances. The employer appealed to the Court of Appeal, contending, *inter alia*, that the purpose of the protective award was compensatory, not punitive. a

Held – In deciding, in the exercise of their discretion, whether to make a protective award, and for what period, employment tribunals should have a number of matters in mind. First, the purpose of the award was to provide a sanction for breach by the employer of the obligations in s 188; it was not to compensate the employees for loss which they had suffered in consequence of the breach. Secondly, the tribunal had a wide discretion to do what was just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default. Thirdly, the default might vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. Fourthly, the deliberateness of the failure could be relevant, as could the availability to the employer of legal advice about his obligations under s 188 of the 1992 Act. Fifthly, it was a matter for the tribunal as to how it assessed the length of the protected period, but a proper approach in a case where there had been no consultation was to start with the maximum period and reduce it only if there were mitigating circumstances justifying a reduction to an extent which the tribunal considered appropriate. In the instant case, given the tribunal's finding that no consultation at all had taken place, the decision to make a protective award of the maximum period had not been perverse. The appeal would therefore be dismissed (see [25], [26], [43], [45]–[48], [50], below). b
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d

Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades [1978] 2 All ER 649 and dicta of Slynn LJ in *Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers* [1980] 1 All ER 231 at 239 disapproved. e

Notes

For the duty to consult, and for complaint and protective award, see 47 *Halsbury's Laws* (4th edn) (2001 reissue) paras 1407, 1410. f

For the Trade Union and Labour Relations (Consolidation) Act 1992, ss 188, 189, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 364, 368.

Cases referred to in judgments

Association of Patternmakers and Allied Craftsmen v Kirvin Ltd [1978] IRLR 318, EAT. g

Clarks of Hove Ltd v Bakers' Union [1978] 2 All ER 15, [1978] 1 WLR 563, EAT; *rvsd in part* [1979] 1 All ER 152, [1978] 1 WLR 1207, CA.

EC Commission v Greece Case 68/88 [1989] ECR 2965, ECJ.

EC Commission v UK Case C-383/92 [1994] IRLR 412, [1994] ICR 664, [1994] ECR I-2479, ECJ. h

GMB v Rankin and Harrison [1992] IRLR 514, EAT.

Middlesborough BC v TGWU [2002] IRLR 332, EAT.

Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, [1988] AC 344, HL.

Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers [1980] 1 All ER 231, [1980] ICR 31, EAT. j

Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades [1978] 2 All ER 649, [1978] 1 WLR 558, EAT.

TGWU v Gainsborough Distributors (UK) Ltd [1978] IRLR 460, EAT.

Wilson (Joshua) & Bros Ltd v Union of Shop, Distributive and Allied Workers [1978] 3 All ER 4, [1978] ICR 614, EAT.

Appeal

- a** Susie Radin Ltd (the company) appealed, with permission of the Court of Appeal (Keene and Scott Baker LJJ) from the decision of the Employment Appeal Tribunal (Judge Levy QC, Ms J Drake, Mr I Ezekiel) on 24 June 2003 dismissing the company's appeal from the decision of an employment tribunal sitting at Newcastle-upon-Tyne, released on 13 May 2000: (i) that the company had
- b** breached s 188 of the Trade Union and Labour Relations (Consolidation) Act 1992; and (ii) making a protective award under s 189 of the 1992 Act of the maximum period permitted, on hearing complaints lodged by originating applications by the GMB trade union on behalf of member employees of the company, and by 29 non-union employees of the company. The facts are set out in the judgment of Peter Gibson LJ.

c *Sean Jones* (instructed by *Steeles*) for the company.

Philip Mead (instructed by *Thompsons*, Newcastle-upon-Tyne) for the GMB and the other respondents.

Cur adv vult

d

20 February 2004. The following judgments were delivered.

PETER GIBSON LJ.

- e** [1] This appeal involves a challenge to the protective award, including in particular the length of the protected period, made by an employment tribunal (ET) under s 189(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended by the Trade Union Reform and Employment Rights Act 1993 and the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations, SI 1995/2587 and SI 1999/1925
- f** respectively. The ET had found that the employer, which made more than 100 employees redundant on the closure of its English factory, had breached s 188 of the 1992 Act by its failure to consult and the ET made a protective award of the maximum period permitted under the 1992 Act. The Employment Appeal Tribunal dismissed the appeal of the employer. This appeal, brought with the permission of this court, is the first occasion on which the principles on which a
- g** protective award falls to be made have been considered at the level of this court.

THE FACTS

- h** [2] The appellant, Susie Radin Ltd (the company), designs and, until 14 July 2000, manufactured clothing at a factory in Crook, County Durham. One hundred and eight employees worked in the factory. There was a recognition agreement with the GMB although not all the employees were members of that union. Miss Woodall was the GMB officer responsible for the company's employees.

- j** [3] The first indication of a possible closure of the factory came in a letter to Miss Woodall from a director of the company, Mr Grant, on 20 March 2000, in which he rejected a pay claim for April 2000 and said that keeping the factory open was far from guaranteed and was being continually reviewed. Mr Grant and another director, Ms Radin, had consulted the company's solicitor, Mr Shaw, who on 6 April 2000 sent letters to the GMB and to the employees not represented by the GMB notifying them of the impending redundancies, and saying:

'Subject to any consultations, the proposed method of dismissal will be by serving a 12 week notice of dismissal for reasons of redundancy anticipated to terminate on 14 July 2000.'

[4] On 19 April 2000 the directors and Mr Shaw had an acrimonious meeting with Miss Woodall. Later that day the directors and Mr Shaw had a meeting with all the employees. Mr Shaw then dictated a letter of dismissal to be sent to all employees and those letters were dispatched almost immediately. On 13 June 2000 Mr Grant and Mr Shaw met first the non-union representatives and later Miss Woodall and a GMB shop steward and discussed possibilities to save the factory. There was no further contact between the GMB and the company and the factory closed on 14 July 2000.

[5] An originating application was presented promptly by the GMB, seeking a protective award on behalf of its members. Twenty-nine non-GMB employees also lodged originating applications. The company denied any entitlement to a protective award. The GMB members also themselves presented originating applications complaining of unfair dismissal, a complaint also made by the non-GMB employees.

THE PROCEEDINGS

[6] An ET sitting at Newcastle-upon-Tyne heard the applications on 19 December 2001. By their reserved decision sent to the parties on 13 May 2002, the ET found that prior to 20 March 2000 the company was proposing the closure of the factory and the redundancy of the workforce, that at the meeting with Miss Woodall on 19 April 2000 the company had provided none of the information required by s 188(4) of the 1992 Act and that there was no consultation either with her, that the meeting with all the employees was not a meeting with the representatives of the employees as required by s 188(1B) of the 1992 Act and that on 13 June 2000 the company was 'going through the motions of what [it] considered to be consultation'. The ET expressed their conclusion on this topic in para 40 of the decision:

'We therefore come to the conclusion that the application for a protective award is well founded and that the respondents are entitled to a declaration to that effect. We have to consider the period. We consider that 90 days is appropriate. [Counsel for the company] argues that because the respondents gave an extended notice period of 12 weeks to the employees, which was not necessary, that the protective award should be nil. We cannot agree with that. The purpose of the protective award is to ensure that the employers carry out proper consultation. No consultation was carried out in this case. The requirements of s 188 require 90 days minimum consultation which did not take place. The tribunal has to consider the employers' default in [not] complying with s 188 of the 1992 Act. We have found that there was no consultation. The respondents failed completely to comply with s 188. That is serious. We therefore conclude that it is appropriate that a period of 90 days be the protective award period.'

[7] The ET said of the complaint of unfair dismissal (para 41):

'So far as unfair dismissal is concerned we accept that the applicants were dismissed for redundancy which is a potential fair reason and that the respondents have shown that reason. In so far as fairness is concerned this was a closure of the whole of the factory. There was no possibility of it

a remaining open. A decision had been made to close it and that all of the employees would be made redundant. There was no need for any selection procedure or any individual consultation because that consultation would have resulted in the same position at the end of the day. None of the employee[s] could have saved their jobs by any individual consultation. There was no alternative employment available. We do not find that there was an unfair dismissal.'

b [8] Accordingly the ET decided that—

(1) the complaints under ss 188 and 189 of the 1992 Act were well founded, (2) a protective award should be made in respect of such of the former employees of the company as it dismissed by reason of redundancy on or after 14 July 2000, (3) the protected period should be 90 days beginning with 14 July 2000, and (4) the former employees were fairly dismissed.

c [9] The company then appealed against the first three parts of that decision. The appeal was heard by the Employment Appeal Tribunal (EAT), Judge Levy QC presiding, who dismissed the appeal. On the protective award the EAT said that the award made by the ET was one which could be properly considered just and equitable in the circumstances, the fact which really concerned the ET having been the clear lack of consultation throughout the period.

d [10] Permission to appeal to this court on a number of grounds was sought by the company but refused by the EAT and, on application to this court, by Keene LJ on paper. However, on a renewed application, this court (Keene and Scott Baker LJ) allowed the appeal to go ahead on grounds limited to the protective award. In granting permission, Keene LJ noted that Mr Sean Jones for the company had told the court that there is considerable variation in the practice of ETs over protective awards and that no guidance had yet been given by this court as to the approach to be adopted by ETs in relation to their exercise of discretion e f or the factors which should be reflected in any award.

THE STATUTORY PROVISIONS

[11] Before I consider the rival submissions made to us, it is convenient to set out the statutory provisions relevant to the appeal.

g [12] The provisions with which we are concerned are in Ch II of Pt IV of the 1992 Act, that chapter relating to the procedure for handling redundancies. The relevant provisions were originally contained in ss 99–107 of the Employment Protection Act 1975. They were enacted to give effect to Council Directive (EEC) 75/129 (OJ 1975 L48 p 29). By the 1975 directive it was recited that it was important that greater protection should be afforded to workers in the event of collective redundancies (defined to mean dismissals effected by an employer for one or more reasons not related to the individual workers concerned, above a specified minimum number). The 1975 directive provided for a consultation procedure which had to be followed by the employer. It has now been replaced by Council Directive (EC) 98/59 (OJ 1998 L225 p 16), art 6 of which requires member states to ensure that 'judicial and/or administrative procedures for the enforcement of obligations under the Directive are available to the workers' representatives and/or workers'.

j [13] There is no mention in either directive of any protective award. Nothing is expressly stated as to any sanction for any failure to comply with the consultative procedure. However, it is not in dispute that art 5 of the EC Treaty (now art 10 EC) requires member states to take all measures necessary to ensure

that infringements of Community law are 'penalized under conditions ... which, in any event, make the penalty effective, proportionate and dissuasive'. (See *EC Commission v Greece* Case 68/88 [1989] ECR 2965 at 2985 (para 24).)

[14] By s 188(1) and (1A) of the 1992 Act (as amended):

'Duty of employer to consult...representatives.—(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be affected by the proposed dismissals or may be affected by measures taken in connection with those dismissals.

(1A) The consultation shall begin in good time and in any event—(a) where the employer is proposing to dismiss 100 or more employees as mentioned in subsection (1), at least 90 days, and (b) otherwise, at least 30 days, before the first of the dismissals takes effect.'

[15] Section 188(1B) provides who are the appropriate representatives of any affected employees. If the employees are of a description in respect of which an independent trade union is recognised by their employer, those representatives are representatives of the trade union. In any other case, the appropriate representatives are employee representatives as specified in para (b) of s 188(1B).

[16] By s 188(2):

'The consultation shall include consultation about ways of—(a) avoiding the dismissals, (b) reducing the numbers of employees to be dismissed, and (c) mitigating the consequences of the dismissals, and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.'

This was a new provision introduced in 1995 but giving effect to provisions in art 2 of the 1975 directive.

[17] Section 188(4) provides:

'For the purposes of the consultation the employer shall disclose in writing to the appropriate representatives—(a) the reasons for his proposals, (b) the numbers and descriptions of employees whom it is proposed to dismiss as redundant, (c) the total number of employees of any such description employed by the employer at the establishment in question, (d) the proposed method of selecting the employees who may be dismissed ... (e) the proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect and (f) the proposed method of calculating the amount of any redundancy payments to be made (otherwise than in compliance with an obligation imposed by or by virtue of any enactment) to employees who may be dismissed.'

[18] Section 189 is in this form, so far as material:

'Complaint...and protective award.—(1) Where an employer has failed to comply with a requirement of section 188 ... a complaint may be presented to an employment tribunal on that ground ... (c) in the case of failure relating to representatives of a trade union, by the trade union, and (d) in any other case, by any of the affected employees or by any of the employees who have been dismissed as redundant...

a (2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

b (3) A protective award is an award in respect of one or more descriptions of employees—(a) who have been dismissed as redundant, or whom it is proposed to dismiss as redundant, and (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188, ordering the employer to pay remuneration for the protected period.

c (4) The protected period—(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and (b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188; but shall not exceed 90 days...

[19] By s 189(5) the ET are not to consider a complaint unless presented to them before the date on which the last of the dismissals to which the complaint relates takes effect or in the three-month period beginning with that date or such further period as the ET consider reasonable where the ET are satisfied that presentation within the three-month period was not reasonably practicable.

d [20] By s 190 the employer is obliged to pay remuneration for the protected period to every employee of a description to which the protective award relates. Sections 190 and 191 contain provisions limiting that right to be paid remuneration. For example, under s 190(4), the employee is not entitled to remuneration under a protective award in respect of a period during which he is employed by the employer unless entitled to be paid by the employer in respect of that period by virtue of his employment contract or his rights in a period of notice. Other provisions terminate the right to payment if the employee dies during the protected period (s 190(6)) or is fairly dismissed or unreasonably terminates the contract of employment (s 191(1)).

e [21] Section 190(3), until repealed in 1993, provided for a set-off of certain payments made by an employer to an employee in respect of a period within the protected period against the employer's liability to pay the protective award. However, in *EC Commission v UK* Case C-383/92 [1994] IRLR 412 at 421–422, [1994] ICR 664 at 725–726 (paras 42–44) the European Court of Justice held that s 190(3) largely deprived what it called 'that sanction' (viz the protective award) of its practical effect and 'its deterrent value', and pointed out that an employer will not be 'penalised' by 'the sanction' except and only to the extent that the protective award exceeds the sums which he is otherwise required to pay to the employee. That court therefore held that the United Kingdom, 'by failing to provide for effective sanctions in the event of failure to consult' as required by the 1975 directive, had failed to fulfil its obligations under that directive and art 5 of the EC Treaty (now art 10 EC).

THE RIVAL SUBMISSIONS

j [22] Mr Jones for the company makes the following submissions, which I summarise in my own words. (1) The purpose of the discretionary protective award is compensatory, not punitive. (2) The ET, in exercising their discretion as to the period of the protective award, were obliged to: (a) award a protected period of such length as was just and equitable in all the circumstances; and (b) have regard to the seriousness of the company's default in complying with its obligations. (3) The fact that, as the ET found in relation to unfair dismissal,

consultation would have made no difference is (a) one of the circumstances to be taken into account in assessing what length would be just and equitable for the protected period, and (b) a factor relevant to the assessment of the seriousness of the company's default. (4) In considering the seriousness of the default, the ET should have considered to what extent the underlying legislative purpose of ss 188 and 189 (to be found by reference to s 188(2)) was frustrated. (5) The ET failed to take account of the futility of consultation or, if they did, they made a decision which was perverse.

[23] Mr Philip Mead for the GMB and other respondents submits: (1) the purpose of the protective award is to provide a sanction for the employer's breach of the obligation to consult and is not concerned with loss suffered by the employees consequent on that breach; (2) the ET are given a wide discretion as to the protective award and the length of the protected period; (3) there should be no interference with the exercise of discretion unless the ET have erred in principle or were plainly wrong; (4) the ET, having found that there was no consultation at all and a failure to supply the appropriate information in writing, were entitled to exercise their discretion to grant a protective award with a protected period of the maximum length.

DISCUSSION

[24] The following features of the statutory provisions can be identified as relevant. (1) An absolute obligation is imposed on the employer to consult the appropriate representatives of employees who may be affected by the proposed dismissals, such consultation to be in good time and to be conducted with representatives who are fully informed by reason of the required disclosure specified in s 188(4). Moreover, because the disclosure must be in writing, there can be no dispute as to the extent of the disclosure in fact made. (2) The topics for the consultation must include the matters specified in s 188(2) and the employer must undertake the consultation not as an end in itself but with a view actually to reach agreement. (3) The consequences of a finding by the ET that the complaint is well-founded are the mandatory declaration to that effect and, if the ET chose to exercise their discretion, the making of the protective award. No other sanction is provided. (4) The references to protection in the defined terms, 'a protective award' and 'the protected period', are not explained by any other reference to protection in the domestic statutory provisions nor in the directives, although the 1975 directive refers to the importance of greater protection for workers affected by collective redundancies. (5) The protective award is expressed to be in respect of one or more descriptions of employees affected, rather than in respect of individuals; it is a collective award. (6) That the particular circumstances of individuals are not the focus of attention in the statutory provisions is also brought out by the fact that the protected period begins with the date on which the first of the dismissals to which the complaint relates takes effect (unless the date of the protective award is earlier) and that the limitation period for bringing a complaint under s 189 is defined by reference to the date on which the last of the dismissals to which the complaint relates takes effect, regardless of the dates on which the dismissals of others to whom the complaint refers take effect. (7) A protective award imposes an obligation on the employer to pay remuneration, quantified in s 190, during the protected period and confers an entitlement on every employee of a description to which the award relates to be paid remuneration during that period, subject to the specified limits and exceptions in ss 190 and 191; the ET in making that award and in fixing

a the length of the protected period are not directly concerned with the remuneration and its quantum in the case of individual employees. (8) There is no reference whatever to compensation or loss in the provisions relating to the protective award, in contrast to the other statutory provisions in employment legislation using the formula 'just and equitable in all the circumstances having regard to' (see, for example, ss 60(4), 80(4) and 123(1) of the Employment Rights Act 1996). (9) The only guidance given as to the length of the protected period is that, subject to a maximum of 90 days, it is to be what the ET determine to be 'just and equitable in all the circumstances having regard to the...employer's default in complying with any requirement of section 188' (see s 189(4)(b)).

c [25] In the light of those features, despite Mr Jones' submissions to the contrary, it seems to me tolerably plain that the purpose of the protective award is to ensure that consultation in accordance with the requirements of s 188 takes place by providing a sanction against failure to comply with the obligations imposed on the employer. The potential severity of that sanction can be seen from the facts of the present case where the award, we are told, will cost the company some £250,000 by way of remuneration for the employees made d redundant.

e [26] Whilst that sanction results in money being paid to the employees affected in the form of remuneration paid to them, there is nothing in the statutory provisions to link the length of the protected period to any loss in fact suffered by all or any of the employees. Their dismissals may not take effect at the same date. Their individual circumstances, for example whether another job immediately became available, may well differ. The required focus is not on compensating the employees but on the default of the employer and its seriousness. It is that seriousness which governs what is just and equitable in all the circumstances. I find it impossible to see how compensation for loss could be f implied into the statutory provisions, given that the award, if one is to be made, is across the board for all employees falling within a particular description, as distinct from an individual award to each employee.

g [27] In *Association of Patternmakers and Allied Craftsmen v Kirvin Ltd* [1978] IRLR 318 at 319 (para 1) Lord McDonald, giving the judgment of a Scottish EAT, adverted to the punitive nature of the protective award when he said:

h 'A Tribunal, however, is specifically enjoined to determine the [protected] period and so the amount of the award by paying regard to the seriousness of the employer's default. This introduces a punitive element into the jurisdiction of an Industrial Tribunal and is in contrast with eg, the calculation of a compensatory award which is based upon what is just and equitable having regard to the loss sustained.'

j [28] I have already noted the decision of the European Court of Justice in *EC Commission v UK* Case C-383/92 [1994] IRLR 412, [1994] ICR 664 that the United Kingdom had, because of s 190(3), failed to provide for effective sanctions for a failure to consult as required by the 1975 directive and so breached the obligations under that directive and art 5 of the EC Treaty (now art 10 EC). It is therefore clear that the ET's ability to make a protective award, albeit discretionary, must be taken as intended to fulfil an obligation under European Community law to provide an effective sanction for breach of the employer's obligation to consult.

[29] However, it is only too apparent from the reported decisions of English EATs to which our attention has been drawn that the approach in this jurisdiction has been rather different. a

[30] To my mind matters went wrong in the first of those decisions, *Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades* [1978] 2 All ER 649, [1978] 1 WLR 558. In that case the employer without consultation announced the closure of two factories and the redundancy of the workforce, at one factory in 14 days' time and, at the other, in 64 days' time. The ET made a protective award of 60 days. On appeal by the employer, the EAT, Kilner Brown J presiding, by a majority (Mr Bill Sirs dissenting) allowed the appeal in part. They unanimously thought that the ET were misled into thinking that statutory provisions were merely penal, but Mr Sirs thought that the ET came to the right answer because, once the ET decided to make an award, it should be of the maximum period unless the employer could show mitigating factors, and there was none. b

[31] Kilner Brown J said of what is now s 189(4)(b) ([1978] 2 All ER 649 at 651, [1978] 1 WLR 558 at 560): c

'In linking the maximum period of a protective award with the period of notice and consultation required before dismissing for redundancy the legislation would appear to contemplate an award of compensation commensurate with the loss suffered by an employee who has been given short shrift in a redundancy situation. This is consistent with the whole spirit of both the Redundancy Payments Act 1965 and, more particularly, the Trade Union and Labour Relations Act 1974.'

He continued ([1978] 2 All ER 649 at 652, [1978] 1 WLR 558 at 560): d

'The other factor which has to be considered when reaching an answer which is just and equitable is the seriousness of the employer's default. The wording seems to us to be singularly unfortunate. Does this import an element of punishment for a bad breach of industrial relations? We are told that many industrial tribunals do so regard it. Indeed, in this instant case Mr Lisle, the well-known and much respected general secretary of the trade union involved, made no bones about it. In a submission reminiscent of a (foreign) public prosecutor calling for a maximum punishment, he maintained that it was a penal clause and a bad case of default called for the maximum period of award against the employer. If this interpretation and this approach be right, then this part of sub-s (5) of s 101 is wholly inconsistent with the spirit of the Trade Union and Labour Relations Act 1974.'

[32] Kilner Brown J said that the EAT preferred to regard the imposition of penalties for bad behaviour as a retrograde step in the field of legislation dealing with good industrial relations and the giving of compensation to employees unfairly treated or discriminated against. He said that the EAT were entitled to look at the various Acts as a whole and that they intended to follow the broad scope of all the modern legislation and to look to the loss suffered by the employee and to concentrate on compensation. Because the legislation then in force linked the period of an award with the period of notice to a trade union for the purpose of consultation, the primary consideration, he said, was to assess the e
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a consequences to the employee. He continued ([1978] 2 All ER 649 at 652, [1978] 1 WLR 558 at 561):

b 'Whether or not the employer's conduct should be penalised seems to us to beg the question. In other words the seriousness of the default ought to be considered in its relationship to the employees and not in its relationship to the trade union representative who has not been consulted.'

[33] The EAT dismissed the appeal in relation to the employees given only 14 days' notice and halved the protected period in relation to the other employees.

c [34] I respectfully disagree with the approach adopted in the *Talke Fashions* case. The EAT in that case concentrated not so much on the actual words of the statutory provisions governing a protective award but on generalised notions derived from other employment legislation. No account was taken of the origin of the statutory provisions relating to consultation, that is to say that they were intended to implement the 1975 directive. It seems to me impermissible to construe specific provisions in an Act implementing a directive by reference to what are perceived to be principles contained in other legislation. A statutory purpose of compensation for loss suffered by an employee was found by the EAT even though there is no mention of compensation or loss in the relevant provisions and it is plain that the protective award is a collective award.

d [35] Kilner Brown J was again presiding in three differently-constituted EATs in three further cases in which the *Talke Fashions* case was referred to with approval (see *Clarks of Hove Ltd v Bakers' Union* [1978] 1 WLR 563 at 565, *TGWU v Gainsborough Distributors (UK) Ltd* [1978] IRLR 460 and *Joshua Wilson & Bros Ltd v Union of Shop, Distributive and Allied Workers* [1978] 3 All ER 4, [1978] ICR 614).

e [36] A rather more conventional approach to statutory construction was adopted in *Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers* [1980] 1 All ER 231, [1980] ICR 31. In that case the employer had closed bakeries, making employees redundant, without consultation. The ET determined as a preliminary issue that the ET could make a protective award even if none of the employees had suffered any loss. Slynn J, giving the judgment of the EAT, adverted to the fact that in the employment legislation there were provisions where sums were to be paid without any assessment of actual loss being made. He continued ([1980] 1 All ER 231 at 236, [1980] ICR 31 at 37):

f 'So it seems to us that despite this background of the desire to encourage consultation in order to avoid liability for unfair dismissal, and also despite the fact that in some areas the object of Parliament is clearly seen to be purely one of compensation, we have to look at the particular sections with which we are concerned and decide what precisely they lay down. It seems to us that here it is important to bear in mind that the obligation which is imposed on an employer is one in respect of descriptions of employees.'

g [37] Slynn J said that it was 'striking' that s 101(5) of the 1975 Act, the then equivalent of s 189(4), did not refer to loss suffered by the employee. He continued ([1980] 1 All ER 231 at 237, [1980] ICR 31 at 38):

j 'So it would seem that basically the question is, how serious was the employer's default in complying with the requirements of s 99? Obviously there can be defaults of different gravity. For example, one requirement of the Act is that necessary information shall be disclosed in writing. It might

be that if all the information had been given orally to a trade union representative, a tribunal would not take a very serious view of that as a failure to comply with a requirement. On the other hand, failure to give reasons at all, or failure to include one of the matters specified in s 99(5), might be more serious. A failure to consult at all, or consultation only at the last minute, might be taken to be even more serious.'

(Section 99 of the 1975 Act contains provisions now in s 188. Section 99(5) is the equivalent of s 188(4).)

[38] After consideration of the authorities and noting that the *Talke Fashions* and *TGWU* cases provided support for the views that what is to be done is to compensate, Slynn J said ([1980] 1 All ER 231 at 239, [1980] ICR 31 at 40-41):

'But that does not seem to us to be the end of the question. The question is: to compensate for what? It seems to us that it is to compensate for the failure to consult. It seems to us that here Parliament is providing that employers should, in this kind of potential or actual redundancy situation, discuss the matter with the union and the Secretary of State in the hope of achieving one or other of the alternative courses to which we have referred. True it is that the tribunal has power to make a declaration. It seems to us that there is a duty, in the appropriate case, to make a declaration. In addition it seems to us that Parliament has given to the industrial tribunals the power, if they so decide, also to make a protective award which involves the payment of money. It seems to us that when that decision is taken, the question which has to be looked at is not the loss or potential loss of actual remuneration during the relevant period by the particular employee. It is to consider the loss of days of consultation which have occurred. The tribunal will have to consider, how serious the breach on the part of the employer was. It may be that the employer has done everything that he can possibly do to ensure that his employees are found other employment. If that happens, a tribunal may well take the view that either there should be no award or, if there is an award, it should be nominal. It does not seem to us that the tribunal has to be satisfied, before it can make an award, that the employees have not been paid during the relevant period. Indeed, if the application is made before the dismissals take place, these facts may not be known. It might be quite impossible to know, until the end of the period, what is the position so far as earnings from the same employer or from other sources are concerned.'

[39] The EAT accordingly decided that the ET came to the correct decision and remitted the case back to the ET for them to decide whether there should be a protective award and, if so, what should be the length of the protected period.

[40] With much of what was said in the *Spillers-French* case I am in respectful agreement. Where I respectfully differ is as to the utility of introducing the notion of compensation for the loss of days of consultation. No doubt the language of compensation was used because of what was said in the *Talke Fashions* case that what is to be done by the protective award is to compensate. For the reasons given, there is no basis for that. Further I have some difficulty in seeing how in practice the loss of days of consultation is to be computed. Although this part of the decision in the *Spillers-French* case has frequently been cited and followed by EATs, it seems to me that the more practical approach in a case where there has been no consultation is to do what Mr Sirs suggested in the

a *Talke Fashions* case to be correct, viz to start with the maximum protected period and reduce it if there are circumstances justifying a reduction. That was held by a Scottish EAT (Lord Coulsfield presiding) to be the proper approach (see *GMB v Rankin and Harrison* [1992] IRLR 514).

b [41] Mr Jones placed considerable reliance on what Slynn J had said ([1980] 1 All ER 231 at 239, [1980] ICR 31 at 40–41), against the background of fact that there had been no consultation, that if the employer had done everything that he could possibly do to ensure that his employees are found other employment, the ET might well take the view that there should be no award or only a nominal award. That, Mr Jones submitted, indicated that Slynn J took the view that the obligation to have regard to the seriousness of the employer's default involved consideration of the consequences to the employees resulting from the failure to consult. Mr Jones relied on this in support of his argument that the ET should consider the extent to which the legislative purpose was frustrated, and that the futility of consultation, as found by the ET in the present case when rejecting the unfair dismissal claim, should have led the ET to conclude that they should make no protective award or only a nominal award.

d [42] To the extent that the EAT were saying in the *Spillers-French* case that, despite a complete failure to consult, the ET could properly conclude that no, or only a nominal, award was appropriate merely because of the employer's efforts to find alternative employment for the employees, I would respectfully disagree. Given the absolute obligation on the employer to consult, and to consult meaningfully, I cannot accept that a wholesale disregard of the obligations imposed on the employer by s 188 of the 1992 Act could properly lead to such a result. I do not believe that Slynn J was suggesting that the consequences to individual employees were relevant to the seriousness of the employer's default. Instead he seems to me to have been saying that what the employer did by way of finding the employees other employment would be a relevant consideration for the ET. Even on that point I respectfully doubt the significance attached to it by Slynn J, because the employer's obligation under s 188(2)(c) was to consult about ways of mitigating the consequences of the dismissals; unilateral action by the employer without consultation seems to me not only to fail to comply with the obligation but to be likely to be less effective mitigation.

g [43] In any event I cannot accept Mr Jones' submission that the futility of consultation is not only relevant to the issue of unfair dismissal and to the denial of any compensation but is also relevant to making no protective award or only a nominal award. I of course accept that in the light of *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974, [1988] AC 344 the exceptional case may occur where the ET can properly find that the employer at the time of the employees' dismissal acted reasonably in taking the view that procedural steps, such as consultation, normally appropriate could not have altered the decision to dismiss and therefore could be dispensed with. However, for the purpose of a protective award, as distinct from unfair dismissal, the required focus is on the seriousness of the employer's default in complying with the mandatory obligation to consult. I respectfully agree with the observations of the EAT (Judge Peter Clark presiding) in *Middlesbrough BC v TGWU* [2002] IRLR 332 at 338 (para 47), referring to s 188:

'The duties under the section are mandatory. It is not open to an employer, for this purpose, to argue, as would be open to him in defending

a complaint of unfair dismissal by the individual employee, that consultation would, in the circumstances, be futile or utterly useless: see *Polkey...*' a

[44] Further in any event there may be insurmountable problems were it relevant to consider the consequences to individual employees of the failure to consult. Suppose that for half the employees of the relevant description there were no adverse consequences. How should that affect the length of the protected period? Given that there is but one award in respect of all within that description, it might be thought that to halve the award would be unjust and inequitable to those for whom the consequences were adverse and would be overgenerous to those for whom there were no adverse consequences. To determine whether to make a protective award and if so for what length of time on that basis would be unworkable in such a case. b

[45] I suggest that ETs, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind. (1) The purpose of the award is to provide a sanction for breach by the employer of the obligations in s 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach. (2) The ET have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default. (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. (4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s 188. (5) How the ET assess the length of the protected period is a matter for the ET, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the ET consider appropriate. c d e

CONCLUSION f

[46] In my judgment in guiding themselves as they did in para 40 of their decision the ET, for the reasons I have given, did not misdirect themselves in law. On the facts of this case I readily acknowledge that another ET might have taken a less serious view of the default given the relatively generous notice period. However, I find it impossible to say that the decision to make a protective award of the maximum period was perverse, given the findings that no consultation at all took place, although the company had been advised by its solicitor of the need for consultation, that on one occasion when consultation might have taken place, the company was merely going through the motions of what it considered to be consultation—a far cry from meaningful consultation with a view to reaching an agreement—and that none of the information required to be supplied in writing was supplied. g h

[47] It follows that I would dismiss this appeal.

LAWS LJ.

[48] I agree with the judgments of Peter Gibson and Longmore LJ, which I have had the opportunity of reading in draft. j

LONGMORE LJ.

[49] It may at first sight seem surprising to say that the fact that consultation would have been futile is something which an employment tribunal should not take into account when assessing the length of time for which a protective award

- a should be made. But the argument that took place has convinced me (1) that there is nothing in the statutory wording which requires such futility to be taken into account and (2) that in a collective claim brought by a union it would be impossible to take such futility into account in a fair and practical way. If some employees are not affected at all and others are affected (perhaps some of them in different ways) there is no fair way in which it can be taken into account.
- b [50] I therefore agree that the guidance on this point given in *Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades* [1978] 2 All ER 649, [1978] 1 WLR 558 and *Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers* [1980] 1 All ER 231, [1980] ICR 31 should no longer be treated as authoritative and that henceforth employment tribunals making protective awards should assess the length of the award by reference to the judgment of Peter Gibson LJ in this case. I too would dismiss this appeal.
- c

Appeal dismissed.

Melanie Martyn Barrister.

Bagnall v Official Receiver

[2003] EWCA Civ 1925

COURT OF APPEAL, CIVIL DIVISION

LATHAM AND ARDEN LJ

1 DECEMBER 2003

Bankruptcy – Discharge – Automatic discharge – Application for suspension of automatic discharge – Appeal from dismissal of bankrupt’s application to strike out application to suspend automatic discharge – Power of court to make interim ex parte order suspending automatic discharge – Insolvency Act 1986, s 279(3) – Insolvency Rules 1986, rr 6.215(4), 7.4(6).

A bankrupt would have obtained an automatic discharge from his bankruptcy on 6 August 2002, pursuant to s 279^a of the Insolvency Act 1986, which provided for automatic discharge, except in certain cases, at the expiry of three years from the commencement of the bankruptcy. However, on 23 July, at the request of the trustee in bankruptcy, the Official Receiver applied for a suspension of the automatic discharge, pursuant to s 279(3), on the basis that the bankrupt had failed to fulfil his statutory obligations to provide the trustee in bankruptcy with information relating to his financial affairs. The Official Receiver was unable to send the bankrupt copies of the Official Receiver’s report to reach him at least 21 days before the date fixed for the hearing, as required by r 6.215(4)^b of the Insolvency Rules 1986, and therefore applied to the district judge without notice on 2 August for suspension of the automatic discharge, pursuant to r 7.4(6)^c of the 1986 Rules, which provided that where the case was one of urgency, the court had the power to hear an application immediately, either with or without notice to, or attendance of, other parties. The district judge made an order suspending the discharge until the substantive application could be heard. The bankrupt’s application to strike out the Official Receiver’s application was dismissed and the bankrupt appealed. The judge dismissed the appeal, finding, inter alia, that the district judge had had power to make the order of 2 August and that there had been material before him upon which he could conclude that it had been appropriate to do so. The substantive hearing of the Official Receiver’s application, which was allowed, took place in May 2003. The bankrupt did not appeal against that decision and was eventually discharged from his bankruptcy in September 2003. However, he appealed against the judge’s decision upholding the district judge’s interim order suspending automatic discharge, contending, inter alia, that the district judge had not had the power to make an order under s 279 of the 1986 Act, as r 6.215 of the 1986 rules, which was mandatory, had not been complied with, and that r 7.4(6) did not confer the power to make an interim order, with the consequence that interim order and the Official Receiver’s application were nullities.

a Section 279, so far as material, is set out at [1], below

b Rule 6.215, so far as material, is set out at [3], below

c Rule 7.4, so far as material, is set out at [2], below

- Held** – The powers conferred on the court by r 7.4(6) of the 1986 rules to deal with urgent applications applied to applications under r 6.215. The court had power to make an interim order under s 279(3) and in doing so it had to be satisfied that there were reasonable grounds for concluding that such an order would be made after the substantive hearing on the material then placed before the court. In the instant case the district judge had been, correctly, satisfied that there were reasonable grounds for concluding that the Official Receiver's application was likely to succeed. The appeal would accordingly be dismissed (see [24], [26]–[28], [33], [34], below).

Decision of Evans-Lombe J [2003] 3 All ER 613 affirmed.

c Notes

For the power of the court to suspend the automatic discharge of a bankrupt, see 3(2) *Halsbury's Laws* (4th edn) (2002 reissue) paras 633, 634.

For the Insolvency Act 1986, s 279, see 4 *Halsbury's Statutes* (4th edn) (1998 reissue) 945.

- d** For the Insolvency Rules 1986, rr 6.125 and 7.4 see 3 *Halsbury's Statutory Instruments* (2001 issue) 590, 599.

Cases referred to in judgments

First Express Ltd, Re [1992] BCLC 824.

- e** *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77.
Jacobs v Official Receiver [1998] 3 All ER 250, [1999] 1 WLR 619.
Official Receiver v Milburn (6 July 1999, unreported).
Official Receiver v Murjani (1 March 1995, unreported).

f Appeal

- Kenneth Reginald Bagnall QC appealed from the decision of Evans-Lombe J on 18 June 2003 ([2003] EWHC 1398 (Ch), [2003] 3 All ER 613) dismissing his appeal (i) from the order of Deputy District Judge Robinson in the Eastbourne County Court made pursuant to his judgment on 30 January 2003 dismissing Mr Bagnall's application to strike out the Official Receiver's application under s 279 of the Insolvency Act 1986 to suspend his automatic discharge from bankruptcy on the date three years from the date of the order making him bankrupt; and (ii) from the interim order of Deputy District Judge Radcliffe on 2 August 2002 suspending Mr Bagnall's automatic discharge from bankruptcy until the substantive hearing of the Official Receiver's application. The facts are set out in the judgment of
- h** Arden LJ.

Mr Bagnall appeared in person.

Richard Ritchie (instructed by the *Treasury Solicitor*) for the Official Receiver.

j

ARDEN LJ (delivering the first judgment at the invitation of Latham LJ).

[1] The Insolvency Act 1986 provides that, except in certain cases, bankrupts will be automatically discharged from their bankruptcy at the expiration of three years from the commencement of the bankruptcy (see s 279 of the 1986 Act). However where a bankrupt has not co-operated with his trustee the court may

defer the relevant date. This power is conferred by s 279(3) which provides as follows:

‘Where the court is satisfied on the application of the official receiver that an undischarged bankrupt in relation to whom subsection (1)(b) applies has failed or is failing to comply with any of his obligations under this Part, the court may order that the relevant period under this section shall cease to run for such period, or until the fulfilment of such conditions (including a condition requiring the court to be satisfied as to any matter), as may be specified in the order.’

[2] The question which arises on this appeal is whether the court has power to make an interim order suspending the bankrupt’s automatic discharge until the substantive hearing of an application under s 279. Such an order was made in the present case. *Evans-Lombe J* ([2003] EWHC 1398 (Ch), [2003] 3 All ER 613) held that the court had power to make such order by virtue of r 7.4(6) of the Insolvency Rules 1986, SI 1986/1925. This deals with urgent interim applications and is in the following terms:

‘Where the case is one of urgency, the court may (without prejudice to its general power to extend or abridge time limits)—(a) hear the application immediately, either with or without notice to, or the attendance of, other parties, or (b) authorise a shorter period of service than that provided for by paragraph (5); and any such application may be heard on terms providing for the filing or service of documents, or the carrying out of other formalities, as the court thinks fit.’

Paragraph (5) provides that:

‘Unless the provision of the Act or Rules under which the application is made provides otherwise, and subject to [r 7.4(6)], the application must be served at least 14 days before the date fixed for the hearing.’

The judge also set out r 7.5. But, as the judge recognised, that does not apply where the rules require the application to be served, as here, on the bankrupt and his trustee.

[3] Where an application is made under s 279 the Official Receiver must file with his application a report setting out the reasons why it appears to him that an order suspending the automatic discharge should be made. This is provided for by the 1986 rules (see r 6.215(2)). The court is to give notice of the hearing of the application to the trustee and the bankrupt as well as the Official Receiver (see r 6.215(3)). The length of this notice is governed by r 7.4(5), which I have set out above. Paragraphs (4) and (5) of r 6.215 deal with service of the report of the Official Receiver and the procedure to be adopted where the bankrupt disputes the report:

‘(4) Copies of the official receiver’s report under this Rule shall be sent by him to the trustee and the bankrupt, so as to reach them at least 21 days before the date fixed for the hearing.

(5) The bankrupt may, not later than 7 days before the date of the hearing, file in court a notice specifying any statements in the official receiver’s report

- a which he intends to deny or dispute. If he gives notice under this paragraph, he shall send copies of it, not less than 4 days before the date of the hearing, to the official receiver and the trustee.'

- b It is to be noted that r 6.215(4) requires there to be 21 days between the service of the Official Receiver's report and the date fixed for the hearing. However, under r 12.9(2), the court can in an appropriate case shorten this period.

THE BACKGROUND

- c [4] The appellant, Mr Bagnall QC, was declared bankrupt on 6 August 1999 on the petition of DJ Freeman, solicitors. Before the bankruptcy order was made there had been a proposal for a voluntary arrangement which failed and also proceedings for a freezing order. In the latter proceedings Mr Bagnall disclosed greater assets than had been disclosed to his trustee in the course of his bankruptcy. The trustee considered that Mr Bagnall was obstructing her realisation of some of his assets.

- d [5] The third anniversary of the bankruptcy would have fallen on 6 August 2002. Therefore under s 279 Mr Bagnall was due to be discharged from his bankruptcy on that date. However on 12 July 2002 the trustee in bankruptcy wrote to the Official Receiver asking the Official Receiver to make an application under s 279(3). The Official Receiver prepared a report which was simply in these terms:

- e 'The Official Receiver in the above matter hereby reports that:—
The Bankruptcy Order was made in the Slough County Court Number 35 of 1999 on 6 August 1999, on a creditors petition and later transferred to Eastbourne County Court Number 133 on 18 August 1999.
On 15 September 1999 Shirley Angela Jackson of BN Jackson Norton was appointed Trustee of the bankruptcy estate by the Secretary of State under Section 296 of the Insolvency Act 1986.
f The Trustee has requested this application for the reasons detailed in the attached letter of 19 July 2002.
The Official Receiver is of the opinion that the Bankrupt has failed to fulfil his obligations under Section 333 of the Insolvency Act 1986 and that the
g period until his automatic discharge should be suspended until such time that the bankrupt has complied with the requirements of the Trustee in bankruptcy.'

- h The letter referred to in the third paragraph of the Official Receiver's report was a revised copy of the trustee's letter dated 12 July 2002.

- i [6] On 23 July 2002 the Official Receiver issued the necessary application. If 21 days' notice was required to elapse before the third anniversary of the bankruptcy order, 21 days' notice of the hearing could not be given. Furthermore it is common ground that unless the discharge of bankruptcy was suspended on or before that date the bankruptcy would come to an end and could not
j subsequently be revived by an order under s 279(3).

[7] Accordingly on 2 August 2002 the Official Receiver applied, without notice, to Deputy District Judge Radcliffe, sitting in the Eastbourne County Court. Deputy District Judge Radcliffe made an order suspending the discharge until the substantive application could be heard. It is clear that the deputy district judge wished to maintain the status quo until that date. Mr Bagnall was not

represented at the hearing. He was not served with the application or the Official Receiver's report, nor was he informed that there would be an application until after the order was made. a

[8] The date for the substantive hearing of the application was originally fixed for 11 September 2002, but then it was adjourned successively to later dates. By letter dated 7 August 2002 the Official Receiver asked the deputy district judge to consider a letter written by the solicitors for Mr Bagnall in which they disputed the grounds of the application. The Official Receiver had anticipated that the application would be opposed and, indeed, knew that those representing Mr Bagnall would take the point that there was no communication between the trustee and Mr Bagnall between December 2000 and May 2002. The deputy district judge confirmed his order; he did not give any reasons for doing so. The deputy district judge dealt with the matter on paper; there was no hearing. b
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[9] On 24 October 2002 Mr Bagnall applied to strike out the Official Receiver's application. On 30 January 2003 District Judge Robinson dismissed the application. It was against that order that Mr Bagnall appealed to the judge. The judge's order against which this appeal is brought refers to a further order of 7 March 2003, which we have not seen but are told is not material for the disposition of this appeal. Judgment on the Official Receiver's substantive application under s 279 was ultimately given on 16 May 2003, that is nearly ten months after the application was issued and nine months after the third anniversary of the bankruptcy order. The district judge suspended the discharge on the grounds that Mr Bagnall had failed to co-operate with the trustee. There was no appeal from this order. Mr Bagnall obtained his discharge on 21 September 2003, some four months later. d
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[10] In the period between the date on which he would have been automatically discharged from his bankruptcy and the date when he was actually discharged there was considerable litigation between the trustee and Mr Bagnall, and Mr Bagnall continued to be subject to all the limitations which, by law, are imposed on a bankrupt person. If the four-month suspension had been ordered in August 2002 Mr Bagnall would have been discharged from bankruptcy in December 2002 and not September 2003. f

MR BAGNALL'S SUBMISSIONS g

[11] On this appeal Mr Bagnall submits that the judge had no power to make an interim order under s 279, and that the application did not comply with r 6.215. Accordingly, on Mr Bagnall's submission, both the application and the order were nullities. Mr Bagnall submits that the power to make an interim order is not conferred by r 7.4(6). The procedure for applications under s 279(3) is set out exclusively in r 6.215. That rule is mandatory. The period of 21 days could not be shortened. The deputy district judge made the order so as to maintain the status quo, not because of any urgency. The district judge was not in fact referred to the decision of Mr Michael Burton QC in *Jacobs v Official Receiver* [1998] 3 All ER 250, [1999] 1 WLR 619 and did not satisfy himself as to the grounds for suspending the discharge. *Jacobs'* case was wrongly decided: the judge made no reference to r 6.215. Alternatively, *Jacobs'* case is distinguishable because in that case the bankrupt was in fact served with the report of the Official Receiver. The district judge's reference to the status quo was inapt because the status quo was about to change. In the circumstances, as he (Mr Bagnall) was not given notice h
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a of the application on 2 August 2002, there was a violation of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) for which he would be entitled to damages.

b [12] Mr Ritchie, for the Official Receiver, submits that r 6.215 is facilitative and not restrictive. It would be offensive to common sense if the court could not make an interim order while the decision under s 279 was pending. The acts of non-compliance relied on by the Official Receiver might only have been discovered on the eve of the expiry of the three-year period.

c [13] Mr Ritchie relies on the decision of Mr Michael Burton in *Jacobs'* case. He submits that the application on 2 August 2003 was under r 7.4(6). The existence of r 6.215(4) does not mean that the court has no power to make an order in any other circumstance.

[14] Finally art 6 of the convention does not apply to an interim application which is not of itself determinative.

CONCLUSIONS

d [15] I deal first with the judge's judgment and explain the reasons for his conclusion. The judge held that there was no authority on the operation of r 7.4(6) and, in particular, on what constitutes urgency within that rule. He held that whether a particular order is to be treated as urgent within r 7.4(6) is a matter for the court in deciding whether or not to make the order. An application was properly to be regarded as urgent where, if the order was not made, the situation of one of the relevant parties or both of them would irretrievably alter. The court would then go on to consider whether in fact to make the order on the balance of convenience.

e [16] The judge then referred to the decision in *Jacobs'* case. He held that it was authority for the proposition that the court considering an application under s 279(3) could make an interim order suspending the bankrupt's automatic discharge pending a full hearing on the Official Receiver's application for such suspension. He noted, however, that in that case there had been full compliance with r 6.215, that the bankrupt was present and able to argue against the making of the bank interim order at the hearing. In *Jacobs'* case the court did not consider rr 7.4(6) or 7.5(1).

f [17] The judge then referred to a passage in the judgment of Robert Walker J in *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77. Robert Walker J (at 81) observed:

h 'I must now go back to consider section 279(3). It refers to the court being satisfied in relation to an undischarged bankrupt. The well-known and reliable practitioner's book *Muir Hunter on Personal Insolvency* notes at 3/129: "There seems to be no power to undo this mode of discharge, once the relevant period has expired." It seems to me that that is plainly right in a case where no application under s 279(3) has been made before the expiry of the 3-year period. If an application has been made by the official receiver, I would be very doubtful whether a bankrupt could, simply by managing to obtain an adjournment for any reason, good or bad, defeat the court's power to adjudicate on an application which had been properly launched. I am, therefore, rather doubtful about the official receiver's suggestion in his official report that, in practice, it is impossible to make an application under s 279(3) within the last 21 days before the expiration of the 3-year period

because of the requirement of notice under r 6.215. I should, however, note that that view obtains at least slight support from a comment by Sir Mervyn Davies made in his judgment in *Official Receiver v Murjani* (1 March 1995, unreported), although I do not regard that expression of view as a considered part of the decision. a

The judge did not comment on this passage. However as I read it, it is an obiter expression of view by Robert Walker J that an interim order could be made if the application under s 279 was issued before the third anniversary of the bankruptcy order. b

[18] The judge then referred to a passage from the judgment of Hoffmann J in *Re First Express Ltd* [1992] BCLC 824 at 828:

‘I am firmly of the view that it was wrong for the application to be made ex parte. It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made. There is, I think, a tendency among applicants to think that a calculation of the balance of advantage and disadvantage in accordance with the second condition is sufficient to justify an ex parte order. In my view, this attitude should be discouraged. One does not reach any balancing of advantage and disadvantage unless the first condition has been satisfied. The principle *audi alterem partem* does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused.’ c
d
e
f

The judge did not comment on that passage. But it is a valuable reminder that ex parte applications should not be lightly made. The reference to the cross-undertaking in damages does not apply in this context since the Official Receiver is not generally required to give any such undertaking. g

[19] The judge then held that r 7.4(6) conferred power on the court to make an interim order suspending a bankrupt’s automatic discharge without notice and before the provisions of r 6.215 had been complied with in a case where the court could properly regard the making of such an order as urgent and had concluded that—on the balance of convenience between the Official Receiver representing the creditors’ interests and the bankrupt—it was appropriate that such an order be made. The judge did not therefore apply the test set out by Mr Michael Burton, namely of ascertaining whether the application was made on grounds which, if unchallenged, would justify a final order of suspension under s 279(3). Applying the test which he laid down, the judge held that it had been satisfied on 2 August 2002, subject to art 6 of the convention. The district judge ([2003] 3 All ER 613 at [24]) was entitled to conclude that it was appropriate for him to make an interim order since— h
j

a 'Suspension of discharge is one of the weapons available to those administering insolvent estates to coerce a bankrupt into ... performing his duty to co-operate with the trustee in bankruptcy in realising his assets for the benefit of his creditors.'

The judge continued:

b 'Had the order of 2 August not been made this weapon would have been removed before proper consideration could take place at a full hearing of whether the Official Receiver was justified in seeking an order of suspension. The prejudice to the bankrupt in the prolongation of his status as a bankrupt in the interim was outweighed by the prejudice to the creditors in irretrievably

c losing the coercive effect of the continuation of the bankruptcy, without being able, through the Official Receiver's application, to justify and so obtain an order of suspension.'

d [20] The judge noted that considerable further delay occurred before judgment was given in May 2003, but he held (at [25]) that: 'To some extent at least, that delay was within the control of the bankrupt ...'

[21] The judge held that there was no violation of art 6 since it was established by authority that interlocutory orders of the court, pending a full hearing at which the rights of the complainant are to be determined finally, do not result in a violation of art 6 even if the application is made *ex parte*.

e [22] Finally the judge dealt with a separate argument based on the construction of the two orders of April and August 2002. We are not concerned with that argument.

f [23] I turn to my conclusions. Rule 7.4(6) enables the court to deal with urgent applications by hearing the application immediately or by shortening the period for service. In my judgment, with respect to the judge, it does not fully answer the question of jurisdiction here since that power must be one which is not excluded by—in this case—s 279(3) or r 6.215. Rule 7.4(6) does not deal with the orders which the court may make on any application in respect of which para (a) or (b) of that subrule has been invoked. That matter must be a question of construction of a substantive section and, in addition, in this case r 6.215.

g [24] I take, first, r 6.215 which has been at the forefront of Mr Bagnall's argument. In my judgment, this rule does not stand alone. It must be read in the context of the 1986 rules as a whole, including r 7.4. There is nothing in r 6.215 to exclude the operation of r 7.4. Accordingly, the powers conferred on the court by sub-r (6) of r 7.4 to deal with urgent applications must apply to applications under

h r 6.215. These powers include the power to shorten the period for service of the application (see r 7.4(6)(b)). Rule 6.215 is therefore not mandatory in all circumstances. On the other hand, it is a clear expression of the underlying policy of the 1986 rules that wherever possible on an application under s 279 the bankrupt should be served and moreover wherever possible he should be given an adequate opportunity to consider, and if appropriate respond to, the points made in the

i Official Receiver's report.

[25] That therefore leaves s 279(3). On first reading s 279(3) does not authorise the making of interim orders. This is because it only applies 'if the court is satisfied that a bankrupt has failed or is failing to comply with any of his obligations under this Part'. Obviously, after a substantive hearing the court must be so satisfied, on the balance of probabilities. This was the conclusion of Judge Rich QC in another

case noted in *Muir Hunter on Personal Insolvency*, namely *Official Receiver v Milburn* (6 July 1999, unreported). It would be odd, however, if the court could not make an order at any interim stage provided of course that the application was filed within the three-year period, otherwise Parliament's intention could be rendered futile if the bankrupt concealed his activities until the last moment or managed to gain an adjournment. I am not suggesting that in this case Mr Bagnall concealed his activities until the very last moment, but taking that possibility as an example.

[26] There could also be other circumstances in which the evident purpose of s 279 could be frustrated by the absence of a power to make an interim order. Suppose the Official Receiver issued and served his application well within the time required but the court declined to make a suspension order; suppose further that the Official Receiver wishes to appeal that order but before the appeal can be heard the three-year period expires. If the appeal is ultimately successful the Official Receiver would be deprived of the fruits of his success if no interim order can be made. I also bear in mind that s 279(3) does not entail any change in the status of the bankrupt but rather the continuation of a pre-existing status and the postponing of the discharge date. In all those circumstances I consider that s 279(3) must be read as enabling the court in an appropriate case to make an order at a point in time before the substantive hearing of the application. The word 'satisfied' means, as I see it, 'proved sufficiently' and there must, in the particular circumstances, be an iterative process between the proposed order and the degree of satisfaction required. Accordingly where only an interim order is proposed the degree of satisfaction required is that sufficient to justify the court in granting that interim order.

[27] In this case the judge expressed the position as being that there was a strong prima facie case for the grant of an order under s 279(3). In my judgment the court has power to make an interim order under this section and in doing it must be satisfied that there are reasonable grounds for concluding that such an order would be made after the substantive hearing on the material then placed before the court. The approach of Mr Michael Burton in *Jacobs'* case was a little different. He held that the court had to be satisfied that the grounds would, if unchallenged, have enabled the court to make an order under s 279(3). If the judge was there suggesting that, in making an interim order, the bankrupt's case, if known, should be disregarded, I would disagree. The judge cannot decide all the matters in dispute until the substantive hearing, but he must be satisfied, as I have said, that there are reasonable grounds for concluding that an order would be made on the substantive hearing on the material then placed before the court. I would expect the judge to lean on the side of the Official Receiver because of the consequences of refusing an interim order where the third anniversary of the bankruptcy order is about to occur. The automatic discharge cannot be reversed after the three-year period has expired. Thus no later decision under s 279(3) could revive the bankruptcy.

[28] Applying the above tests to the facts of this case, I notice that the district judge was motivated by a desire to hold the ring until the application could be heard. He does not appear expressly to have considered the weight of the application but he had before him the report of the Official Receiver including the concluding paragraph which I have read. Bearing in mind that in due course a suspension order was made and that there had been no appeal from that order, the

- a right inference to draw must be that he was satisfied that there were reasonable grounds for concluding that the application was likely to succeed.

[29] I would like to conclude my judgment by making some observations as to the procedure. The policy behind r 6.215 is that wherever possible the bankrupt should be given notice of the application and wherever possible he should be given an adequate opportunity to consider the points in the trustee's report. That policy, as I see it, is reflected in the Official Receiver's practice set out by *Muir Hunter* at para 3-528 where the text states:

c 'The authors understand that if a trustee in bankruptcy considers that an undischarged bankrupt has failed to comply with the statutory obligations and that application should be made to the official receiver to suspend the relevant period, official receivers are reluctant to make such application unless provided with a report by the trustee some six months before the expiry of the relevant period (see *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77 at 83 and the DTi letter "Dear IP" No 42).'

- d Mr Ritchie has informed the court that this particular IP letter has been replaced but in substance it has not been charged.

[30] Mr Ritchie was constrained to admit that it would have been better in this case if the Official Receiver had given Mr Bagnall notice of the application on 2 August and applied for the period of 21 days required by r 6.215 to be shortened if necessary. I entirely agree. That course would have been altogether fairer to the bankrupt. In a case where 21 days' notice cannot be given the bankrupt should at least be told as soon as the decision to launch the application under s 279 is made. The making of a suspension order will have serious consequences for him. Moreover it is not an economical use of the court's resources to leave it to the bankrupt to make his own application to discharge an order made on the application of the Official Receiver without notice. Nor would I expect the Official Receiver, as an officer of the court, to take this course. His presence has been deliberately interposed by Parliament into s 279 to ensure that there is a proper filter between the trustee and the court.

[31] There are two further points. Trustees who leave it to the very last moment run the risk that the court will not exercise its discretion to make the suspension order. It is a judicial discretion. As the judge said, the interests of the creditors whom the Official Receiver represents have to be balanced with those of the bankrupt. Circumstances may arise where a trustee has been so dilatory that the consequences to the bankrupt are so unfair that the court might take the view that it was not appropriate to exercise its powers under s 279(3) despite the bankrupt's past or current failure to co-operate.

[32] Robert Walker J made a further point which I should like to underscore. In his judgment in *Hardy v Focus Insurance Co Ltd* [1997] BPIR 77 at 81 he held:

j '... if trustees in bankruptcy are to ask the official receiver to make an application under s 279(3), the relevant facts must be put before the official receiver (who has an enormous workload) in good time in order to enable the matter to be dealt with in a sensible and satisfactory manner.'

[33] Finally the orders made by the court on 2 April 2003 were not dispositive of any civil right. For the purpose of art 6 of the convention, Mr Bagnall had not lost his right to oppose a suspension of his discharge for bankruptcy and indeed he could

have applied to set aside the without notice order made by Deputy District Judge Radcliffe if he had wished to do so. Accordingly the making of the application without notice did not violate the right of access to court guaranteed by art 6 of the convention. For all those reasons I would dismiss this appeal. a

LATHAM LJ.

[34] I agree. The consequence is that we give permission to appeal and dismiss the appeal. b

Appeal dismissed.

Melanie Martyn Barrister.

a **Bakewell Management Ltd v Brandwood and others**
[2004] UKHL 14

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE,
LORD WALKER OF GESTINGTHORPE AND BARONESS HALE OF RICHMOND

25, 26 FEBRUARY, 1 APRIL 2004

c *Easement – Right of way – Prescription – Lost modern grant – Owner of common able to authorise vehicular right of way over common – Unauthorised vehicular use of common a criminal offence – Whether unauthorised vehicular use of common sufficient otherwise to obtain right of way by prescription or lost modern grant conduct capable of acquisition of easement – Law of Property Act 1925, s 193.*

d The claimant was the owner of a common to which s 193^a of the Law of Property Act 1925 applied. Under s 193(4) it was a criminal offence for any person to drive a vehicle on any such land 'without lawful authority'. The defendants each owned a house bordering on the common. Vehicular access to each of the houses from the nearest public road had, since each house was built, been obtained via one or other of a number of tracks over the common. Neither the claimant, nor the previous owners of the common had given authority for such use of the tracks. The claimant commenced proceedings to establish that the defendants had no vehicular rights over the tracks. The defendants contended that they had acquired easements by prescription or by virtue of the doctrine of lost modern grant. The judge's decision that an easement could not be acquired by conduct which, at the time the conduct took place, was prohibited by a public statute, was upheld by the Court of Appeal. The defendants appealed to the House of Lords.

e **Held** – An easement over land could be acquired, either by prescription or by the fiction of lost modern grant, if the easement could have been lawfully granted by the landowner, whether the use relied on in the acquisition was illegal in the sense of being criminal or in the sense of being tortious. Public policy did not prevent tortious conduct from leading to the acquisition of property rights by long use; that was how prescription operated. Where the conduct in question was criminal conduct, but criminal only because it was user of the land for which the landowner had given no lawful authority, not a criminal use of land against which the public law set its face in all cases, there was no public policy reason to bar that acquisition. Accordingly, as s 193(4) of the 1925 Act allowed the owner of a common to which s 193 applied to authorise the doing of an act that if done without that authority would be an offence, the easements in the instant case could have been lawfully granted by the claimant, and the defendants' appeal would therefore be allowed (see [1], [2], [39], [46]–[48], [56], [61], [62], below).

f *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14, *Robinson v Adair* (1995) Times 2 March, *Hereford and Worcester CC v Pick* (1996) 71 P & CR 231, and *Massey v Boulden* [2003] 2 All ER 87 overruled.

a Section 193, so far as material, is set out at [22], below

Notes

For easements enabling vehicular access over common land, see 6 *Halsbury's Laws* (4th edn) (2003 reissue) para 576. a

For the Law of Property Act 1925, s 193, see 37 *Halsbury's Statutes* (4th edn) (2003 reissue) 330.

Cases referred to in opinions

Airdrie Magistrates v Lanark CC, *Coatbridge Magistrates v Lanark CC* [1910] AC 286, HL. b

Bowmakers Ltd v Barnet Instruments Ltd [1944] 2 All ER 579, [1945] KB 65, CA.

Bryant v Foot (1867) LR 2 QB 161.

Cargill v Gotts [1981] 1 All ER 682, [1981] 1 WLR 441, CA.

Dalton v Angus & Co (1881) 6 App Cas 740, [1881–85] All ER Rep 1, HL. c

Davis v Whitby [1974] 1 All ER 806, [1974] Ch 186, [1974] 2 WLR 333, CA.

Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL.

Glamorgan CC v Carter [1962] 3 All ER 866, [1963] 1 WLR 1, DC.

Hanning v Top Deck Travel Group Ltd (1993) 68 P & CR 14, CA.

Hayling v Harper [2003] EWCA Civ 1147, [2003] 39 EG 117. d

Hereford and Worcester CC v Pick (1996) 71 P & CR 231.

Holman v Johnson (1775) 1 Cowp 341, [1775–1802] All ER Rep 98, 98 ER 1120.

Hulley v Silversprings Bleaching and Dyeing Co Ltd [1922] 2 Ch 268, [1922] All ER Rep 683.

Legge (George) & Son Ltd v Wenlock Corp [1938] 1 All ER 37, [1938] AC 204, HL.

Massey v Boulden [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792. e

National Coal Board v England [1954] 1 All ER 546, [1954] AC 403, [1954] 2 WLR 400, HL.

Neaverson v Peterborough RDC [1902] 1 Ch 557, CA.

R v Oxfordshire CC, ex p Sunningwell Parish Council [1999] 3 All ER 385, [2000] 1 AC 335, [1999] 3 WLR 160, HL.

R (on the application of Beresford) v Sunderland CC [2003] UKHL 60, [2004] 1 All ER 160, [2003] 3 WLR 1306. f

Robinson v Adair (1995) Times 2 March, DC.

Rochdale Canal Co v Radcliffe (1852) 18 QB 287, 118 ER 108.

Tehidy Minerals Ltd v Norman [1971] 2 All ER 475, [1971] 2 QB 528, [1971] 2 WLR 711, CA. g

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL; *affg* [1992] 2 All ER 391, [1992] Ch 310, [1992] 2 WLR 508, CA.

Cases referred to in list of authorities

A-G v Horner (No 2) [1913] 2 Ch 140, CA. h

Angus & Co v Dalton (1877) 3 QBD 85.

Aynsley v Glover (1875) 10 Ch App 283, [1874–80] All ER Rep 988, DC.

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.

Barker v Richardson (1821) 4 B & Ald 579, 106 ER 1048.

Beresford v Royal Insurance Co Ltd [1938] 2 All ER 602, [1938] AC 586, HL; *affg* [1937] 2 All ER 243, [1937] 2 KB 197, CA. j

Bridle v Ruby [1988] 3 All ER 64, [1989] QB 169, [1988] 3 WLR 191, CA.

Bright v Walker (1834) 1 Cr M & R 211, [1824–34] All ER Rep 762.

Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147, [1891–4] All ER Rep 335, CA.

Cobbold v Bakewell Management Ltd [2003] EWHC 2289 (Ch).

- a* *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 3 All ER 150, [2001] 1 WLR 1437.
- Cutter v Eagle Star Insurance Co Ltd, Clarke v Kato* [1998] 4 All ER 417, [1998] 1 WLR 1647, HL.
- Deacon v AT (a minor)* [1976] RTR 244, DC.
- DPP v Morgan* [1975] 2 All ER 347, [1976] AC 182, [1975] 2 WLR 913, HL.
- b* *Great Eastern Rly Co v Goldsmid* (1884) 9 App Cas 927, HL.
- Green v Matthews & Co* (1930) 46 TLR 206.
- Hanmer v Chance* (1865) 4 De G J & Sm 626, 46 ER 1061.
- Harrison v Hill* 1932 JC 13, HC of Just.
- Jones v Price* (1992) 64 P & CR 404, CA.
- c* *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, HL.
- Mill v New Forest Comer* (1856) 18 CB 60, 139 ER 1286.
- Mills v Silver* [1991] 1 All ER 449, [1991] Ch 271, [1991] 2 WLR 324, CA.
- Oakley v Boston* [1975] 3 All ER 405, [1976] QB 270, CA.
- Oxford v Austin* [1981] RTR 416, DC.
- d* *Philipps v Halliday* [1891] AC 228, HL.
- Proprietors of the Staffordshire and Worcestershire Canal Navigation v Proprietors of the Birmingham Canal Navigations* (1866) LR 1 HL 254, HL.
- R v Brown* [1993] 2 All ER 75, [1994] 1 AC 212, [1993] 2 WLR 556, HL.
- R v Miller (Robert)* [1975] 2 All ER 974, [1975] 1 WLR 1222, CA.
- e* *R v Planning Inspectorate Cardiff ex p Howell* [2000] NPC 68.
- Shaw v Groom* [1970] 1 All ER 702, [1970] 2 QB 504, [1970] 2 WLR 299, CA.
- Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] 1 All ER (Comm) 1, CA; *rvsd* [2002] UKHL 43, [2003] 1 All ER 173, [2003] 1 AC 959, [2002] 3 WLR 1547.
- f* *Stevens v Secretary of State for the Environment, Transport and the Regions* (1998) 76 P & CR 503.
- Strongman (1945) Ltd v Sincock* [1955] 3 All ER 90, [1955] 2 QB 525.
- Tapling v Jones* (1865) 11 HL Cas 290, 11 ER 1344, HL.
- Webb v Chief Constable of Merseyside Police* [2000] 1 All ER 209, [2000] QB 427, CA
- g* *Wright v Williams* (1836) 1 M & W 77, 150 ER 353.

Appeal

Roland Brandwood and 42 other defendants appealed with permission of the Appeal

- h* Committee of the House of Lords given on 6 May 2003 from the decision of the Court of Appeal (Ward, Arden LJ and Sullivan J) on 30 January 2003 ([2003] EWCA Civ 23, [2003] 1 WLR 1428) dismissing their appeal from the order of Park J on 21 March 2002 ([2002] EWHC 472 (Ch)) making the declaration sought by the claimant, Bakewell Management Ltd, the owner of Newtown Common, Newbury, Berkshire, that the defendants, all being owners of properties adjacent to the common, had no vehicular rights of way across the common. The facts are set out in the opinion of Lord Scott of Foscote.
- j*

Paul Morgan QC and Janet Bignell (instructed by Berger Oliver) for the appellants.
Hazel Williamson QC and Lesley Blohm (instructed by Darwin Gray, Cardiff) for Bakewell.

Their Lordships took time for consideration.

1 April 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] I have had the privilege of reading in draft the opinions of my noble and learned friends Lord Scott of Foscote, Lord Walker of Gestingthorpe and Lord Hope of Craighead. I am in full agreement with them, and for the reasons they give would allow the appeal and make the order which Lord Scott proposes.

LORD HOPE OF CRAIGHEAD.

[2] I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Scott of Foscote and Lord Walker of Gestingthorpe. I agree with them, for all the reasons that they have given, that *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14 was wrongly decided and must be overruled, and I too would allow the appeal.

[3] The result of this case will come as a welcome relief to many owners of dwellings whose only vehicular access to their properties is across common land. In *Hanning's* case the defendant was driving double-decker buses along a track through a wooded common from the public highway. The owners of the common could have granted the defendant a right of way for its commercial vehicles, but they did not do so. The claimant's reason for seeking the injunction was to preserve the amenity of the common. There is no doubt that this is the broad public purpose which s 193(4) of the Law of Property Act 1925 was designed to serve.

[4] The present action on the other hand has nothing to do with the preservation of the amenity of the common. As Ward LJ observed in the Court of Appeal ([2003] EWCA Civ 23 at [8], [2003] 1 WLR 1429 at [8]):

'Bakewell do not really wish to stop the defendants driving across the common. Their position is stated with admirable frankness in the skeleton argument submitted to the judge: "The purpose of this action is to make money for the claimant by requiring the defendants to pay for what they have taken free and for granted for many years—vehicular access to their residential properties across Newtown Common."'

[5] An unfortunate and, of course, unintended consequence of the decision in *Hanning's* case has been the encouragement that it gave to those who wish to make money out of the hitherto unobserved flaw which it appeared to have revealed in the system for obtaining easements of way through the presumption of a lost modern grant. The scale of the problem was highlighted during the debates on s 68 of the Countryside and Rights of Way Act 2000 in the House of Commons by Sir George Young (351 HC Official Report (6th series) cols 949–960) and in your Lordships' House by Lord Selborne (617 HL Official Report (5th series) cols 428–431). It is well known that opportunist companies have been buying up the freehold of common land in England and Wales for the sole purpose of extracting money from local residents, who had assumed that they had an established right of vehicular access across the common to their homes as they had been obtaining access in this way without interruption since time immemorial. Public authorities too had been exacting these charges, under pressure from the Treasury: see Christopher McNall 'Righting Wrongs? Prescriptive Easements and Illegality' [2004] 68 Conv 67, 69. Many of the

a residents were retired and could not easily find the sums that were being demanded from them.

[6] Section 68 of the 2000 Act was enacted in order to deal with this problem, but it did not provide a complete solution to it. An easement created in accordance with the regulations made under that section has to be paid for, albeit at lower rates than that demanded by the companies: see the Vehicular Access
b Across Common and Other Land (England) Regulations 2002, SI 2002/1711. It is, as Stephen Tromans, Research Professor, Nottingham Law School, put it in his annotations to the section in *Current Law Statutes*, something of a compromise: see also Christopher McNall's criticism of the legislative response ([2004] 68 Conv 67, 69). The section recognised that some owners of commons such as the
c National Trust and parish councils were entitled to seek to obtain a financial benefit from the law as laid down in *Hanning's* case, and it was not its purpose to deprive them of it. In their case, it has to be admitted, the financial benefit was in the nature of an unforeseen windfall.

[7] While Kennedy LJ paid tribute in *Hanning's* case (1993) 68 P & CR 14 at 23 to the long established and valuable principle of lost modern grant, he did not
d think that the fiction should be extended to enable the defendants to curtail public rights in the common by conduct which on each occasion when it was committed was criminal. But in my opinion, for the reasons Lord Scott has given, there is no need for the fiction of the lost modern grant to be extended to give the defendants the remedy they seek. All that is needed is to give to it the weight which it has always been given, despite the fact that the conduct relied on amounted on each
e occasion to a trespass which—assuming the use to be *nec vi, nec clam, nec precario*: not by force, by stealth or with permission—he could have objected to at any time.

[8] As Cockburn CJ explained in *Bryant v Foot* (1867) LR 2 QB 161 at 180–181, it is to be presumed from a period of 20 years' user, and the lack of evidence
f inconsistent with there having been immemorial user or a lost modern grant, that a right which was within grant has been established. Section 193(4) of the 1925 Act recognises that it is open to the owner of the land to grant the authority that is needed for the use of it not to constitute an offence. So too does s 34 of the Road Traffic Act 1988. The owner may wish to consider questions of amenity when he is deciding whether or not to grant the authority which these statutes
g require, but he is not obliged to do so. He may, as has been demonstrated in this case, wish simply to make money for himself. The important point is that the right to use the land without committing an offence is entirely within his grant. His liberty to grant authority is not fettered by the statutes in any way. So it does not require any extension of the fiction for it to be assumed that a use which could
h have been objected to at any time during the 20 year period either because it was tortious or because it was criminal, being a use for which in either case it was within the power of the owner to grant authority, has become established as a prescriptive right.

[9] In *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385 at
j 390, [2000] 1 AC 335 at 349, Lord Hoffmann said that any legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment. There is no doubt that, on the facts that Park J assumed to be true (see [2002] EWHC 472 (Ch), [2003] JPL 75) when he made the declaration that the various defendants referred to in his order had no private rights of way for vehicles across the common, there had been a *de facto* enjoyment of the common for this purpose and that in each case it was open, continuous and long

established. It could have been the subject of an express grant by the owner of the common at any time. The law would have been shown to be defective if it were to have allowed that enjoyment to be disturbed, with the result that it now had to be paid for. It is satisfactory that it has been possible to arrive at a conclusion in this case which is consistent with the value which has always been attached to a user of land which is open, continuous and long-established in the law relating to property rights.

LORD SCOTT OF FOSCOTE.

[10] A residence with a garden bordering upon an ancient common on which commoners pasture their sheep and to which members of the public can resort for exercise, dog walking, picnics, kite flying and the like, sounds like an enviable possession affording amenities of view and tranquillity that would be highly prized by most people. The absence of any direct access to the house from a public road might give rise to a momentary doubt about its attractions and suitability in a modern motorised age; but information that ever since the house was built, well over 20 years ago, its successive owners, and their visitors, have enjoyed vehicular access to the house over a track across the common linking the house with a public road would have quieted most doubts. And all doubts would, I expect, have been quieted if the inquirer, on consulting a lawyer, had been told about s 2 of the Prescription Act 1832. He would have been told that 20 years' open and uninterrupted user of the track as of right and without interruption would have entitled the householder to a right of way over the track.

[11] I am referring, however, to the time before 5 May 1993 when the decision of the Court of Appeal in *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14 was given. The Court of Appeal held that because it had been made an offence by s 193(4) of the Law of Property Act 1925 to drive without lawful authority on a common to which the section applied, and it applied to the *Hanning* common, and since no lawful authority for the defendant company to drive on the common had ever been given, a right of way could not have been acquired by the twenty or more years of uninterrupted use that the defendant company had enjoyed. An easement could not, it was held, be acquired by conduct which, at the time the conduct took place, was prohibited by statute.

[12] The *Hanning* decision was followed by the trial judge, Park J ([2002] EWHC 472 (Ch), [2003] JPL 75), and by the Court of Appeal ([2003] EWCA Civ 23, [2003] 1 WLR 1429) in the present case. They were bound by it but, in the Court of Appeal, the Lords Justices expressed the view that they would anyway have come to the same conclusion.

[13] Each of the appellants in the present case is an owner of a house bordering on a 144-acre common, Newtown Common, near Newbury. Vehicular access to each of the houses from the nearest public road has, since each house was built, been obtained via one or other of a number of tracks over the common. The owner of the common, whether past or present, has given no permission authorising this use of the tracks. The present owner of the common, Bakewell Management Ltd (Bakewell), the respondent company, has commenced proceedings to establish that the appellants have no vehicular rights over these tracks. Bakewell relies on the *Hanning* decision. The question for your Lordships is whether *Hanning's* case was rightly decided.

THE FACTS

a [14] The basic facts are not in dispute. Newtown Common is registered as a common under the Commons Registration Act 1965. It was owned by successive Earls of Carnarvon from early in the nineteenth century until 1986. Bakewell became the owner on 3 July 1997. Some of the tracks and roads across the common which connect appellants' properties to local public roads have tarmac surfaces. Some do not but all are usable by vehicles. Save for two of the properties, the tracks and roads across the common are the only means of vehicular access to public roads.

b [15] The owners of 28 properties, 47 defendants in all, were sued by Bakewell. Four of these did not file a defence. Against all the other defendants Bakewell made an application for summary judgment on the issue of liability. Seven of the defendants, the owners of four of the properties, were given leave to defend by Park J. Against all the others Park J made a declaration that they had no private rights of way for vehicles across Newtown Common.

c [16] The distinction between the seven and the others was based on the length of the period of vehicular access to their respective properties before 3 January 1928 (after which date s 193 of the 1925 Act applied to the common) that they could claim. Each of the seven could claim over 20 years' vehicular access before 3 January 1928. So it was accepted that each had an arguable claim to have acquired an easement by prescription, or under the fiction of lost modern grant, that predated the application of the s 193(4) prohibition to Newtown Common. As to the others, three of them, the owners of two properties, could claim use that commenced before 1928 but was of less than 20 years' duration before 1928. All of the defendants bar six, the owners of four properties, could claim use of more than 40 years before the commencement of the proceedings. The six could claim 20 years' use but not 40.

d [17] The appellants before the House include not only those against whom the declaration of no entitlement of a right of way was made but also the seven who were given leave to defend. The reason, no doubt, is that the seven have a common interest with their co-defendants in hoping to persuade your Lordships that *Hanning's* case was wrongly decided.

e [18] The appellants contend that their vehicular use of the tracks, and that of their respective predecessors in title, has been enjoyed openly and without any permission from the owner for the time being of the common. Bakewell accepts that that is so.

f [19] The status of the common as a common to which s 193 of the 1925 Act applies derives from sub-s (2) which enabled the owner of a common to declare by deed that the section should apply to his common and enacted that 'upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies'. On 31 December 1927 the then owner of the common, the sixth Earl of Carnarvon, declared by deed that s 193 should apply to Newtown Common. The deed was duly deposited with the minister on 3 January 1928 and has not been revoked. It is accepted by the appellants that on 3 January 1928 Newtown Common became a common to which s 193 applied.

g [20] Bakewell made it clear in the course of the hearing before Park J, and its counsel, Miss Williamson QC, has made clear to your Lordships, that Bakewell's purpose in instituting and pursuing the proceedings was not and is not to prevent the householders from using the tracks across the common for access to their respective properties but was and is to make the householders pay for the right

to do so. It is agreed, rightly, that Bakewell's motive is irrelevant to the issues before the House. a

[21] In any event, prompted by the Court of Appeal decision in *Hanning's* case, Parliament enacted s 68 of the Countryside and Rights of Way Act 2000 which instituted a statutory scheme under which an owner of property deprived of a prescriptive right of way over a common, or other land, by the unlawful conduct principle underlying the *Hanning* decision can require the right to be granted to him by the owner of the common in return for payment of an appropriate sum of money. But, of course, if the appellants can satisfy your Lordships that *Hanning's* case is wrong, they can establish their respective rights of access over the common without having to rely on s 68 or to pay Bakewell anything. b

THE STATUTORY PROHIBITION c

[22] The terms of the s 193(4) prohibition in the 1925 Act and its statutory context are important. The section is headed 'Rights of the public over commons and waste lands'. Subsection (1) provides:

'Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common...or manorial waste, or a common, which is wholly or partly situated within an area which immediately before 1st April 1974 was a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided: Provided that—(a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent of the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, for conserving flora, fauna or geological or physiographical features of the land, or for protecting any object of historical interest and, where any such limitations or conditions are so imposed, the rights of access shall be subject thereto; and (c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon...' d
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Subsection (2) enabled 'the lord of the manor or other person entitled to the soil of any land subject to rights of common' to apply s 193 to the land. I have described in [19], above, how this is done. The only other subsection to which I need refer is sub-s (4) which creates the statutory prohibition: h

'Any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence.' i

- a [23] Subsection (1), combined with sub-s (2), identified three categories of land to which s 193 was to apply, first, metropolitan commons (as defined), second, manorial waste or common land within the area of a pre-1 April 1974 borough or urban district, and, third, commons the owners of which had applied the section to the land. The rights of access for air and exercise over land falling into one or other of these three categories that sub-s (1) conferred on the public were subject to important provisos. Proviso (b) allowed the minister, on the application either of the owner of the land or of any person with rights of common, to impose limitations or conditions on the rights conferred on the public. The minister could do so for one or other of the purposes specified in the proviso. The first of the specified purposes would enable the minister to prevent the exercise of the newly conferred public rights from unreasonably interfering with the commoners' rights of common or with the legitimate interests of the owner of the land. Proviso (c) was plainly directed to the same purpose. It imposed specific limitations on and conditions as to the exercise of the newly conferred public rights. The purpose of sub-s (4) was, plainly, to enable the observance by members of the public of limitations and conditions imposed under proviso (b) or proviso (c) to be enforced by a criminal sanction.
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- e [24] The words in sub-s (4) 'without lawful authority' deserve careful attention. They have been taken, in cases like the present and like *Hanning's* case, to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to an authority given by some public official or public body pursuant to the Act, scheme, byelaw or regulation in question. But the ability of the owner of the common in question to give someone a 'lawful authority' to do one or other of the things prohibited by sub-s (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners (see s 30 of the Commons Act 1876). To do so would be a nuisance (see *Clerk & Lindsell on Torts* (18th edn, 2000) p 1682 (para 31–27). Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The reference to 'lawful authority' in sub-s (4) does not, therefore, mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, sub-s (4) allows the owner of a common to which s 193 of the 1925 Act applies to authorise the doing of an act that if done without that authority would be an offence under the subsection.
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- i [25] Section 193(4) of the 1925 Act is not the only statutory provision that creates an offence if motor vehicles are driven off-road 'without lawful authority'. Section 14(1) of the Road Traffic Act 1930 said:

'If without lawful authority any person drives a motor vehicle on to or upon any common land, moor land or other land of whatsoever description (not being land forming part of a road), or on any road being a bridleway or footway, he shall be guilty of an offence...'

There then followed two provisos one of which allowed parking on land within 15 yards of a road and the other allowed a defence if the vehicle had been driven 'for the purpose of saving life or extinguishing fire or meeting any other like emergency'. Section 14(1) of the 1930 Act was repealed by the Road Traffic Act 1960 and replaced by s 18(1) of that Act which was in the same terms. Section 18(1) of the 1960 Act was repealed by the Road Traffic Act 1972 and replaced by s 36(1) of that Act, also in the same terms. Section 36(1) has been repealed by the Road Traffic (Consequential Provisions) Act 1988 and replaced by s 34(1) of the Road Traffic Act 1988 which has slightly different wording but is to exactly the same effect as its statutory predecessors. My comments on 'without lawful authority' in s 193(4) of the 1925 Act are equally applicable to those words in s 34(1) of the 1988 Act and its predecessors.

[26] In a recent case in the Court of Appeal, *Massey v Boulden* [2002] EWCA Civ 1634, [2003] 2 All ER 87, [2003] 1 WLR 1792 the same point arose in relation to s 34(1) of the 1988 Act as had arisen in *Hanning's* case and in the present case in relation to s 193(4). Simon Brown LJ, in a reference (at [9]) to *Hanning's* case and to *Robinson v Adair* (1995) Times 2 March, a Queen's Bench Divisional Court case, said: 'That a prescriptive right of way cannot be acquired by a user in breach of a criminal statute is well established and ... not in dispute before us.' If *Hanning's* case was wrongly decided in treating user in breach of s 193(4) of the 1925 Act as a bar to the acquisition of a right of way by prescription so too was *Massey v Boulden* wrongly decided in treating user in breach of s 34(1) of the 1988 Act as a similar bar.

ACQUISITION OF EASEMENTS BY PRESCRIPTION

[27] The acquisition of easements by long uninterrupted user that has been open, free from force and not dependent upon any precatory permission from the servient owner serves a well-recognised public policy. In *Davis v Whitby* [1974] 1 All ER 806 at 809, [1974] Ch 186 at 192 Lord Denning MR said '... the long user as of right should by our law be given a lawful origin if that can be done' and Stamp LJ ([1974] 1 All ER 806 at 810, [1974] Ch 186 at 192) agreeing with Lord Denning MR, commented '... if long enjoyment of a right is shown, the court will strive to uphold the right by presuming that it had a lawful origin'. More recently Lord Hoffmann in *R v Oxfordshire CC ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 390, [2000] 1 AC 335 at 349 said: 'Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment.'

[28] The rules of prescription developed by English law for the acquisition of easements by long de facto enjoyment were based on the establishing of a fiction, namely, that the long de facto enjoyment was attributable to the grant of the easement by a past owner of the servient land but that the grant had been lost. The opinion given by Lord Hoffmann in *Ex p Sunningwell Parish Council* [1999] 3 All ER 385 at 390–392, [2000] 1 AC 335 at 349–351 contains a valuable exposition of the way in which this fiction developed and led to the enactment of the Prescription Act 1832. The terms of s 2 of the 1832 Act are important:

'No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement ... when such way or other matter ... shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but

a nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.'

b [29] Section 4 of the 1832 Act said that the periods of 20 years and 40 years had to be periods '... next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question ...'. Section 4 is the reason why lost modern grant as a means of claiming an easement by long use continued to exist alongside s 2 of the 1832 Act. In a case where the use relied on had ceased before the commencement of the action challenging the claim to the easement s 2 of the 1832 Act might not be applicable but the claimant might still get home by relying on lost modern grant. In *Tehidy Minerals Ltd v Norman* [1971] 2 All ER 475 at 491, [1971] 2 QB 528 at 552 Buckley LJ explained that the great case of *Dalton v Angus & Co* (1881) 6 App Cas 740, [1881–85] All ER Rep d 1 had decided that—

'...where there has been upwards of 20 years' uninterrupted enjoyment of an easement, such enjoyment having the necessary qualities to fulfil the requirements of prescription, then unless, for some reason ... the existence of such a grant is impossible, the law will adopt a legal fiction that such a grant was made, in spite of any direct evidence that no such grant was in fact made.'

e [30] In the present case the appellants claim their respective rights of way over the tracks across the common both under s 2 of the 1832 Act and, alternatively, under the lost modern grant fiction. No reason has been advanced, other than f the illegality point on which *Hanning's* case was based and which was approved in the present case, why these claims should not succeed on either of these two bases.

HANNING v TOP DECK TRAVEL GROUP LTD

g [31] Horsell Common, the common with which the *Hanning* case was concerned, was a common to which s 193 of the 1925 Act applied. Vehicles belonging to the defendant, Top Deck Travel, had been using a track across the common for well over 20 years. No authority to do this had been given by any owner of the common. The trial judge, Mr John Lindsay QC, had noted that this user was an offence under s 193(4) but that the illegality would have been cured h 'had a grant of the kind otherwise to be presumed been made'. He held that, in view of the illegality of the use on which Top Deck Travel was relying, the court could refuse to recognise the fiction that there had been a lost grant but that the court was not obliged to do so. In the event he did not do so and, accordingly, upheld the right of Top Deck Travel to the easement. Dillon LJ, who gave the j leading judgment in the Court of Appeal, disagreed. He cited a number of cases which, he considered (see (1993) 68 P & CR 14 at 20), had established the rule that 'an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute'. Kennedy LJ gave a judgment to the same effect.

[32] In my respectful opinion, the cases cited by Dillon and Kennedy LJJ do not establish that rule. What they establish is a rather different rule, namely, that

an easement cannot be acquired to do something the doing of which is prohibited by a public statute. The first case cited by Dillon LJ was *Neaverson v Peterborough RDC* [1902] 1 Ch 557. The first sentence of the headnote succinctly expresses what the case decides—‘A lost grant cannot be presumed where such a grant would be in contravention of a statute’. Henn Collins MR explained (at 563–564):

‘If such a grant could not have had a legal origin, then it is not competent for us to presume its existence. On the other hand, if it could have had a legal origin, then we ought to presume the existence of such a grant, when there is evidence of user for such a long period.’

And, (at 573) that ‘such a grant as is here suggested would have been illegal, whoever is supposed to have made it.’

[33] *Neaverson v Peterborough RDC* was cited by Eve J in *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268 at 282, [1922] All ER Rep 683 at 688 as authority for the proposition that—

‘A lost grant cannot be presumed where such a grant would have been in contravention of a statute, and as title by prescription is founded upon the presumption of a grant, if no grant could lawfully have been made, no presumption of the kind can arise, and the claim must fail.’

The lost grant that Top Deck Travel sought to establish, like those that the appellants now before the House seek to establish, could have had a legal origin. The grants could lawfully have been made and would not have been illegal.

[34] *Glamorgan CC v Carter* [1962] 3 All ER 866, [1963] 1 WLR 1 was the next case cited by Dillon LJ. The question at issue arose out of the provisions of the Town and Country Planning Act 1947. The question was whether planning permission was required for the use of certain land as a site for caravans. Section 12(5)(c) of the 1947 Act said that planning permission was not needed in order to authorise the use of unoccupied land for the purpose for which it had been last used. The last use that had been made of the land was as a site for caravans but at the time this use was taking place it had been an illegal use. This was the context in which Salmon LJ made ([1962] 3 All ER 866 at 868, [1963] 1 WLR 1 at 5) the statement cited by Dillon LJ ((1993) 68 P & CR 14 at 20), namely: ‘It seems to me plain on principle that Mrs James could not acquire any legal right by the illegal use to which she was putting the land.’ Salmon LJ made this statement in a planning context. Mrs James could not establish legal rights of use for the purposes of the 1947 Act by relying on use that was unlawful under the 1947 Act. The proposition was plainly correct. But the case had nothing to do with prescriptive use. It was, in my opinion, an unconvincing use of authority to take Salmon LJ’s statement out of context and treat the principle he expressed as applicable to prescriptive use.

[35] The next case cited was *George Legge & Son Ltd v Wenlock Corp* [1938] 1 All ER 37, [1938] AC 204. The question in this case was whether the status of a natural stream could be changed to that of a sewer by the unlawful discharge for a long period of sewage into the stream. Throughout the period of the discharge of sewage into the stream the discharge had been an offence under s 3 of the Rivers Pollution Prevention Act 1876. Their Lordships applied the decision of the House in *Airdrie Magistrates v Lanark CC*, *Coatbridge Magistrates v Lanark CC* [1910] AC 286 in which Lord Loreburn LC (at 291) had commented:

a 'But what the appellants say is this: Permit us to prove that these burns are sewers, and if we can prove that they are sewers, surely it cannot be an offence to pour sewage matter into the sewers. My Lords, that is merely asking leave to prove that they have ... committed in an aggravated degree the very offence with which they are charged.'

b In *George Legge's* case [1938] 1 All ER 37 at 42, [1938] AC 204 at 216 Lord Macmillan, with whose opinion Lord Atkin and Lord Roche agreed, said:

'... it is sought to prove that what was in law a protected stream has become in law an unprotected sewer simply by reason of infringements of the law designed for its protection. Now that is what your Lordships' House in effect held in the *Airdrie* case to be a legal impossibility.'

c And Lord Maugham ([1938] 1 All ER 37 at 46, [1938] AC 204 at 222) said:

d '... there are certainly statutes imposing duties or prohibitions which can be waived ... There are also cases where by the doctrine of a lost grant or lost patent or by some similar presumption individuals have, notwithstanding the terms of a statute, acquired rights apparently in contradiction of it. There is, however, no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer. Such a contention is, indeed, quite untenable.'

e [36] My Lords, Bakewell naturally attaches considerable importance to the last sentence from the passage of Lord Maugham's opinion that I have cited. I would respectfully suggest, however, that *George Legge's* case, and for that matter the *Airdrie* case, are no more than excellent examples of the proposition that a lawful grant to do an act or acts that if done would be illegal cannot be made. It would be the 'legal impossibility' to which Lord Macmillan referred. To go further and say, as Lord Maugham did, that never in any circumstances can acts in breach of public law prohibitions lead to the acquisition of legal rights does not follow and was not necessary for the decision.

f [37] Kennedy LJ in *Hanning* referred to *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441. In *Cargill's* case it was contended that a right to abstract water from a mill pond had been acquired by long use. Under s 23(1) of the Water Resources Act 1963 the abstraction of water from the mill pond as from 1 July 1965 required the grant of a licence from the water authority. The water authority was not the owner of the mill pond. The plaintiff, who had for some years prior to and after 30 June 1965 abstracted water from the pond for use on his neighbouring farm, g contended that he had acquired by long use an easement to do so. He had never applied for or been granted a licence by the water authority. The Court of Appeal held that for the purpose of establishing his easement he was not entitled to rely on his illegal abstraction of water post-30 June 1965. Templeman LJ, with whom on this point Lawton and Brandon LJJ agreed, said ([1981] 1 All ER 682 at 686, h j [1981] 1 WLR 441 at 446):

'... the plaintiff cannot rely on any abstraction of water carried out after 30th June, 1965 in order to establish an easement by prescription. The court will not recognise an easement established by illegal activity.'

[38] The last sentence of the cited passage from Templeman LJ's judgment gives Bakewell the same support as does the sentence from Lord Maugham's

opinion in *George Legge's* case case to which I have referred. But here, too, the sentence went further than was necessary. It was not open to the owner of the mill pond to grant the plaintiff, post-30 June 1965, the right to abstract water from the mill pond unless the plaintiff had the requisite licence from the water authority, which he did not. The grant would have been an unlawful grant, as would have been the comparable grant in *George Legge's* case. Templeman LJ did not have in mind what the situation would have been had a grant, if made by the mill owner, been a lawful grant.

[39] The feature of *Hanning's* case, and the present case, that distinguishes them from such cases as *George Legge's* case and *Cargill's* case is that the servient owner was able, notwithstanding the statutory prohibition, indeed by the very terms of s 193(4) of the 1925 Act, to make a lawful grant of the easement. A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the landowner to grant. It is difficult to see why, in the former class of case, the long and uninterrupted user should not be capable of supporting the presumed grant by the land owner of an easement that if granted would have been lawful and effective notwithstanding that the user was contrary to a statutory prohibition. I can see no requirement of public policy that would prevent the presumption of a grant that it would have been lawful to grant. On the contrary, the remarks of Lord Denning MR and Stamp LJ in *Davis v Whitby* and of Lord Hoffmann in *Ex p Sunningwell Parish Council* to which I have referred provide sound public policy reasons why, if a grant of the right could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed.

THE POST-HANNING CASES

[40] I should refer also to some of the several cases post-*Hanning* in which the principle on which that case was decided was applied. It is convenient to take them in chronological order. *Robinson v Adair* was reported in The Times of 2 March 1995. The case was not about private rights of way but raised the issue whether a particular road had become by presumed dedication a public highway. The Truro Crown Court had allowed Mr Adair's appeal against his conviction for obstructing a highway (see s 137 of the Highways Act 1980). Mr Adair, presumably the owner of the road in question, denied that it was a public highway. Mr Robinson contended that dedication of the road as a public highway was to be presumed after 20 years' uninterrupted use as of right by the public (s 31(1) of the 1980 Act). But the use relied on constituted an offence under s 34(1) of the 1988 Act. Dyson J, giving the judgment of the Divisional Court, referred to *Hanning's* case and said, according to The Times report, that he could see no rational distinction between acquisition of a private easement by presumed grant after long illegal user and the presumed dedication of a highway after long illegal user. However, it was, so I assume for there is nothing to suggest

a the contrary, open to Mr Adair or his predecessors in title to have dedicated the road as a public highway. Such a dedication would have constituted 'lawful authority' for s 34(1) purposes. The dedication would have been effective. That being so, I can see no reason why public policy would prevent a presumption of dedication arising from long use.

b [41] *Hereford and Worcester CC v Pick* (1996) 71 P & CR 231 was another case in which the issue was whether a presumed dedication of a road as a public highway could result from 20 years or more of uninterrupted public use in breach of s 34(1) of the 1988 Act. As in *Robinson's* case a Queen's Bench Divisional Court was considering whether a footpath, alleged to have become a public highway for vehicles by presumed dedication, had been unlawfully obstructed. Stuart-Smith LJ, after referring to *Hanning's* case and to *Robinson's* case said (at c 239) that 'Public rights cannot be based on long use where the user is prohibited by statute'. He said, also, that the user relied on for the presumed dedication would have constituted a public nuisance to pedestrians using the footpath and that, for that reason also, the user could not lead to a presumed dedication.

d [42] I agree with Stuart-Smith LJ's remarks about nuisance. It would not, in my opinion, have been open to the land owner to have dedicated the footpath as a public vehicular highway if use by vehicles would have constituted a public nuisance to pedestrians using the footpath. But I respectfully disagree with the proposition derived from *Hanning's* case and to *Robinson's* case. If it would have been lawful for the landowner to make the dedication in question I can see no reason why the dedication should not have been presumed from long use. e Indeed, if *Robinson's* case and, on this point, *Pick's* case are correct, there could never be a presumed dedication under s 31(1) of the 1980 Act after 20 years of public use. Whatever the intention behind s 34(1) of the 1988 Act may have been, the intention could hardly have been to repeal s 31(1) of the 1980 Act.

f [43] I have already referred briefly to *Massey v Boulden*. The defendants were the owners of a village green crossed by a track which gave vehicular access from a public road to the claimants' house. The successive occupiers of the house had used the track for vehicular access for over 40 years. The defendants resisted the claimants' entitlement to a prescriptive right of way on the ground that the user relied on had constituted an offence under s 34(1) of the 1988 Act. *Hanning's* case was relied on. The Court of Appeal agreed with the defendants and Simon g Brown LJ made the remark that I have cited in [26], above, and need not repeat. Sedley LJ agreed with Simon Brown LJ. Mansell LJ dissented on a point not material to the illegality issue. None of the members of the court addressed what to my mind is the critical question, namely, why public policy should preclude the obtaining by prescription, or by presumed grant, of an easement or right over h land that it would have been lawful for the landowner to grant notwithstanding that the user was, absent the grant, unlawful and criminal.

j [44] Finally, I should refer to *Hayling v Harper* [2003] EWCA Civ 1147; [2003] 39 EG 117. This case, too, raised the question whether vehicular user of a public footpath in breach of s 34(1) of the 1988 Act could lead to the acquisition by prescription of a public right of way. Ward LJ, who had a few months earlier given the leading judgment in the Court of Appeal in the case now before the House, was bound to follow *Hanning's* case and did so. The *Hanning* principle barred, he held, a claim to the easement under s 2 of the 1832 Act. The user relied on had been illegal since 1930 (see [25], above) and the claimants could not, therefore, rely on the user between 1930 and the commencement of the proceedings. But he held that the evidence of user pre-1930 enabled the claimants

to establish the acquisition of an easement by lost modern grant before the advent of s 14 of the 1930 Act. So the claimants won in the end. a

[45] In the present case both Ward and Arden LJ, besides holding themselves bound by *Hanning's* case, as indeed they were, indicated that they thought the *Hanning* decision was correct. Ward LJ cited well-known cases relating to the relevance of illegality in the general law. He cited such classics as *Holman v Johnson* (1775) 1 Cowp 341, [1775–1802] All ER Rep 98, *Bowmakers Ltd v Barnet Instruments Ltd* [1944] 2 All ER 579, [1945] KB 65 and *Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340. These authorities, he said ([2003] 1 WLR 1429 at [53]), established the principle that the Newtown Common householders— b

‘... cannot succeed without proving that they drove without lawful authority of the owner. Their claim is, therefore, founded upon their criminal activity. And for that reason it founders. Secondly, they claim a lost modern grant. It brings them benefit but the benefit is gained by their illegal activity. Public policy does not permit this.’ c

Arden LJ (at [63]) said that ‘... no discretion exists in the present case to disregard the effect of section 193(4) of the Law of Property Act 1925.’ d

CONCLUSIONS

[46] My Lords, in my opinion, the decision in *Hanning's* case and the subsequent justifications of that decision are wrong and ought not to be followed. I accept that, at the end of the day, the issue is one of public policy. It is accepted, however, that a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights. The *Hanning* decision can only be justified on the footing that conduct illegal in a criminal sense is, for public policy purposes, different in kind from conduct illegal in a tortious sense. Why should that necessarily be so? Why, in particular, should it be so where the conduct in question is use of land that is not a criminal use of land against which the public law sets its face in all cases? It is criminal only because it is a user of land for which the landowner has given no ‘lawful authority’. In that respect, the use of land made criminal by s 193(4) of the 1925 Act, or by s 34(1) of the 1988 Act, has much more in common with use of land that is illegal because it is tortious than with use of land that is illegal because it is criminal. e
f
g

[47] In my opinion, if an easement over land can be lawfully granted by the landowner the easement can be acquired either by prescription under s 2 of the 1832 Act or by the fiction of lost modern grant whether the use relied on is illegal in the criminal sense or merely in the tortious sense. I can see no valid reason of public policy to bar that acquisition. We have been referred to no case, pre-*Hanning*, that decided the contrary. The decision in *Hanning's* case took the law, in my opinion, in a wrong direction. It follows that, in my opinion, your Lordships should hold *Hanning's* case to have been wrongly decided and should overrule the various rulings in reliance on *Hanning's* case that have been made in the subsequent cases. I would allow this appeal and set aside the order of the Court of Appeal dated 30 January 2003 and the order of Park J dated 21 March 2002. The parties must apply to the High Court for any necessary directions as to the disposal or the further conduct of the action. Bakewell must pay the costs of the appellants here and below. h
j

LORD WALKER OF GESTINGTHORPE.

- a [48] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Scott of Foscote. I gratefully adopt his summary of the facts and I agree that, for the reasons which he gives, this appeal should be allowed. But because we are differing from the courts below on a point of some general interest, I add some observations of my own.
- b [49] The development of the law of prescription of easements has been considered by your Lordships' House in two recent cases (both concerned with analogous public rights), *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335 and *R (on the application of Beresford) v Sunderland CC* [2003] UKHL 60, [2004] 1 All ER 160, [2003] 3 WLR 1306. As the discussion in those cases shows, the basis of the law of prescription of easements and profits is that long-continued open and peaceful enjoyment of an apparent right should if possible be ascribed to a lawful origin. One of the requirements, if the presumption or inference of a lawful origin is to be made, is that the apparent right should lie in grant (that is, should be capable of being created by an express grant made by deed): see for instance the classic statement by Cockburn CJ in *Bryant v Foot* (1867) LR 2 QB 161 at 179. Similarly Lord Lindley said in *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 at 239: 'The common law doctrine is that all prescription presupposes a grant.' Otherwise the fictional technique of presuming or inferring a lost modern grant would not meet the case.
- c [50] In my opinion it is the requirement that there should have been a competent grantor, rather than any wider principle based on criminality, which best explains the well-known cases on which the respondent relied. The first was *Rochdale Canal Co v Radcliffe* (1852) 18 QB 287, 118 ER 108. Riparian owners who operated steam engines had a statutory power (under the Act of Parliament incorporating the canal company and authorising and regulating the construction and use of the canal) to extract from the canal—
- e 'such quantities of water as shall be sufficient to supply the said engine or engines with cold water, for the sole purpose of condensing the steam used for working any such engines'.
- f Radcliffe, a riparian mill owner, had for upwards of 20 years extracted water and used it, not merely for condensing steam but for a variety of other purposes. His claim to a prescriptive right failed because the canal company could not lawfully have granted him larger rights. To do so would have been beyond its powers and (to the extent that it might interfere with public rights of navigation) against the public interest. Coleridge J put the point very clearly ((1852) 18 QB 287 at 314, 118 ER 108 at 118):
- g 'The foundation of the fourth plea is a supposed grant, the existence of which is to be shewn by acts of user. But, if the acts of user would not be legal, the grant cannot be inferred from them. The company here are not the owners of the water, but trustees for the public, under a very limited trust. They are bound to apply all the water that may be required to the purposes of the navigation; they are also bound to allow so much as is wanted for the particular use (specified in [the statute]), of the mill owners within a certain distance of the banks.'
- j

[51] The same point is clearly made in the judgment of Collins MR in *Neaverson v Peterborough RDC* [1902] 1 Ch 557. The Newborough Inclosure Act 1812 provided for draining, enclosing and improving a fen which was common

land. Under the 1812 Act the grass growing on various roadways was vested in the surveyor of highways, who had power to let it for the pasturage of 'sound and healthy sheep' but with an express prohibition of other animals. Nevertheless the land was in the event used, for over 60 years, for the pasturage of horses and cattle, despite the fact that this involved a danger of damage to the drainage system (see 570–571). Collins MR stated the issue (at 563–564):

'There is evidence, no doubt, in this case of a long-continued practice of letting the herbage on the road for the pasturage, not of sheep exclusively, but also of a limited number of horses and cattle. The question is whether that ought to be treated as evidence of a lost grant, which might have had a legal origin. If such a grant could not have had a legal origin, then it is not competent for us to presume its existence. On the other hand, if it could have had a legal origin, then we ought to presume the existence of such a grant, when there is evidence of user for such a long period.'

[52] Collins MR (at 573) answered the question in a well-known passage:

'Again, it is essential to consider who, if a grant is to be presumed, are to be the supposed grantors and grantee. The defendants' counsel found themselves in considerable difficulties in this respect. I agree that the Court is endowed with a great power of imagination for the purpose of supporting ancient user. But, in inferring a legal origin for such user, it cannot infer one which would involve illegality. That was laid down in *Rochdale Canal Co. v. Radcliffe*.'

After discussing that case and difficulties as to the grantee he continued:

'But a much greater difficulty arises as to the supposed grantors. The learned judge appears to have been of opinion that the owners of the soil of the private roads might release the surveyor from the restriction as to the letting of the herbage. But, as I have already pointed out, the restriction not being intended merely for their benefit, they had no power to waive it, and, if they did so, they did what they had no power to do, and what the Legislature forbids.'

[53] *Hulley v Silversprings Bleaching and Dyeing Co Ltd* [1922] 2 Ch 268, [1922] All ER Rep 683 was concerned with a statutory prohibition on the pollution of rivers and watercourses, the Rivers Pollution Prevention Act 1876, which created criminal offences. A lower riparian owner sued the Silversprings company for nuisance. The fact that the plaintiff's predecessors had acquiesced in pollution for twenty years was held to be no defence, because the plaintiff was not the only person affected by the pollution. There was a wider public interest. But Eve J ([1922] 2 Ch 268 at 282, [1922] All ER Rep 683 at 688) saw the significance of the criminality of the pollution as being that it excluded the possibility of a lawful grant:

'The evidence on both sides satisfies me that the defendants have continually, and down to very recent dates in this year, been committing offences against the Act—in other words, that the user on which they rely as establishing the easement is a user contrary to statute. A lost grant cannot be presumed where such a grant would have been in contravention of a statute, and as title by prescription is founded upon the presumption of a

a grant, if no grant could lawfully have been made, no presumption of the kind can arise, and the claim must fail: *Neaverson v Peterborough RDC*.'

[54] Apart from *Hanning v Top Deck Travel Group Ltd* (1993) 68 P & CR 14, the last case relied on by the respondent was *Cargill v Gotts* [1981] 1 All ER 682, [1981] 1 WLR 441. In that case a farmer had acquired an easement to take water from a mill pond on his neighbour's land. He had acquired this right by prescription before the relevant provisions of the Water Resources Act 1963 came into force on 1 July 1965, with the effect that it would be a criminal offence for the farmer to continue to take water without an official licence. Templeman LJ said ([1981] 1 All ER 682 at 686, [1981] 1 WLR 441 at 446):

c 'I conclude that every abstraction of water by the plaintiff from the mill pond after 30 June, 1965, was illegal. It follows, in my judgment, that the plaintiff cannot rely on any abstraction of water carried out after 30 June, 1965, in order to establish an easement by prescription. The court will not recognise an easement established by illegal activity.'

d [55] The last sentence of this quotation has often been cited, and it was referred to by Dillon LJ in *Hanning's* case (1993) 68 P & CR 14 at 20. After discussing the authorities Dillon LJ drew this conclusion (at 20):

e 'I take all these cases to recognise what has always been the rule of the law; that an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute.'

f Kennedy LJ (at 23) also referred to *Cargill's* case and reached a similar conclusion. These formulations of the principle will in almost every case produce the same result as is obtained by asking the question: Could the right claimed have been lawfully granted by deed? The canal company in the *Rochdale Canal Co* case, the highway surveyor in *Neaverson's* case and the lower riparian owner (and his predecessors) in *Hulley's* case were not in a position to make a lawful grant because they had no power to authorise acts which affected not only their own private interests, but also wider public interests.

g [56] The present case is exceptional because of the unusual nature of the offence created by s 193(4) of the Law of Property Act 1925. It creates a criminal offence but it is, most unusually, an offence in respect of which the owner of the soil of the common has a dispensing power. It is common ground that that is the effect of the words 'without lawful authority' in sub-s (4). Moreover the landowner does not hold his dispensing power in any sort of fiduciary capacity. He is not bound to exercise it in the public interest. He can if he thinks fit exercise his dispensing power in his own private interest, by levying a charge for the grant of his authority. Miss Williamson QC (for the respondent) candidly agreed that from her client's point of view the appeal is ultimately about money.

j [57] That extraordinary feature of the criminal liability created by s 193(4) was noted by the Court of Appeal in *Hanning's* case, since it was the ground on which the case had been decided (in favour of prescription) at first instance. But Dillon LJ equated the judge's approach with that of the Court of Appeal (the so-called 'public conscience' test) in *Tinsley v Milligan* [1992] 2 All ER 391, [1992] Ch 310. Dillon LJ (who was giving judgment after this House had reserved judgment, but before it gave judgment in *Tinsley v Milligan* [1993] 3 All ER 65, [1994] 1 AC 340) correctly anticipated the House's disapproval of the 'public conscience' test. He said ((1993) 68 P & CR 14 at 18):

'Parliament does not only enact statutory provisions in the public interest where the public conscience would be affronted if the provision were not made; there are very many more statutory provisions made for the public benefit where the public conscience is not stirred, but any restrictions or prohibitions in those provisions have to be observed.'

He then analysed some of the authorities which I have mentioned and reached the general conclusion set out above. Kennedy LJ (at 23) did not regard this as an area in which the court had any discretion. Sir Roger Parker agreed with both judgments.

[58] Dillon LJ (at 20) also cited a general statement by Lord Maugham in *George Legge & Son Ltd v Wenlock Corp* [1938] 1 All ER 37 at 46, [1938] AC 204 at 222:

'There is, however, no case in the books in which repeated violation of the express terms of a modern statute passed in the public interest has been held to confer rights on the wrongdoer. Such a contention is indeed quite untenable.'

I do not consider that that wide proposition has any application here, since a statutory prohibition in respect of which a private citizen has an unfettered dispensing power, exercisable if he thinks fit for his own private purposes, cannot easily be described as enacted in the public interest.

[59] My Lords, in my view this House should not readily conclude that the decision of the Court of Appeal in *Hanning's* case was mistaken, especially as it has been followed, not only by the Court of Appeal in this case, but also on other occasions. Nevertheless I am satisfied that the wide formulations of the principle by Templeman LJ in *Cargill's* case and by the Court of Appeal in *Hanning's* case, although producing the right result in the generality of cases, are too wide in a case like the present. That is not to say that the residents of houses near Newtown Common did not commit a criminal offence (of a fairly venial nature) when they drove across the common to and from their houses. The principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight. Nevertheless the prior authority of the owner of the common would have provided a complete defence to any criminal charge. In the ordinary case of prescription of a private right of way, the prior authority of the landowner (in the solemn form of a grant by deed) is presumed or inferred from long user, even though every act of user during the prescription period takes place without his actual prior authority and is a tortious (though not a criminal) act. I cannot see that any public interest would be served by holding that the absence of the landowner's actual prior authority should produce a completely different result in cases where s 193(4) of the 1925 Act is in play.

[60] I do not see this as reintroducing the 'public conscience' test which this House disapproved in *Tinsley v Milligan*. It is merely a recognition that the maxim *ex turpi causa* must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest (see for instance *National Coal Board v England* [1954] 1 All ER 546 at 552, [1954] AC 403 at 419). In my opinion it is the landowner's unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of

a that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality.

[61] I would therefore allow this appeal.

BARONESS HALE OF RICHMOND.

b [62] I agree that this appeal should be allowed for the reasons given by my noble and learned friend Lord Scott of Foscote, with which I understand that my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Walker of Gestingthorpe also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Gorringe v Calderdale Metropolitan Borough Council

[2004] UKHL 15

HOUSE OF LORDS

LORD STEYN, LORD HOFFMANN, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY AND LORD BROWN OF EATON-UNDER-HEYWOOD

3, 4 FEBRUARY, 1 APRIL 2004

Highway – Maintenance – Scope of duty to maintain – Whether duty to maintain including duty to place warning signs – Highways Act 1980, s 41(1).

Local authority – Statutory duty – Whether statutory duty to promote road safety creating parallel common law duty – Road Traffic Act 1988, s 39(2),(3).

The claimant suffered severe injury driving a motor car on a country road when, just short of a crest in the road, she braked sharply and skidded into the path of a bus coming from the opposite direction. The claimant brought proceedings against the defendant local authority. She argued that the authority's failure to place on or near the road sufficient signs giving warning to motorists that they were approaching a dangerous part of the road constituted a breach of its duty as highway authority under s 41(1)^a of the Highways Act 1980 'to maintain the highway'. Alternatively she contended that s 39(2), (3)^b of the Road Traffic Act 1988 which imposed a duty on every local authority to prepare and carry out a programme of measures designed to promote and improve road safety, created a common law duty to users of the highway, in parallel with the statutory duty, to take reasonable steps to promote and improve road safety. The deputy judge found in her favour, holding that in the absence of a 'slow' warning, the claimant could not have been at fault. The majority of the Court of Appeal disagreed, holding that the authority was not in breach of any duty to the claimant. She appealed to the House of Lords.

Held – (1) The duty imposed on a highway authority by s 41(1) of the 1980 Act to put and keep the highway in repair was not capable of covering the provision of warning signs. The duty to 'maintain the highway' did not include a duty to take reasonable care to secure that the highway was not dangerous to traffic. In the instant case the accident had not been caused by any defect in the state of repair of the road or by any failure of the authority to maintain the road (see [1], [14]–[16], [52], [65], [68], [69], [81], [101], below); *Haydon v Kent CC* [1978] 2 All ER 97, *Goodes v East Sussex CC* [2000] 3 All ER 603 and *Lavis v Kent CC* (1992) 90 LGR 416 applied.

(2) The existence of the broad public duty in s 39 of the 1988 Act did not generate a common law duty of care and thus a private law right of action. A common law duty to act could not be imposed upon a local authority based solely on the existence of a broad public law duty. It was in the public interest that local authorities should take steps to promote road safety, but that did not require a

^a Section 41, so far as material, is set out at [12], below

^b Section 39, so far as material, is set out at [18], below

a private law duty to a careless driver or to any other road user. Accordingly, the appeal would be dismissed (see [1], [6], [35], [36], [38], [44], [71], [72], [77], [90], [91], [93], [94], [105], below); *Stovin v Wise* (Norfolk CC, third party) [1996] 3 All ER 801 applied; dicta of Lord Woolf CJ in *Larner v Solihull MBC* [2001] LGR 255 at 260, 261 criticised.

b Notes

For the duty of a highway authority to maintain the highway, for the meaning of maintenance, and for the powers of local authorities as to giving road safety information, see, respectively, 21 *Halsbury's Laws* (4th edn) (2004 reissue) paras 271, 272 and 40(1) *Halsbury's Laws* (4th edn reissue) para 21.

c For the Highways Act 1980, s 41, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 128.

For the Road Traffic Act 1988, s 39, see 38 *Halsbury's Statutes* (4th edn) (2001 reissue) 794.

Cases referred to in opinions

- d** *Almeda v A-G for Gibraltar* [2003] UKPC 81, [2003] All ER (D) 335 (Nov).
Anns v London Borough of Merton [1977] 2 All ER 492, [1978] AC 728, [1977] 2 WLR 1024, HL.
Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.
- e** *Barrett v Enfield LBC* [1999] 3 All ER 193, [2001] 2 AC 550, [1999] 3 WLR 79, HL.
Bird v Pearce (Somerset CC, third party) (1979) 77 LGR 753, CA.
British Railways Board v Herrington [1972] 1 All ER 749, [1972] AC 877, [1972] 2 WLR 537, HL.
Burnside v Emerson [1968] 3 All ER 741, [1968] 1 WLR 1490, CA.
- f** *Capital and Counties plc v Hampshire CC, Digital Equipment Co Ltd v Hampshire CC, John Munroe (Acrylics) Ltd v London Fire and Civil Defence Authority, Church of Jesus Christ of Latter Day Saints (Great Britain) v West Yorkshire Fire and Civil Defence Authority* [1997] 2 All ER 865, [1997] QB 1004, [1997] 3 WLR 331, CA.
East Suffolk Rivers Catchment Board v Kent [1940] 4 All ER 527, [1941] AC 74, HL.
Geddis v Proprietors of Bann Reservoir (1878) 3 App Cas 430, HL.
- g** *Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645, [1966] 3 WLR 513, PC.
Goodes v East Sussex CC [2000] 3 All ER 603, [2000] 1 WLR 1356, HL.
Gorringe v The Transport Commission (Tasmania) (1950) 80 CLR 357, Aust HC.
Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office [1991] 3 All ER 733, [1992] 1 AC 58, [1991] 3 WLR 388, HL.
- h** *Haydon v Kent CC* [1978] 2 All ER 97, [1978] QB 343, [1978] 2 WLR 485, CA.
Home Office v Dorset Yacht Co Ltd [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.
Larner v Solihull MBC [2001] LGR 255, CA.
Lavis v Kent CC (1992) 90 LGR 416, CA.
- j** *Murray v Nicholls* 1983 SLT 194, Ct of Sess.
O'Rourke v Camden London BC [1997] 3 All ER 23, [1998] AC 188, [1997] 3 WLR 86, HL.
Phelps v Hillingdon London BC, Anderton v Clwyd CC, Jarvis v Hampshire CC, Re G (a minor) [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.
Reeves v Comr of Police of the Metropolis [1999] 3 All ER 897, [2000] 1 AC 360, [1999] 3 WLR 363, HL.

- Rowling v Takaro Properties Ltd* [1988] 1 All ER 163, [1988] AC 473, [1988] 2 WLR 418, PC. a
- Russell v The Men of Devon* (1788) 2 TR 667, 100 ER 359, DC.
- Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions)* [1940] 3 All ER 349, [1940] AC 880, HL.
- Sheppard v Glossop Corp* [1921] 3 KB 132, [1921] All ER Rep 61, CA.
- Skilton v Epsom & Ewell UDC* [1936] 2 All ER 50, [1937] 1 KB 112, CA. b
- Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801, [1996] AC 923, [1996] 3 WLR 388, HL.
- Sutherland Shire Council v Heyman* (1985) 157 CLR 424, Aust HC.
- Tomlinson v Congleton BC* [2002] EWCA Civ 309, [2003] 3 All ER 1122, [2003] 2 WLR 1120; *rvsd* [2003] UKHL 47, [2003] 3 All ER 1122, [2004] 1 AC 46, [2003] 3 WLR 705. c
- X and ors (minors) v Bedfordshire CC, M (a minor) v Newham LBC, E (a minor) v Dorset CC* [1994] 4 All ER 602, [1995] 2 AC 633, [1994] 2 WLR 554, CA; *affd* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases referred to in list of authorities d

- A v Essex CC* [2003] EWCA Civ 1848, [2003] All ER (D) 321 (Dec).
- A-G v Scott* [1905] 2 KB 160, CA.
- Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582.
- Bolitho (administratrix of the estate of Bolitho (decd)) v City and Hackney Health Authority* [1997] 4 All ER 771, [1998] AC 232, [1997] 3 WLR 1151, HL. e
- Brodie v Singleton Shire Council, Ghantous v Hawkesbury City Council* [2001] HCA 29, (2001) 206 CLR 512, Aust HC.
- Caparo Industries plc v Dickman* [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.
- Co-operative Group (CWS) Ltd v International Computers Ltd* [2003] EWCA Civ 1955, [2003] All ER (D) 404 (Dec). f
- Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, (1999) 200 CLR 1, Aust HC.
- Cross v Kirklees Metropolitan BC* [1998] 1 All ER 564, CA.
- D v East Berkshire Community Health NHS Trust, K v Dewsbury Healthcare NHS Trust, K v Oldham NHS Trust* [2003] EWCA Civ 1151, [2003] 4 All ER 796, [2004] 2 WLR 58. g
- Fitzleet Estates Ltd v Cherry (Inspector of Taxes)* [1977] 3 All ER 996, [1977] 1 WLR 1345, HL.
- Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL. h
- Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53, [1988] 2 WLR 1049, HL.
- Just v British Columbia* [1989] 2 SCR 1228, Can SC. i
- Kane v New Forest DC* [2001] EWCA Civ 878, [2001] 3 All ER 914, [2002] 1 WLR 312.
- Kent v Griffiths* [2000] 2 All ER 474, [2001] QB 36, [2000] 2 WLR 1158, CA.
- Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65, [2000] QB 451, [2000] 2 WLR 870, CA.

- a* *Marc Rich & Co AG v Bishop Rock Marine Co Ltd, The Nicholas H* [1995] 3 All ER 307, [1996] AC 211, [1995] 3 WLR 227, HL.
- Matheos (owners of Steamship) v Louis Dreyfus & Co* [1925] AC 654, [1925] All ER Rep 422, HL.
- McFarlane v Tayside Health Board* [1999] 4 All ER 961, [2000] 2 AC 59, [1999] 3 WLR 1301, HL.
- b* *Murphy v Brentwood DC* [1990] 2 All ER 908, [1991] AC 398, [1990] 3 WLR 414, HL.
- Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2001] 3 All ER 97, [2002] QB 266, [2001] 3 WLR 376.
- Parramatta City Council v Lutz* (1988) 12 NSWLR 293, Aust CA.
- Porter v Magill* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC 357, [2002] 2 WLR 37.
- c* *Pyrenees Shire Council v Day, Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330.
- R v Gough* [1993] 2 All ER 724, [1993] AC 646, [1993] 2 WLR 883, HL.
- R v UK Electric Telegraph Co (Ltd)* (1862) 3 F&F 73, (1862) 6 LT 378, 176 ER 33.
- Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2003] 4 All ER 987, [2003] 3 WLR 1091.
- d* *Swinney v Chief Constable of the Northumbria Police* [1996] 3 All ER 449, [1997] QB 464, [1996] 3 WLR 968, CA.
- W v Essex CC* [2000] 2 All ER 237, [2001] 2 AC 592, [2000] 2 WLR 601, HL.
- White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, sub nom *Frost v Chief Constable of South Yorkshire Police* [1999] 2 AC 455, [1998] 3 WLR 1509, HL.
- e* *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1988] AC 175, [1987] 3 WLR 776, PC.
- f* *Giles Wingate-Saul QC and Mark Laprell* (instructed by *Clarksons*, Halifax) for the appellant.
- Mark Turner QC and Richard Hone QC* (instructed by *Hill Dickinson*, Manchester) for the respondent.

Appeal

- g* The claimant, Denise Gorringe, by her litigation friend, June Elizabeth Todd, appealed with permission of the Appeal Committee of the House of Lords given on 15 May 2003 from the decision of the Court of Appeal (May LJ and Sir Murray Stuart-Smith, Potter LJ dissenting) on 2 May 2002 ([2002] EWCA 595, [2002] RTR 446) dismissing the appeal of the Calderdale Metropolitan Borough Council from
- h* the decision of Roger Thorn QC, sitting as a deputy High Court judge in the Halifax/Leeds District Registry, on 22 February 2001, giving judgment for the claimant in her proceedings against the council for damages for personal injury. The facts are set out in the opinion of Lord Hoffman.

- j* Their Lordships took time for consideration.

1 April 2004. The following opinions were delivered.

LORD STEYN.

[1] My Lords, in agreement with all members of the House I too am satisfied Calderdale Metropolitan Borough Council (the council) did not owe

Mrs Gorrington a duty of care to place a marking on the road or to erect a sign, warning motorists to slow down on approaching the crest of road where the accident happened. I am in agreement with the opinions of my noble and learned friends Lord Hoffmann, Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood on the reasons for this conclusion in respect of highways and on the proper construction of s 39 of the Road Traffic Act 1988 and s 41 of the Highways Act 1980. There is nothing that I can usefully add to their careful and detailed analysis about the legal position in regard to highways.

[2] There are, however, a few remarks that I would wish to make about negligence and statutory duties and powers. This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called 'the rule of public policy which has first claim on the loyalty of the law; that wrongs should be remedied' (see *X and ors (minors) v Bedfordshire CC* [1994] 4 All ER 602 at 619, [1995] 2 AC 633 at 663 per Bingham MR). Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise.

[3] In recent years four House of Lords decisions have been milestones in the evolution of this branch of the law and have helped to clarify the correct approach, without answering all the questions (see *X and ors (minors) v Bedfordshire CC*, [1995] 3 All ER 353, [1995] 2 AC 633, *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801, [1996] AC 923, *Barrett v Enfield LBC* [1999] 3 All ER 193, [2001] 2 AC 550 and *Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619). There are two comments on these decisions which I would make. First, except on a very careful study of these decisions, there is a principled distinction which is not always in the forefront of discussions. It is this: in a case founded on breach of statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute excludes a private law remedy? An assimilation of the two inquiries will sometimes produce wrong results.

[4] The second point relates to observations of Lord Hoffmann in his landmark majority judgment in *Stovin v Wise* to which Lord Hoffmann has made reference in his opinion. In *Stovin v Wise* [1996] 3 All ER 801 at 828, [1996] AC 923 at 953 Lord Hoffmann observed:

'In summary, therefore, I think that the minimum pre-conditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.'

a Since *Stovin v Wise* these observations have been qualified in *Barrett's* case and *Phelps' case*. I say that not because of the context of the actual decisions in those cases in *Barrett's* case a council's duty to a child in care and in *Phelps' case* a duty of care in the educational field. Rather it is demonstrated by the legal analysis which prevailed in those decisions. In *Barrett's* case [1999] 3 All ER 193 at 225, [2001] 2 AC 550 at 586 Lord Hutton observed:

b 'I further consider that the decision of this House in *Stovin v Wise* (*Norfolk CC, third party*) [1996] 3 All ER 801 at 814, [1996] AC 923 is not an authority which precludes a finding that there was a duty of care in this case, because *Stovin's* case was concerned solely with the omission by a highway authority to perform a statutory power, whereas in the present case the allegation of negligence relates to the manner in which the local authority exercised its statutory duty and powers. In *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353 at 369, [1995] 2 AC 633 at 736 Lord Browne-Wilkinson said: "For myself, I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence." I am in agreement with this view and I consider that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of negligence e *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) to determine if the decision fell outside the ambit of the statutory discretion. I further consider that in each case the court's resolution of the question whether the decision or decisions taken by the defendant in exercise of the statutory discretion are unsuitable for judicial determination will require, as Lord Keith stated in *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501, a careful analysis and weighing of the relevant circumstances.'

g Lord Nolan and I expressly agreed with Lord Hutton's analysis. In substance a similar analysis was adopted by the House in *Phelps' case* [2000] 4 All ER 504 at 517, [2001] 2 AC 619 at 652–653 per Lord Slynn of Hadley.

[5] These qualifications of *Stovin v Wise* have been widely welcomed by academic lawyers. A notably careful and balanced analysis is that of Professor Paul Craig (*Administrative Law* (2003, 5th edn) pp 888–904). He stated (at 898):

h 'There are many instances where a public body exercises discretion, but where the choices thus made are suited to judicial resolution. The mere presence of some species of discretion does not entail the conclusion that the matter is thereby non-justiciable. In the United States, it was once argued that the very existence of discretion rendered the decision immune from negligence. As one court scathingly said of such an argument, there can be discretion even in the hammering of a nail. Discretionary judgments made by public bodies, which the courts feel able to assess, should not therefore preclude the existence of negligence liability. This does not mean that the presence of such discretion will be irrelevant to the determination of liability. It will be of relevance in deciding whether there has been a breach of the duty of care. It is for this reason that the decisions in [*Barrett v Enfield LBC* [1999]

3 All ER 193, [2001] 2 AC 550] and [*Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619] are to be welcomed. Their Lordships recognised that justiciable discretionary choices would be taken into account in deciding whether the defendant had acted in breach of the duty of care. There may also be cases where some allegations of negligence are thought to be non-justiciable, while others may be felt suited to judicial resolution in accordance with the normal rules on breach.'

[6] I would dismiss the appeal.

LORD HOFFMANN.

[7] My Lords, on 15 July 1996, on a country road in Yorkshire, Mrs Denise Gorringe drove her car head-on into a bus. It was hidden behind a sharp crest in the road until just before she reached the top. When she first caught sight of it, a curve on the far side may have given her the impression that it was actually on her side of the road. At any rate, she slammed on the brakes and at 50 miles an hour the wheels locked and the car skidded into the path of the bus. Mrs Gorringe suffered brain injuries severely affecting various bodily functions including speech and movement.

[8] On the face of it, the accident was her own fault. It was certainly not the fault of the bus driver. He was driving with proper care when Mrs Gorringe skidded into him. But she claims in these proceedings that it was the fault of the local authority, the Calderdale Metropolitan Borough Council (the council). She says that the council caused the accident by failing to give her proper warning of the danger involved in driving fast when you could not see what was coming. In particular, the council should have painted the word 'SLOW' on the road surface at some point before the crest. There had been such a marking in the past, but it disappeared, probably when the road was mended seven or eight years before.

[9] When the case was before the Court of Appeal ([2002] EWCA Civ 595, [2002] RTR 446), Potter LJ said (at [93]) that it would have been 'no more than a warning of the need to do that which should have been obvious to her in any event as she drove up from the dip'. Nevertheless, he was willing to hold that the council's omission to provide such a warning meant that the accident was partly its fault. The judge (Mr Roger Thorn QC, sitting as a deputy judge) had gone even further. He said that it was entirely the fault of the council. In the absence of such a warning, Mrs Gorringe could not be blamed for driving too fast. But May LJ and Sir Murray Stuart-Smith disagreed. They said that the council was not in breach of any duty to Mrs Gorringe and that she was entirely responsible. Her action was dismissed and she appeals to your Lordships' House.

[10] My Lords, the general rule is that even in the case of occupiers of land, there is no duty to give warning of obvious dangers (see the recent case of *Tomlinson v Congleton BC* [2003] UKHL 47, [2003] 3 All ER 1122, [2004] 1 AC 46). People must accept responsibility for their own actions and take the necessary care to avoid injuring themselves or others. And a highway authority is not of course the occupier of the highway and does not owe the common duty of care. Its duties (and those of its predecessors, the inhabitants of the parish) have for centuries been more narrowly defined, both by common law and statute.

[11] At common law it was the duty of the inhabitants of a parish to put and keep its highways in repair. A highway had to be, as Diplock LJ said in *Burnside v Emerson* [1968] 3 All ER 741 at 744, [1968] 1 WLR 1490 at 1496-1497—

a 'in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition.'

b [12] The inhabitants appointed a surveyor of highways to carry out this duty on their behalf and the expense was met by levying a rate. By various statutes culminating in the Highways Act 1959, the duty was transferred from the inhabitants to statutory highway authorities. It is now contained in s 41(1) of the Highways Act 1980: a highway authority is 'under a duty ... to maintain the highway'. But the common law duty to repair was the only duty of the inhabitants. In all other respects the public had to take the highway as they found it. Furthermore, the duty of the inhabitants was a public duty which was enforceable only by a prosecution on indictment. It could not be relied upon by c an individual to found a claim for damages. I expect it was thought burdensome enough for the inhabitants to have to pay the highway rate. There was no reason why they should have also to pay damages for injuries caused by the deficiencies of the surveyor in carrying out repairs. The users of the highway were expected d to look after themselves.

e [13] This remained the law when the duty was transferred to highway authorities. An individual who had suffered damage because of some positive act which the authority had done to make the highway more dangerous could sue for negligence or public nuisance in the same way as he could sue anyone else. The highway authority had no exemption from ordinary liability in tort. But the duty to take active steps to keep the highway in repair was special to the highway authority and was not a private law duty owed to any individual. Thus it was said that highway authorities were liable in tort for misfeasance but not for non-feasance. Sometimes it was said that the highway authority was 'exempt' f from liability for non-feasance, but it was not truly an exemption in the sense that the authority had a special defence against liability. The true position was that no one had ever been liable in private law for non-repair of a highway. But all this was changed by s 1(1) of the Highways (Miscellaneous Provisions) Act 1961. The public duty to keep the highway in repair was converted into a statutory duty owed by the highway authority to all users of the highway, giving a remedy in g damages for its breach.

h [14] The new private law duty was however limited to the obligation which had previously rested upon the inhabitants at large, namely, to put and keep the highway in repair. As Lord Denning MR explained in *Haydon v Kent CC* [1978] 2 All ER 97, [1978] QB 343, that remains the meaning of 'maintain the highway' in s 41 of the 1980 Act today. In *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356 this House decided that the duty therefore did not require the highway authority to remove ice or snow from the road. The presence of ice and snow did not mean that the highway was out of repair. Removing ice and snow was a different kind of obligation which could be imposed on highway authorities only by Parliament. It has since been added to the repairing duty by s 111 of the j Railways and Transport Safety Act 2003.

[15] The judge decided that, in the absence of a suitable warning painted on the road or carried on a sign, the highway was out of repair. The Court of Appeal unanimously disagreed and I have little to add to their reasons. The provision of information, whether by street furniture or painted signs, is quite different from keeping the highway in repair. In *Lavis v Kent CC* (1992) 90 LGR 416 at 418

Steyn LJ said in response to a similar submission that s 41 required an authority to erect a warning sign: a

‘In my judgment it is perfectly clear that the duty imposed is not capable of covering the erection of traffic signs, and nothing more need be said about that particular provision.’

[16] This observation may be said to be short and to the point but I doubt whether, in the light of the judgment of Lord Denning MR in *Haydon*’s case, there is a great deal more to say. At any rate, I agree with it. b

[17] The alternative claim is for common law negligence. Mr Wingate-Saul QC, who appeared for Mrs Gorringer, accepts that in the absence of the statutory provision to which I shall shortly refer, such a claim would be hopeless. If the highway authority at common law owed no duty other than to keep the road in repair and even that duty was not actionable in private law, it is impossible to contend that it owes a common law duty to erect warning signs on the road. It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it. The law does recognise such duties in special circumstances: see, for example, *Goldman v Hargrave* [1966] 2 All ER 989, [1967] 1 AC 645 on the positive duties of adjoining landowners to prevent fire or harmful matter from crossing the boundary. But the imposition of such a liability upon a highway authority through the law of negligence would be inconsistent with the well-established rules which have always limited its liability at common law. c
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[18] Accepting this as the general position, Mr Wingate-Saul submits that a common law duty has been created by (or ‘in parallel’ with) s 39(2) and (3) of the Road Traffic Act 1988: f

‘(2) Each local authority must prepare and carry out a programme of measures designed to promote road safety ...

(3) Without prejudice to the generality of subsection (2) above, in pursuance of their duty under that subsection each local authority—(a) must carry out studies into accidents arising out of the use of vehicles on roads ... within their area, (b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for which they are the highway authority ... and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads ...’ g
h

[19] These provisions, with their repeated use of the word ‘must’, impose statutory duties. But they are typical public law duties expressed in the widest and most general terms: compare s 1(1) of the National Health Service Act 1977: ‘It is the Secretary of State’s duty to continue the promotion ... of a comprehensive health service ...’ No one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty. They j

a are enforceable, so far as they are justiciable at all, only in proceedings for judicial review.

[20] Nevertheless, Mr Wingate-Saul submits that s 39 casts a common law shadow and creates a duty to users of the highway to take reasonable steps to carry out the necessary studies and take the appropriate measures. At any rate, their conduct in compliance with these duties must not be such as can be described as 'wholly unreasonable'. The judge found that it was unreasonable for the council not to have painted a warning sign on the road and Potter LJ thought that he was entitled to come to this conclusion.

c [21] The effect of statutory powers and duties on the common law liability of a highway authority was considered by this House in *Stovin v Wise* (Norfolk CC, third party) [1996] 3 All ER 801, [1996] AC 923. Mrs Wise emerged from a side road and ran down Mr Stovin because she was not keeping a proper look-out. When he sued her for damages, she (or rather her insurance company) joined the Norfolk County Council as a third party because the visibility at the intersection was poor and they said that the council should have done something to improve it. The council had statutory powers which would have enabled the necessary d work to be done and there was evidence that the relevant officers had decided in principle that it should be done, but they had not got round to doing it.

[22] The decision of the majority was that the council owed no private law duty to road users to do anything to improve the visibility at the intersection. 'Drivers of vehicles must take the highway network as they find it.' (See [1996] 3 All ER 801 at 833, [1996] AC 923 at 958.) The statutory power could not be converted into a common law duty. I pointed out in my speech that the council had done nothing which, apart from statute, would have attracted a common law duty of care. It had done nothing at all. The only basis on which it was a candidate for liability was that Parliament had entrusted it with general responsibility for the highways and given it the power to improve them and take e other measures for the safety of their users.

[23] Since the existence of these statutory powers is the only basis upon which a common law duty was claimed to exist, it seemed to me relevant to ask whether, in conferring such powers, Parliament could be taken to have intended to create such a duty. If a statute actually imposes a duty, it is well settled that the question of whether it was intended to give rise to a private right of action depends upon the construction of the statute (see *Hague v Deputy Governor of Parkhurst Prison*, *Weldon v Home Office* [1991] 3 All ER 733 at 741, 748–752, [1992] 1 AC 58 at 159, 168–171). If the statute does not create a private right of action, it would be, to say the least, unusual if the mere existence of the statutory duty could generate a common law duty of care.

h [24] For example, in *O'Rourke v Camden London BC* [1997] 3 All ER 23, [1998] AC 188 a homeless person sued for damages on the ground that the council had failed in its statutory duty to provide him with accommodation. The action was struck out on the ground that the statute did not create a private law right of action. In a speech with which all other members of the House concurred, I said:

j '... the [Housing] Act [1985] is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social

services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done.' (See [1997] 3 All ER 23 at 26, [1998] AC 188 at 193.)

[25] In the absence of a right to sue for breach of the statutory duty itself, it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. (Compare *Stovin v Wise* [1996] 3 All ER 801 at 827–828, [1996] AC 923 at 952–953.) And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had a power to do so.

[26] This was the reasoning by which the majority in *Stovin v Wise* came to the conclusion that the council owed no duty to road users which could in any circumstances have required it to improve the intersection. But misunderstanding seems to have arisen because the majority judgment goes on to discuss, in the alternative, what the nature of such a duty might have been if there had been one. It suggests that it would have given rise to liability only if it would have been irrational in a public law sense not to exercise the statutory power to do the work. And it deals with this alternative argument by concluding that, on the facts, there had been no breach even of such a duty. The suggestion that there might exceptionally be a case in which a breach of a public law duty could found a private law right of action has proved controversial and it may have been ill-advised to speculate upon such matters.

[27] The approach of the minority, in a speech by Lord Nicholls of Birkenhead, was very different. He thought that the statutory powers had invested the highway authority with general responsibilities which could in appropriate circumstances give rise to a common law duty of care. He referred to a number of circumstances which might singly or cumulatively justify the existence of a duty and he said that on the facts there had been such a duty and that the council had been in breach.

[28] *Stovin v Wise* was considered by the Court of Appeal in *Larner v Solihull MBC* [2001] LGR 255. Mrs Larner was injured in a collision when she failed to give way on entering a major road at a junction. She had passed two 'Give Way' signs but sued the highway authority on the ground that its duties under s 39 of the 1988 Act required additional warning to be given. The Recorder of Birmingham, Judge Crawford QC, dismissed the action on a number of grounds. The foremost was that s 39 neither gave rise to an action for breach of statutory duty nor generated a duty of care. He also held that there had been no breach of any duty which might conceivably exist and that if there had been, it would not have been the cause of the accident.

[29] Mrs Larner appealed to the Court of Appeal (Lord Woolf CJ, Judge and Robert Walker LJ). Lord Woolf CJ described the duty under s 39 as a 'target duty' which did no more than 'require the council to exercise its powers in the

a manner that it considers is appropriate'. Lord Woolf CJ (at 259) cited a passage from my speech in *Stovin v Wise* [1996] 3 All ER 801 at 827–828, [1996] AC 923 at 952–953 in which I said:

b 'If [a statutory] duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.'

c [30] He then said ([2001] LGR 255 at 260, 261):

d '15. ... However, so far as section 39 of the 1988 Act is concerned, we would accept that there can be circumstances of an exceptional nature where a common law liability can arise. For that to happen, it would have to be shown that the default of the authority falls outside the ambit of discretion given to the authority by the section. This would happen if an authority acted wholly unreasonably ...

e 16. ... As long as any common law duty is confined in this way, there are no policy reasons which are sufficient to exclude the duty. An authority could rely on lack of resources for not taking action and then it would not be in breach ... These difficulties in the way of claimants mean that the existence of the residual common law duty should not give rise to a flood of litigation. On the other hand for the desirability of a duty in the exceptional case we adopt the reasons of Lord Nicholls of Birkenhead in *Stovin* ...'

f [31] There is nothing in this reasoning to explain why the passage which Lord Woolf CJ cited from the majority judgment in *Stovin v Wise* did not apply to s 39 of the 1988 Act. He simply says that he adopts the view of the minority in *Stovin v Wise*. Mr Wingate-Saul submitted that this was legitimate because the only real disagreement between majority and minority in *Stovin v Wise* was over the facts: the majority thought that the council was immune from liability because it was exercising a discretion whereas the minority thought that there had been an operational failure. But that is not in my opinion a correct analysis of the decision. The majority rejected the argument that the existence of the statutory power to make improvements to the highway could in itself give rise to a common law duty to take reasonable care to exercise the power or even not to be irrational in failing to do so. It went no further than to leave open the possibility that there might somewhere be a statutory power or public duty which generated a common law duty and indulged in some speculation (which may have been ill-advised) about what that duty might be.

j [32] Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide. For example, the majority reasoning in *Stovin v Wise* was applied in *Capital and Counties plc v Hampshire CC* [1997] 2 All ER 865, [1997] QB 1004 to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services (see s 1 of the Fire Services Act 1947). The Court of Appeal

held, in my view correctly, that this did not create a common law duty. Stuart-Smith LJ (giving the judgment of the Court of Appeal) said: a

‘In our judgment the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If therefore they fail to turn up or fail to turn up in time because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable.’ (See [1997] 2 All ER 865 at 878, [1997] QB 1004 at 1030.) b

[33] The Court of Appeal in *Larner’s* case went on to hold that on the facts there had been no breach of duty. But the consequences of the door which it left open can be seen in the present case. The council was obliged to give discovery of documents relating to its accident studies undertaken pursuant to s 39(3)(a), the decision-making process by which it decided what measures in the light of such studies were appropriate and the steps which had been taken to implement such measures. It was heavily criticised by the judge for the lateness and insufficiency of such discovery. The trial lasted six days, during which the council called a number of its officers as witnesses and was criticised for not calling enough. The simple facts which I have summarised at the beginning of this speech seem to have disappeared from view in the enthusiasm for a hostile judicial inquiry into the council’s administration. If s 39 continues to provoke investigations of this nature, much of the road safety budget will be consumed in the cost of litigation. c
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[34] Mr Wingate-Saul said that it did not matter that the danger would have been obvious to a reasonable driver. The duties imposed upon local authorities to promote road safety were imposed in the interests of careless as well as careful drivers. Indeed, he described Mrs Gorringer as ‘vulnerable’ because she did not know the area and compared the case with *Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360, in which the police conceded that they owed a duty of care to a prisoner to take reasonable care to prevent him from taking his own life. e
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[35] Of course it is in the public interest that local authorities should take steps to promote road safety. And it would also be unwise for them to assume that all drivers will take reasonable care for their own safety or that of others. If a driver kills or injures someone else by ignoring an obvious danger, it is little consolation to the victim or his family that the other driver was wholly to blame. And even if the careless driver kills or injures only himself, the accident may have a wider impact upon his family, his economic relationships and the burden on the public services. That is why s 39 of the 1988 Act is framed as a broad public duty. In this respect there is a parallel with the duty to house the homeless discussed in *O’Rourke v Camden London BC* [1997] 3 All ER 23, [1998] AC 188. But the public interest in promoting road safety by taking steps to reduce the likelihood that even careless drivers will have accidents does not require a private law duty to a careless driver or any other road user. *Reeves’* case was a highly exceptional case. If I may quote what I said in *Tomlinson v Congleton BC* [2003] UKHL 47 at [46], [2003] 3 All ER 1122 at [46], [2004] 1 AC 46: g
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‘A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees, or some lack of capacity, such as the inability of children to recognise danger (see *British Railways Board v Herrington* [1972] 1 All ER 749, [1972] AC 877) or the despair of prisoners which may lead them to inflict

a injury on themselves (see *Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360).'

[36] Nor does it follow that the council should be liable to compensate third parties whom careless drivers have injured. The drivers must take responsibility for the damage they cause and compulsory third party insurance is intended to ensure that they will be able to do so (compare *Stovin v Wise* [1996] 3 All ER 801 at 823, [1996] AC 923 at 958).

b [37] *Larner's* case was binding on the Court of Appeal in this case and explains why Potter LJ felt obliged to hold that the council owed a duty of care to Mrs Gorrington and, on the judge's findings of fact, was in breach of that duty. But in my opinion Mr Peter Crawford QC, the judge in *Larner's* case, was right in
c holding that there was no duty of care. His decision on that point should not have been called into question by the Court of Appeal.

[38] My Lords, I must make it clear that this appeal is concerned only with an attempt to impose upon a local authority a common law duty to act based solely on the existence of a broad public law duty. We are not concerned with cases in
d which public authorities have actually done acts or entered into relationships or undertaken responsibilities which give rise to a common law duty of care. In such cases the fact that the public authority acted pursuant to a statutory power or public duty does not necessarily negative the existence of a duty. A hospital trust provides medical treatment pursuant to the public law duty in the National Health Service Act 1977, but the existence of its common law duty is based simply
e upon its acceptance of a professional relationship with the patient no different from that which would be accepted by a doctor in private practice. The duty rests upon a solid, orthodox common law foundation and the question is not whether it is created by the statute but whether the terms of the statute (for example, in requiring a particular thing to be done or conferring a discretion) are
f sufficient to exclude it. The law in this respect has been well established since *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430.

[39] Thus in *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004 the House held that the statutory powers and discretions of the Home Office in connection with the rehabilitation of young offenders were not
g sufficient to exclude liability for a breach of their common law duty of care which arose from their bringing some young offenders to an island and leaving them unsupervised when it was reasonably foreseeable that they would cause damage if they tried to escape. In *Barrett v Enfield LBC* [1999] 3 All ER 193, [2001] 2 AC 550 the plaintiff claimed that when he was taken into care, the council assumed
h parental responsibilities over him and so came under a duty of care in respect of the way he was treated. It was alleged that various acts and omissions had been in breach of this duty. The council tried to get the claim struck out as disclosing no cause of action because it had been exercising wide statutory discretions. The House refused to strike out the action. The plaintiff did not rely upon a common
j law duty of care generated by the existence of statutory powers. It is true that the council only assumed parental responsibility because of its statutory powers or duties, but the fact was that it did so. It was that which the plaintiff alleged gave rise to the duty. The statutory powers and duties might have provided the council with defences in respect of its specific acts or omissions but that could not be decided without an investigation of the facts.

[40] Similarly in *Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619 the local education authority employed an educational psychologist to

examine the plaintiff and diagnose her learning difficulties. The psychologist negligently failed to diagnose dyslexia and, as a result, the plaintiff left school with fewer skills than she would have learned if she had been diagnosed earlier. The council relied upon the fact that it had provided the psychologist pursuant to its public law duties which were not actionable in private law. But the House held that the duty of care did not depend upon the statute. It arose because the psychologist had impliedly undertaken to exercise proper professional skill in diagnosis, in the same way as a doctor provided by the National Heath Service. The fact that the doctor-patient relationship was brought into being pursuant to public law duties was irrelevant except so far as the statute provided a defence. The House decided that no such defence had been established.

[41] The well-known dissent of Lord Atkin in *East Suffolk Rivers Catchment Board v Kent* [1940] 4 All ER 527 at 533, [1941] AC 74 at 88 was based upon a similar distinction. Lord Atkin in no way challenged the proposition of Lord Romer, speaking for the majority, that a statutory power could not in itself generate a common law duty of care. His view was that by going onto the land and commencing the work, the catchment board had done an act which created a common law duty to complete the work with reasonable despatch. The majority thought that this was insufficient. But I do not think that there is anything in Lord Atkin's dissent which calls into doubt the principle for which the *East Suffolk* case is regularly cited and which was applied by the majority in *Stovin v Wise*.

[42] An attempt to apply similar reasoning appears in the difficult case of *Bird v Pearce (Somerset CC, third party)* (1979) 77 LGR 753. The plaintiff was a passenger in a car on a major road who was injured in a collision with a car which emerged from a minor road. The driver of the second car, who was agreed (as between the two cars) to be 90% responsible, joined the county council (as highway authority) as a third party, alleging it had negligently removed and failed to repaint the warning lines which customarily indicated to drivers that they were entering upon a major road. The Court of Appeal held that by removing the lines, the council had created a hazard.

[43] The reasoning of the Court of Appeal appears to have been that by painting the lines in the first place, the council had created an expectation on the part of users of the main road that there would be lines to warn people on side roads that they were entering a major road. This may be a rather artificial assumption and I express no view about whether the case was correctly decided. But I would certainly accept the principle that if a highway authority conducts itself so as to create a reasonable expectation about the state of the highway, it will be under a duty to ensure that it does not thereby create a trap for the careful motorist who drives in reliance upon such an expectation.

[44] My Lords, in this case the council is not alleged to have done anything to give rise to a duty of care. The complaint is that it did nothing. Section 39 is the sole ground upon which it is alleged to have had a common law duty to act. In my opinion the statute could not have created such a duty. The action must therefore fail. For these reasons and those of my noble and learned friends Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, I would dismiss the appeal.

LORD SCOTT OF FOSCOTE.

[45] My Lords, this case has arisen out of a road traffic accident in which Mrs Denise Gorringer, the driver of one of the vehicles involved, was very severely injured. It is accepted that she was driving too fast for safety. The other

a vehicle was a bus. It is accepted that the bus driver was in no respect at fault. At the time of the accident the weather and visibility were good. The day was sunny and the road was dry. There was nothing the matter with the surface of the road.

[46] It is said, however, that the highway authority, Calderdale Metropolitan Borough Council (the council), were at fault and must bear some responsibility and liability for the consequences of the accident. They were at fault because they had failed to place on or near the road sufficient signs giving warning to motorists that they were approaching a dangerous part of the road. Mrs Gorringe's case against the council is put in two alternative ways. It is contended that the council's failure to put in place the requisite signage constituted a breach of its duty under s 41(1) of the Highways Act 1980 'to maintain the highway'. Alternatively it is contended that the failure constituted a breach of the council's common law duty of care owed to Mrs Gorringe and all motorists driving on the stretch of road in question. In arguing for a common law duty of care of a standard sufficient to enable the failure to constitute a breach, reliance has been placed on s 39 of the Road Traffic Act 1988. Section 39 imposes a duty on every highway authority to prepare and carry out a programme of measures designed to promote and improve road safety.

[47] In summary, Mrs Gorringe's case is, first, that the absence of suitable road signage constituted a failure 'to maintain' the road in such a condition as to be safe for use; and, secondly, that the council's common law duty of care required it to put into effect safety measures that included the positioning of the road signs in order to discharge its s 39 duty. It is, I think, convenient at this point to set out and explain the effect of the relevant statutory provisions.

SECTION 41(1) OF THE HIGHWAYS ACT 1980

[48] Section 41(1) provides that—

'The authority who are for the time being the highway authority for a highway maintainable at the public expense are under a duty ... to maintain the highway.'

Section 329(1), the definition section, says that "'maintenance" includes repair, and "maintain" and "maintainable" are to be construed accordingly.' The 1980 Act was a consolidating Act and s 41(1) reproduced the terms of s 44(1) of the Highways Act 1959. The 1959 Act had contained the same definition of 'maintenance' and 'maintain' as is to be found in s 329(1) of the 1980 Act.

[49] The 1959 Act left unaltered the old common law rule that those responsible for the maintenance or repair of public highways could not be made liable in a civil action for damage caused by the condition of the highway if the condition was attributable merely to a failure to repair. The rule was, however, abolished by s 1(1) of the Highways (Miscellaneous Provisions) Act 1961 which said that—

'The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated.'

But sub-s (2) of s 1 provided a statutory defence to actions for damage caused by non-repair:

'In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at public expense, it shall be a defence ... to prove that the authority had taken such care as in all

the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic.’ a

This statutory defence was reproduced in s 58(1) of the 1980 Act.

[50] It should be noted that these statutory provisions did not wholly abolish the old common law distinction between misfeasance and non-feasance in relation to the condition of highways. What they did do was greatly to reduce the importance of the distinction. The common law immunity enjoyed by highway authorities and abolished by s 1(1) of the 1961 Act related only to liability for failure to repair a highway. Liability for damage arising otherwise than from the non-repair of a highway was not affected. An example of the distinction can be seen in *Skilton v Epson & Ewell UDC* [1936] 2 All ER 50, [1937] 1 KB 112. A line of traffic studs had been placed in the centre of the highway. One of them had become loose. As a car passed over the loose stud it shot out and struck the plaintiff on her bicycle. She fell off and was injured. She sued the highway authority. The plaintiff succeeded at trial but the highway authority appealed on the ground that the plaintiff's complaint was of non-repair of the highway. The appeal failed. Slessor LJ said that ‘The question which has to be decided by the court is this, essentially. Have the defects caused a nuisance in the highway?’ He held that they had. Romer LJ agreed. He said: b

‘I think the defendants have been rightly made liable for the damage caused to the plaintiff, and for this reason, that they have done something on the highway not for the purpose of maintaining it as a highway, but for some totally different purposes, and what they did had at the time the injury was caused to the plaintiff become and resulted in a nuisance to the highway, and for such a nuisance the defendants were, in my opinion, properly made liable, notwithstanding the fact that they are also the highway authority.’ c
(See [1936] 2 All ER 50 at 59, [1937] 1 KB 112 at 125–126.) d

[51] In a case, therefore, where the damage complained of has been caused not by a failure to maintain the highway but by something done by the highway authority, or for which the highway authority have become responsible (cf *Sedleigh-Denfield v O’Callaghan (Trustees for St Joseph’s Society for Foreign Missions)* [1940] 3 All ER 349, [1940] AC 880 and see s 130(3) of the 1980 Act), liability continued after 1961 as before, to be determined by the common law principles of negligence or, as the case may be, public nuisance. It is only where the alleged liability arises out of a failure ‘to maintain’ the highway that the s 41(1) duty and the s 58(1) defence come into play. e

[52] It is important, therefore, to keep in mind the fairly narrow scope of the s 41(1) duty. It has been authoritatively established by the unanimous decision of this House in *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356, approving the minority view expressed by Lord Denning MR in *Haydon v Kent CC* [1978] 2 All ER 97, [1978] QB 343, that the duty ‘to maintain’ is confined to a duty to repair and keep in repair. The case arose out of black ice on a highway. It was contended that the highway authority’s failure to salt or grit the road was a failure ‘to maintain’ it. The House held it was not. The duty ‘to maintain’ was a duty limited to keeping the fabric of the road in such good repair as to render its physical condition safe for ordinary traffic and did not extend to preventing the formation of ice or removing an accumulation of snow. The decision has been reversed by s 111 of the Railways and Transport Safety Act 2003 which has added to s 41(1) a duty ‘to ensure, so far as reasonably practicable, that safe passage f

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a along a highway is not endangered by snow or ice'. But the limitations on the s 41(1) duty established by *Goodes*' case otherwise remain.

SECTION 39 OF THE ROAD TRAFFIC ACT 1988

[53] The section provides as follows:

b '(1) The Secretary of State may, with the approval of the Treasury, provide for promoting road safety by disseminating information or advice relating to the use of roads.

(2) Each local authority must prepare and carry out a programme of measures designed to promote road safety and may make contributions towards the cost of measures for promoting road safety taken by other authorities or bodies.

c (3) Without prejudice to the generality of subsection (2) above, in pursuance of their duty under that subsection each local authority—(a) must carry out studies into accidents arising out of the use of vehicles on roads or parts of roads, other than trunk roads, within their area, (b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for which they are the highway authority ... and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads, and ...'

[54] It is an essential plank in Mrs Gorringe's case that the council were in breach of their duty under s 39. But it is accepted, and rightly, that s 39 cannot possibly be construed so as to justify the conclusion that a private action in damages can be brought for breach of the statutory duty. Mrs Gorringe's contention is that s 39 can none the less be used to jack up the council's common law duty of care to a standard sufficient to enable the failure to provide suitable signage to constitute a breach of the duty.

SECTIONS 64 AND 65 OF THE ROAD TRAFFIC REGULATION ACT 1984

g [55] In view of the importance to Mrs Gorringe's case of the Council's failure to install the requisite warning signs it is relevant to notice some of the provisions of the 1984 Act relating to the installing of road signs:

h '64.—(1) In this Act "traffic sign" means any object or device ... for conveying, to traffic on roads ... warnings, information, requirements, restrictions or prohibitions of any description—(a) specified by regulations made by the Ministers acting jointly, or (b) authorised by the Secretary of State, and any line or mark on a road for so conveying such warnings, information, requirements, restrictions or prohibitions.

(2) Traffic signs shall be of the size, colour and type prescribed by regulations made as mentioned in subsection (1)(a) above ...

j (4) Except as provided by this Act, no traffic sign shall be placed on or near a road except ... (c) a traffic sign placed on any land—(i) by a person authorised under the following provisions of this Act to place the sign on a road, and (ii) for a purpose for which he is authorised to place it on a road ...

65.—(1) The traffic authority may cause or permit traffic signs to be placed on or near a road, subject to and in conformity with such general

directions as may be given by the Ministers acting jointly or such other directions as may be given by the Secretary of State.

[56] The signs that it is contended in the present case ought to have been installed by the council, whether signs on posts at the side of the road or signs painted on the surface of the road, would be 'traffic signs' as defined in s 64(1). The council is the 'traffic authority' for the purposes of s 65(1). There were, presumably, some 'general directions' given under s 65(1) with which the signs contended for would have conformed, but no details of these are in your Lordships' papers and none are referred to in the judgments of the courts below.

THE FACTS

[57] Mrs Gorringe's contentions raise issues of law but it is necessary before they can be properly considered to outline the facts that have given rise to them.

[58] The road where the accident took place is the B6113 at Barkisland in West Yorkshire. It had been, in earlier times, a minor rural road linking the villages of Barkisland and Greetland but, in modern times, has become a link road between the urban areas of Elland and Ripponden. The road serves also as a local link to the M62. It is on a bus route and well used by traffic. It runs in a south-west/north-east direction.

[59] The accident occurred on 15 July 1996. Mrs Gorringe was driving in a north-east direction. She reached a stretch of the road which is well described in the judgment of Potter LJ in the Court of Appeal [2002] EWCA Civ 595, at [3] [2002] RTR 446 at [3]. I need to do no more than provide a précis. A driver travelling in the direction Mrs Gorringe was travelling reaches a point where the road ahead slopes down for a short distance and then bends somewhat to the right and proceeds uphill to a crest. The crest is where the accident happened. Once at the bottom of the downslope the driver has no view of the road beyond the crest and will have no view of a vehicle approaching from the opposite direction until both his car and the approaching car are close to the crest. The need for care when approaching the crest, from whichever direction, would, or should, be obvious to the driver. The need for care is augmented by the fact that, at the crest, the road takes a slight left hand bend. The existence of this bend may not be apparent to a driver approaching the crest from the south-west, as Mrs Gorringe was doing, until close to the crest. The crest presents a further hazard in that, at the apex, the change of gradient from uphill to downhill occurs over a distance of no more than 25 metres. Unless a car is travelling at a speed well below 50 mph it is at risk of becoming momentarily airborne. The crest is known locally as 'the Barkisland bump'. A further potential danger arises from the width of the road at the crest. The road narrows slightly at the crest so that a wide vehicle, such as a bus, keeping well into the verge, will effectively occupy its entire side of the road.

[60] At the time of the accident a traffic warning sign was in place just after the bottom of the downslope. Coming from the south-west, the sign was placed on the left hand verge of the road some 85 metres short of the crest. It consisted of the usual red-edged white triangle within which were two horizontal black bumps indicating 'Uneven Road'. The sign was visible to cars approaching from the south-west. There was no other warning sign in place. But at some time in the past, the late 1980s or early 1990s, at a point just before the commencement of the downslope and about 175 metres from the crest, there had been a white 'SLOW' on the surface of the road. By the time of the accident this 'SLOW'

a marking was no longer visible. Whether it had been removed by design, by wear or by inadvertence in the course of road repairs was not resolved by the evidence.

[61] The circumstances of the accident were these. Mrs Gorringe, whose two young daughters were passengers in the car, was just short of the crest when she slammed on her brakes. The severity of her injuries caused by the accident has prevented her from being able to give any account of the accident but it was b surmised by the trial judge that she may suddenly have seen the top of the bus approaching from the opposite direction and, because it was negotiating the bend on the far side of the crest, she may have thought, mistakenly, that the bus was on her side of the road. The surmise seems a plausible one but, whatever the reason, it is clear from the evidence that Mrs Gorringe applied her brakes very sharply just as she was approaching the crest; the front wheels of her car locked, c she was unable to steer the car and it skidded across the road into the side of the bus. The bus driver must have had a second or so to take evasive action because he was able to bring the bus virtually to a halt with its near side wheels on the grass verge when the collision took place.

d [62] It has been estimated that Mrs Gorringe was travelling at about 50 mph at the time she put on her brakes. Although her speed was well within the 60 mph speed limit for the road, it was an excessive speed for safe driving having regard to the geography of the road where the accident took place.

[63] Considerable time was taken at the trial in investigating the steps that the council had taken in the years and months prior to the accident in pursuance of e its duty under s 39 of the 1988 Act. Details of the evidence about this are set out in the judgment of Potter LJ (at [17]–[27]) and in the judgment of May LJ (at [119]–[128]). It is not necessary for me to repeat these details and it suffices, I think, for me to note that, per Potter LJ (at [89]):

f ‘... the judge justifiably found that, while there was an adequate and rational policy in respect of the long-term improvement of stretches of road, there was a total absence of any policy, and indeed no consideration had been given, in respect of measures for the short-term alleviation of obvious dangers by inexpensive signage on an interim basis pending long-term road improvement measures.’

g But that, per May LJ (at [128]):

h ‘... the site in question ... was not, in the light of accident studies either before or after the claimant’s accident, an accident blackspot according to recognised criteria ... The 1994 [Local Authority Consultancy] report had not concluded that this was an accident blackspot and no relevant accident had occurred there since the report ...’

[64] I can now turn to consider the two issues.

The s 41 issue

j The duty to maintain the highway extends, it is argued, beyond the surface of the highway itself and applies also to all and any structures, ancillary to the use of the highway, which have been placed, or ought to be placed, on the verges or on pavements bordering the highway. So stated, the s 41(1) duty to maintain would cover the installation and maintenance of road signs, traffic lights, pedestrian crossing signs and perhaps, even street lights (but see *Sheppard v Glossop Corp* [1921] 3 KB 132, [1921] All ER Rep 61).

[65] In my opinion, this argument cannot be accepted. It confuses the s 41(1) duty to maintain the highway and the liability that may, post-1961, arise from a failure to do so, with the common law liability that might arise from acts done on or around the highway that have created a source of danger to users of the highway. In *Bird v Pearce (Somerset CC, third party)* (1979) 77 LGR 753 the highway authority, in order to give priority of passage to vehicles on a major road, provided warning signs at the junctions of all minor roads with the major road. The warnings consisted of the usual double white lines. In the course of road repairs the warning lines were temporarily obliterated and no substitute warnings were provided. An accident was caused by a driver emerging from a minor road into the major road. The question was whether the highway authority could be made liable in negligence for the accident. The Court of Appeal held that it could. The respondent in the present case naturally prays the decision in aid. But the basis of the Court of Appeal's decision was that the highway authority, in temporarily obliterating the white lines, had created a potential source of danger that had not existed before it had placed white lines upon the road in the first place, per Eveleigh LJ (at 759)—

'Up to that moment drivers had no justification for relying upon anything other than their own appreciation of the road situation. Once the authority in the exercise of their power created a pattern of traffic flow, drivers could be expected to rely in some degree upon it.'

Brandon LJ (at 761) expressed agreement with Eveleigh LJ's reasoning and Megaw LJ (at 762) adopted similar reasoning:

'It was reasonable to foresee that traffic ... would be likely to become accustomed to the priority of the Bruton road at all such junctions, and the fact that drivers, at any rate those who were familiar with the road, would, reasonably, be likely to drive on the assumption, not only of the priority, but of the fact that it was made known to drivers on the side roads by the presence of the appropriate warnings signs.'

[66] There are, I think, some difficulties in applying this reasoning so as to justify the result of the case, but the principle that a highway authority may be liable if it introduces a new danger to the road is plainly unexceptionable and the case provides no assistance to Mrs Gorringe.

[67] Moreover, there is authority that stands in the way of regarding the installation of road signage as done pursuant to the duty to maintain the road. In *Skilton v Epsom & Ewell UDC* [1936] 2 All ER 50, [1937] 1 KB 112, to which I have already referred, the Court of Appeal declined to regard the placing of the studs in the centre of the road, or the repair of the stud that had become loose, as part of the 'maintenance' of the road. Slessor LJ said that—

'it would be wrong ... to come to the conclusion that the insertion of this stud into the road under the powers which the local authority have to insert it can in any way be said to be an act connected with the maintenance or the repair of the highway as such. To explain why I have come to that conclusion, I find it necessary to look to the Acts which enable the local authority to insert the traffic signs, as they are called, or to place them on the highway.' (See [1936] 2 All ER 50 at 55, [1937] 1 KB 112 at 120.)

The provisions of the Road Traffic Act 1930 to which Slessor LJ was referring were the predecessors of s 64 and 65 of the Road Traffic Act 1984.

a [68] In *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356 this House expressly rejected the argument that the 1961 Act had enlarged the scope of the duty to maintain into a duty to take reasonable care to secure that the highway was not dangerous to traffic (per Lord Hoffmann [2000] 3 All ER 603 at 609, [2000] 1 WLR 1356 at 1362) and held that the duty to maintain was no more than a duty to repair and keep in repair.

b [69] In my opinion, therefore, and in agreement with all three members of the Court of Appeal, the appellant's case, in so far as it is based on a breach of s 41(1) of the 1980 Act must fail. The accident was not caused by any defect in the state of repair of the road or by any failure of the council 'to maintain' the road.

The s 39 issue

c [70] Mr Wingate-Saul QC, counsel for Mrs Gorrington, accepts that a breach of s 39 cannot lead to an award of damages for breach of statutory duty. He accepts, also, that if s 39 had never been enacted, a claim against the council for common law damages in negligence would fail. This is because, vis-à-vis the council, Mrs Gorrington's complaints are simply of a failure to provide signage warning motorists of the dangers ahead. The case cannot be brought, and is not brought, as one in which the accident is attributable to a new source of danger negligently introduced by the council. It cannot be put on *Bird v Pearce* lines. But these two concessions by Mr Wingate-Saul, both rightly made, lead to an incongruity that, in my opinion, is fatal to his case. The reason why damages in a private action for breach of the statutory duty imposed by s 39 cannot be recovered is because s 39, correctly construed, does not impose a duty owed to any individual. It imposes a duty owed to the public as a whole. It forms part of the corpus of public law, not private law, and can only be enforced by the procedures and remedies available for enforcing public law duties. All of this is, I believe, common ground. But, if that is so, how can s 39 contribute to the creation of a standard of care that, f in the absence of s 39, the common law would not impose? The notion that it might do so derives, I think, from remarks about s 39 made by Lord Woolf CJ in his judgment in *Larner v Solihull MBC* [2001] LGR 255. The remarks were largely based upon the minority opinion that had been given by my noble and learned friend Lord Nicholls of Birkenhead in *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801, [1996] AC 923, a case in which the majority opinion was given by g my noble and learned friend, Lord Hoffmann.

[71] *Stovin v Wise* was a case where a highway authority had failed to exercise a statutory power which, if it had been exercised, would or might have prevented the road accident from happening. Lord Hoffmann pointed out ([1996] 3 All ER 801 at 827, [1996] AC 923 at 952) that the question whether a statutory duty can h give rise to a private cause of action is a question of construction of the statute. It requires, he said, an examination of the policy of the statute in order to decide whether it was intended to confer a right to compensation for breach. He went on:

j 'Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision.'

Then, after citing a passage from the opinion given by Lord Browne-Wilkinson in *X and ors (minors) v Bedfordshire CC* [1995] 3 All ER 353, [1995] 2 AC 633, Lord Hoffmann continued with the passage cited in [29], above in this present

appeal. I respectfully agree with these passages from his judgment in *Stovin v Wise*. Indeed, I would be inclined to go further. In my opinion, if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty. I would respectfully accept Lord Browne-Wilkinson's comment in *X v Bedfordshire CC* [1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739 that—

‘the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done.’

But that comment cannot be applied to a case where the defendant has done nothing at all to create the duty of care and all that is relied on to create it is the existence of the statutory duty. In short, I do not accept that a common law duty of care can grow parasitically out of a statutory duty not intended to be owed to individuals.

[72] In *Larner v Solihull MBC* [2001] LGR 255, a case, like the present, about the responsibility of a council for placing warning signs on the highway, Lord Woolf CJ said (at 260 (para 15))—

‘... so far as section 39 of the 1988 Act is concerned, we would accept that there can be circumstances of an exceptional nature where a common law liability can arise. For that to happen, it would have to be shown that the default of the authority falls outside the ambit of discretion given to the authority by the section. This would happen if an authority acted wholly unreasonably.’

I am, with respect, unable to agree. The common law liability contemplated could not, in my opinion, ever arise from a breach of s 39 except in circumstances where the liability would have arisen independently of the s 39 duty. I have already cited the section. Both sub-ss (2) and (3) impose duties. The sub-s (2) duty is a duty to prepare and carry out measures designed to promote road safety. Suppose a council does absolutely nothing and is in flagrant breach of its sub-s (2) duty. How could that omission ever lead to a common law liability for failure to take some specific road safety step? The statutory duty is an entirely general one. It imposes a ‘target’ duty and no more than that. It cannot be read as intending to create specific duties owed to individuals. The sub-s (3) duties are more specific but, still, are only target duties. The statutory policy was that highway authorities should devise and implement road safety measures. The policy was not that private individuals should be able to bring private actions for damages for their failure to do so.

[73] There are, of course, many situations in which a public authority with public duties has a relationship with a member of the public that justifies imposing on the public authority a private law duty of care towards that person. And the steps required to be taken to discharge that private law duty of care may be steps comprehended within the public duties. *Barrett v Enfield LBC* [1999] 3 All ER 193, [2001] 2 AC 550 and *Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619 are examples. But the council in the present case had no

a relationship with Mrs Gorringe that it did not have with every other motorist driving on the stretch of road in question.

[74] Quite apart from the objections of principle which, in my opinion, ought to be held to bar the creation of common law liability out of statutory duties such as those in s 39, the history of this case provides a very salutary example of the undesirability of opening the door to the possibility of the creation of such liability. A tragic but simple road traffic accident, the cause of which was that Mrs Gorringe, driving too fast for the road, made a driving error, has led to a lengthy trial involving an extensive (and expensive) trawl through council documents going back many years in order to enable her to try and establish a breach by the council of its s 39 duties of sufficient seriousness to bring the case into Lord Woolf CJ's 'circumstances of an exceptional nature' category and to justify categorising the council's failure to provide warning signs as wholly unreasonable.

[75] In *Larner's* case itself common law liability was not established. In the present case common law liability was found at trial but was rejected by the Court of Appeal and ought, in my opinion, to be rejected by your Lordships. The enticing door left ajar by Lord Woolf CJ's reference to 'circumstances of an exceptional nature where a common law liability [based on a breach of s 39] can arise' ought in my opinion, in the interests of litigants generally, to be firmly shut.

[76] In summary, if a highway authority is in breach of its duty under s 41(1) (as amended in 2003) it can be sued if damage is thereby caused. If it is to escape liability it must bring itself within the s 58 defence. In addition, a highway authority may be liable at common law for damage attributable to dangers that it has introduced, or, in the case of dangers introduced by some third party, that it has unreasonably failed to abate. Members of the public who drive cars on the highways of this country are entitled to expect that the highways will be kept properly in repair. They are entitled to complain if damage is caused by some obstruction or condition of the road or its surroundings that constitutes a public nuisance. And they are, of course, entitled to complain if they suffer damage by the negligence of some other user of the highway. But an overriding imperative is that those who drive on public highways do so in a manner and at a speed that is safe having regard to such matters as the nature of the road, the weather conditions and the traffic conditions. Drivers are first and foremost themselves responsible for their own safety.

[77] I would for these reasons, as well as those given by my noble and learned friends Lord Hoffmann, Lord Rodger of Earlsferry and Lord Brown of Eaton-under-Heywood, dismiss this appeal.

h LORD RODGER OF EARLSFERRY.

[78] My Lords, the appellant, Mrs Gorringe, sustained appalling injuries when the car she was driving at about 50 mph collided with a bus at the crest of a rise on a country road in Yorkshire. She claims damages for her injuries from Calderdale Metropolitan Borough Council (the council), but in order to succeed she must establish that they resulted from a breach of a common law duty of care that the council owed to her. What she alleges is that the council failed in the duty, which she claims they were under, to repaint a 'SLOW' sign on the surface of the road where it dipped down before rising to the crest where the accident happened.

[79] Her counsel, Mr Wingate-Saul QC, began by accepting that, in the absence of s 39 of the Road Traffic Act 1988, the council would have owed no

duty of care to Mrs Gorringe at common law to place any sign warning her of any dangers presented by the crest in the road where she met her accident. The concession was correct, but it is worth exploring just why that is so. a

[80] From early times various statutes placed the responsibility for repairing highways on to the inhabitants of parishes. Their duty was to put the road into such repair as to be reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year. This duty was enforceable by proceedings on indictment. But if the inhabitants of the parish neglected their duty and allowed the roads to fall into disrepair with the result that someone was injured, they were not liable in damages. See, for instance, *Russell v The Men of Devon* (1788) 2 TR 667 at 672, 100 ER 359 at 362 per Lord Kenyon CJ. So firmly rooted in the common law was this rule that, when later statutes put the duty of repair on other bodies, the rule survived and they too were not liable in damages unless the relevant statute made it clear, by express provision or necessary implication, that the duty was to be enforceable by action by the injured person. See *Gorringe v The Transport Commission (Tasmania)* (1950) 80 CLR 357 at 375–376 per Fullagar J, cited with approval by the Privy Council in *Almeda v A-G for Gibraltar* [2003] UKPC 81 at [11], [2003] All ER (D) 335 (Nov) at [11]. Although the rule related to failure to repair, it is equally clear that there was no common law duty on highway authorities to warn travellers that the roads were in a state of disrepair. A fortiori there was no duty to warn them of any problems that might be presented by the natural contours of the land over which the roads ran. Travellers had to look out for themselves. b
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[81] That remained the position until, by s 44 of the Highways Act 1959, the duty to maintain the highway was placed on highway authorities. Two years later, s 1(1) of the Highways (Miscellaneous Provisions) Act 1961 abrogated the rule exempting the highway authorities from liability from non-repair of the highway. But in any action in respect of damage resulting from an authority's failure to maintain the highway, it was a defence for the authority to prove that it had taken all reasonable care to secure that the part of the highway in question was not dangerous for traffic (see s 1(2)). The current provisions are to be found in ss 41 and 58 of the Highways Act 1980. The appellant contended that the failure to repaint the 'SLOW' marking on the road some distance before the locus of the accident constituted a failure to maintain that part of the highway under s 41. For the reasons given by my noble and learned friends, Lord Hoffmann, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood, however, I am satisfied that the duty to maintain the highway does not include a duty to repaint warning signs on the surface. That ground of liability must accordingly be rejected. e
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[82] The advent of motor cars and lorries greatly increased the traffic on the highways. As a result, traffic signs began to spring up by the sides of roads. In the Road Traffic Act 1930 Parliament moved to regulate the matter. It banned the placing of signs on or near any roads except where this was done by a highway authority, subject to, and in conformity with, any general or other directions given by the minister of transport (see s 48(1)–(3)). Sections 51 and 52 of the Road Traffic Act 1960 contained a rather more elaborate version of the same legislation. The provisions were consolidated in ss 54 and 55 of the Road Traffic Regulation Act 1967 and are now to be found in ss 64 and 65 of the Road Traffic Regulation Act 1984. The regulations made by the Secretary of State prescribe, for instance, the types of sign with which we are all familiar, their size and height and how they are to be lighted. While the statutory provisions have h
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- a over the years conferred a power on the relevant authorities to place such signs on or near roads, it is a public law power. There is nothing in the legislation to suggest that the grant of this power to place signs was to alter the underlying position that authorities have no common law liability to warn motorists of impending risks from the contours or layout of the road. Indeed, it would have been remarkable if the legislation of 1930 or 1960 had brought about such a
- b change since, under the common law then prevailing, a highway authority was not liable in damages for failing to repair the road. And when, in due course, Parliament imposed a statutory duty on authorities to maintain the highway and made them liable in damages for failing to perform that duty, it did not go further and impose a statutory duty to warn of impending dangers to motorists driving along a properly maintained highway.
- c [83] What little authority there is confirms that the powers of a roads authority to place signs have been superimposed on a common law which continues to impose no duty on the authority to warn of impending dangers. Although not cited by counsel, *Murray v Nicholls* 1983 SLT 194 is in many respects similar to the present case. A car was driven without stopping out of Devon View
- d Street in Airdrie into Victoria Place where it collided with another car. The driver of the first car was killed and his passengers were injured. They sued the driver's widow and Strathclyde Regional Council as roads authority. At the time the authority's power to place signs would have been governed by ss 54 and 55 of the 1967 Act and, under s 38(2) and (2A) of the Road Traffic Act 1972 as amended, the authority would have been under the same road safety duty as is now imposed
- e by s 39(2) and (3) of the 1988 Act. The pursuers averred that, some considerable time before the accident, Strathclyde had caused white lines to be painted at the junction, indicating that priority should be given to traffic in Victoria Place. But the lines had been all but obliterated as a result of road works some months before the accident and they had not been repainted. There were no signs at the
- f junction. The pursuers averred that Strathclyde were in breach of their duty to take reasonable care that roads in their area were maintained in such a condition that persons using them could do so in safety. They had failed to have the lines repainted as soon as was reasonably practicable after the works were completed and they had failed to erect and maintain warning signs.
- g [84] The common law of Scotland is somewhat more generous to those injured due to the failure to maintain the roads than was English common law. None the less Lord Stott held that the pursuers' averments in so far as directed against Strathclyde were irrelevant and so dismissed the action against them. He accepted that the previous existence of the white lines at the junction was sufficient to show that it was reasonably foreseeable that, in the absence of such
- h an indication, a vehicle might be driven into Victoria Place without stopping. He continued (at 194–195):

- j 'But while foreseeability is no doubt necessary to found a duty it does not follow from the mere fact of foreseeability that a duty will necessarily arise. No case was cited to me in which a road authority has been held to be at fault merely by reason of failure to mark white lines on the roadway or erect a warning sign at a road junction in a built-up area. The only authority referred to by counsel for the pursuers was *Bird v. Pearce* where the point was expressly reserved. The ratio of the decision whereby the road authority was found to be at fault was that by markings on the road they had created a pattern of traffic flow on which drivers could expect to rely and that the

obliteration of the markings caused something of the nature of a trap of which the defendants ought to have given warning. In the present case there is no averment to suggest that either driver was influenced by the existence of the markings at an earlier date. What is said is that because of houses and walls adjacent to the road, those driving northwards towards the junction would have no visibility to the east until they actually reached it, but that is no more than the normal state of affairs in a built-up area. The fact that white lines had been put there before while relevant to the question of foreseeability has no bearing otherwise on the existence of a duty. If the pursuers' contention were accepted it would open up a wide field for actions against road authorities. It would seem, for instance, to follow that the pedestrian run down when crossing a busy thoroughfare would be entitled to say that his injuries were caused by the failure of the authority to set the machinery in motion for the provision of a pedestrian crossing. If such duties are to be imposed on road authorities, that should in my opinion be done by Parliament and not by courts of law, and in the absence of authority I am not prepared to hold that the power given to a local authority to mark white lines on the roadway and erect warning signs implies a duty to do so at every crossing in a built-up area where there is a considerable volume of traffic.'

[85] Lord Stott rightly distinguished *Bird v Pearce*. There the Court of Appeal held that, by painting white lines at a series of junctions along the road and then omitting to repaint the lines that had been obliterated at one junction, the council had themselves created a potential source of danger that had not existed before the lines were painted. In effect they had trapped motorists into relying on the white line markings as indicating that they were driving along a major road and that they had priority over traffic in the side roads. In other words the council had exercised their power under s 55(1) of the 1967 Act to paint signs on the road to assist drivers but, by failing to repaint one and so breaking the pattern, had negligently created a danger to motorists which would not otherwise have existed. Assuming that this was correct, on ordinary common law principles the council were liable to the plaintiff who suffered injury due to the danger they had created. The fact that the authority had been exercising a statutory power when they created the danger was irrelevant, since there was nothing in the statute to provide them with a defence against their common law liability.

[86] By contrast, in *Murray v Nicholls* the pursuers averred no more than that Strathclyde had failed to exercise their power to repaint the lines in circumstances where it was foreseeable that vehicles would collide. In effect they had failed to warn drivers to take care when driving out of Devon View Street into Victoria Place. The mere fact that Strathclyde had the public law power to paint white lines on the road did not mean that they came under a common law duty to take care to exercise that power wherever it was foreseeable that, otherwise, accidents were liable to happen. As Lord Stott pointed out, it is not for the courts but for Parliament to create such a far-reaching duty, after considering all the implications. Parliament has so far chosen not to do so, leaving it to drivers to take proper care for the safety of themselves, their passengers and other road users.

[87] By deciding to paint the lines at the junction—presumably because of the perceived risk of collisions—Strathclyde would have come under a duty to do so carefully and not in a way that would aggravate any dangers at the junction. But they had not somehow imposed on themselves, retrospectively, a common law

a duty to paint the lines or, prospectively, to paint them back if they were obliterated.

[88] In exactly the same way, in the present case, the mere fact that the defendants had once painted the 'SLOW' sign on the road does not mean that they had been under a common law duty to do so, or that they were under such a duty to repaint the sign when it came to be obliterated. When that happened, the situation returned to what it had been before the defendants decided to exercise their statutory powers by painting it in the first place. They were not under any common law duty to exercise their power to repaint it and are not liable because, for whatever reason, they did not do so. Of course, if they had done so, it might have helped motorists. And after the appellant's accident, they did indeed repaint the marking and make a number of other changes. But this was something that they decided to do in the exercise of their statutory powers, not something that they were under a common law duty to do. This is simply an application of what was said by Mason J in *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 465:

d '... although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration of the authority of its discretion, but that is all.'

e [89] As I said at the outset, Mr Wingate-Saul accepts that this would be the position if it were not for s 39 of the Road Traffic Act 1988. Sections 38 and 39 are grouped under the cross heading 'Promotion of Road Safety'. Section 38 deals with the Highway Code, while s 39 has the broad heading 'Powers of Secretary of State and local authorities as to giving road safety information and training'. f Section 39(2) and (3) derive from s 38(2) and (2A) of the 1972 Act as amended by s 8(1) of the Road Traffic Act 1974. Subsection (2) imposes on local authorities the duty to carry out a programme of measures designed to promote road safety. In particular, under sub-s (3) the local authority must carry out studies of vehicle accidents in their area and, in the light of those studies, take appropriate measures to prevent such accidents, including the construction, improvement, maintenance or repair of roads for which they are the highway authority and other measures in the exercise of their powers for controlling, protecting or assisting the movement of traffic on the roads. One purpose, at least, is to ensure that local authorities take road safety considerations into account in carrying out their highway functions. This is to be achieved by placing a wide public law duty, in the nature of a target g duty, on the authorities concerned. A duty of that kind is not enforceable by means of a private law action for its breach. While accepting this, Mr Wingate-Saul submitted that the enactment of this public law duty had created a new (private) common law duty of care on the part of the authorities for the safety of those using the roads in their area.

j [90] My Lords, I am unable to accept that submission. Section 39 involves the kind of target duty that gives rise to no right to damages for its breach at the suit of an individual, even where the breach of duty has consisted in the negligent failure of the local authority to take the appropriate measures to prevent accidents. As Lord Hoffmann pointed out on behalf of the majority in *Stovin v Wise (Norfolk CC, third party)* [1996] 3 All ER 801 at 827, [1996] AC 923 at 952, and as he has pointed out again in his speech today, if such a duty does not give rise

to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed.

[91] The position would be different if the statutory duty in s 39 had been superimposed on a situation where there was an existing duty of care on traffic authorities to warn motorists of prospective risks. Then various questions about the interplay of the two duties would arise. For example, as Lord Wilberforce pointed out in *Anns v London Borough of Merton* [1977] 2 All ER 492 at 501, [1978] AC 728 at 755, where Parliament imposes a duty but gives the authority a discretion in performing the duty, a plaintiff cannot rely upon a common law duty of care, unless the action taken was not within the limits of the bona fide exercise of that discretion. So it would only be where the local authority's actions were not within those limits that there would be a claim for damages for breach of the underlying duty of care. It might also be that the factors to be taken into account in exercising a pre-existing common law duty of care would be affected by the content of the statutory duty. But that is very different from saying that the imposition of this statutory duty has called into existence a common law duty where none existed before.

[92] In *Larner v Solihull MBC* [2001] LGR 255 the Court of Appeal had to consider the effect of s 39 of the 1988 Act. The claimant was injured when she failed to observe two 'Give Way' signs, drove across a junction and collided with another vehicle. She sued the council for damages on the ground that they had failed to provide additional advance warning signs. On the facts of the case the claimant failed. In delivering the judgment of the court, however, Lord Woolf CJ accepted (at 260 (para 15)) that in the case of s 39 an authority could be liable at common law if they acted wholly unreasonably in failing to provide a sign and their default thus fell outside the ambit of discretion given to them by the section. In doing so, he adopted the approach of the minority in *Stovin v Wise*. Liability presupposes duty, however—and, on the reasoning of the majority in *Stovin v Wise*, there is nothing to show that the enactment of s 39 prompted the emergence of a common law duty of care on councils to place warning signs. So the mere fact that, in a given case, a reasonable council would have exercised its powers by providing an additional sign does not alter the fact that they would have been under no common law duty to do so. Conversely, even if it would have been wholly unreasonable for the council not to provide an additional sign, this does not mean that they were in breach of a common law duty to do so. I therefore agree that this aspect of the reasoning of the Court of Appeal should be disapproved.

[93] If traffic authorities carry out their duties under s 39, this should help to make the roads safer by informing their decisions as to the repairs and modifications, including the placing of warning signs, that should be carried out. In the exercise of their public law powers and duties, highway authorities do often, or even usually, warn of prospective dangers at junctions or crests in the road, but drivers cannot rely on them always having done so. Drivers must take care for themselves and drive at an appropriate speed, irrespective of whether or not there is a warning sign. By insisting that drivers always look out for dangers themselves and not rely on others, the common law supports the overall policy of promoting road safety. If drivers fail to drive carefully and others are injured, the others can recover compensation from the drivers' insurers or from the Motor Insurers' Bureau. Neither the drivers nor their passengers, nor indeed their insurers, can recover damages from the highway authorities for not having

a placed a warning sign. If that settled pattern is to be changed, it is for Parliament to make the change and to approve the additional funding needed by the authorities to handle and meet the claims.

[94] In the circumstances I am satisfied that the council did not owe Mrs Gorringe a duty of care to paint a marking on the road or to set up a sign, warning her to slow down as she approached the crest in the road
b where the accident occurred. For these reasons, as well as for those given by Lord Hoffmann, Lord Scott of Foscote and Lord Brown of Eaton-under-Heywood, the appeal must be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD.

c [95] My Lords, on 15 July 1996 Mrs Gorringe suffered very severe injuries in a collision on a B road in West Yorkshire when, just short of a crest in the road, she braked sharply and, with locked wheels, skidded into a double-decker bus.

[96] Section 39 of the Road Traffic Act 1988 imposes upon local authorities certain statutory duties, couched in the broadest of terms, designed to promote road safety and to prevent road accidents. It is Mrs Gorringe's case that in the
d discharge of those duties the respondent local authority (Calderdale Metropolitan Borough Council (the council)) ought properly to have warned her of the dangers of the road ahead, in particular by painting a 'SLOW' sign on the road surface. Although acquitted of all blame by the trial judge, Mrs Gorringe now accepts that she herself must be regarded as having approached the crest at a negligently fast speed. Assume, however, that a 'SLOW' sign on the road would have protected
e her against her own negligence. Was the council duty-bound to put it there and, if so, is a breach of such duty actionable in private law? These are the issues raised before your Lordships' House.

[97] It is not suggested that the council's s 39 duty is actionable as such in private law. In other words it is accepted that no claim could arise here for breach
f of statutory duty. What is suggested, however, is that a common law duty of care arises out of the council's statutory duty, and that the council would be liable in a private law claim for damages for breach of that duty.

[98] The argument is founded principally on *Larner v Solihull MBC* [2001] LGR 255, in which the Court of Appeal, although rejecting the claim on the facts, contemplated that damages for breach of a common law duty of care would be
g recoverable for a local authority's failure to paint warning signs on the road, based upon a breach of its s 39 duty, provided always that the default complained of was not within the ambit of the authority's discretion (at 260 (paras 13, 15)); provided, in other words, that the council could be shown to have acted irrationally, that being the suggested touchstone by which the breach of a public
h law duty gives rise to common law liability.

[99] In deciding that a common law duty of care could arise, the court adopted the reasoning in favour of such a duty given by the minority of the House in *Stovin v Wise* (*Norfolk CC, third party*) [1996] 3 All ER 801, [1996] AC 923—and in addition relied on a trilogy of decisions in your Lordships' House—
j *X and ors (minors) v Bedfordshire CC*, *M (a minor) v Newham LBC*, *E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 and *Phelps v Hillingdon London BC* [2000] 4 All ER 504, [2001] 2 AC 619—in each of which a duty of care was held (at least arguably) to have arisen.

[100] I agree with the reasons given in the speech of my noble and learned friend Lord Hoffmann for distinguishing that line of authority—essentially because the common law duty of care in those cases was found or suggested to

have arisen not by reference to the existence of the respective authorities' statutory powers and duties but rather from the relationships in fact created between those authorities and the children for whom in differing ways they had assumed responsibility. I would add, moreover, this further distinction. Unless in those cases the court were to find the authority's various responsibilities capable of giving rise to a common law duty of care, those wronged children, themselves wholly blameless, would go uncompensated, however inadequately their interests had been safeguarded. In the highway context, by contrast, the claimant (or some other road user involved in the accident) will almost inevitably himself have been at fault. In these circumstances it seems to me entirely reasonable that the policy of the law should be to leave the liability for the accident on the road user who negligently caused it rather than look to the highway authority to protect him against his own wrong.

[101] With regard to the physical state of the highway itself, of course, the legislation has since 1961 placed the responsibility for its maintenance upon the highway authority, a duty now found in s 41 of the Highways Act 1980, as amended by s 111 of the Railways and Transport Safety Act 2003 to reverse the effect of this House's decision in *Goodes v East Sussex CC* [2000] 3 All ER 603, [2000] 1 WLR 1356. This duty, moreover, is actionable as such so as to give rise to a private law claim for damages. Road users, therefore, are entitled to rely upon the state of the road's surface and accordingly the primary liability for any loss resulting from a breach of the s 41 duty rests on the authority. Road users are not, however, entitled to rely upon the highway authority with regard to the various other hazards of road use. They are not entitled to suppose that their journeys will be free from these or that the need for care will generally be highlighted so as to protect them from their own negligence.

[102] What I have said thus far is in the context of road accidents involving negligence on the part of at least one of the road users involved. But that is because I find it difficult to contemplate a case in which a road accident could occur without such negligence unless either (a) it results from the physical state of the road (in which case, as already explained, liability will in any event rest upon the highway authority), or (b) the highway authority will, irrespective of any particular statutory power or duty, be liable in a conventional common law negligence action for having enticed the motorist to his fate by some positive act. Assuming that the road user is not to be regarded as negligent, he must inevitably have been misled into ignoring whatever danger precipitated his accident. Although motorists are not entitled to be forewarned of the ordinary hazards of highway use, plainly they must not be trapped into danger. If, for example, an authority were to signal a one-way street but omit to put 'No Entry' signs at the other end, it might well be found liable, not because of any statutory power or duty to erect such signs but rather because it induced a perfectly careful motorist into the path of danger. Or assume road markings indicating where it is safe to overtake and where it is not and that by some crass mistake in the painting of these a motorist were to be ensnared into the path of an oncoming vehicle previously hidden in a blind spot ahead. That too would suggest to me misfeasance of the kind traditionally attracting tortious liability without the need to look for some statutory power or duty as its foundation. Such cases, however, may be expected to be few and far between and I would certainly not regard *Bird v Pearce* (*Somerset CC, third party*) (1979) 77 LGR 753 as one of them: the suggestion there that the highway authority itself created the danger appears to me irreconcilable with the

a conclusion that one of the drivers was himself two-thirds to blame for the collision.

[103] There seems to me, therefore, no good reason for superimposing upon such general powers and duties as are conferred upon highway authorities a common law duty of care in respect of their exercise. Nor does it seem to me that Parliament can have intended a private law liability in damages to flow from a public law failure in the exercise of the authority's powers or the discharge of its duties. Where with regard to highways Parliament does intend users to have a remedy for damages it says so, as initially it did in 1961 and then again, by extending the s 41 duty to encompass the removal of ice and snow, in 2003. A maintenance obligation of this nature, moreover, lends itself to enforcement by way of private law action altogether more readily than a more general duty of care. Section 41 imposes comparatively well defined obligations upon authorities and, although resort to the s 58 statutory defence may complicate the litigation, that is as nothing compared to the problems, exemplified by this very case, of determining just what warnings at any particular point in the highway system are required, in effect as a matter of law, to be given. One cannot over-maintain the fabric of the public highway. Warning overload, however, is all too easily imaginable. As it is, road users tend to discount such warnings as are implicit in the various speed limits and other cautionary signs to which they are subject. The currency would be debased still further were highway authorities, anxious to avoid lengthy and expensive litigation of the kind the council has been subjected to here, to feel obliged to multiply its street signing still further.

e [104] It follows from all this that, sympathetic though inevitably one must feel towards someone as severely injured as Mrs Gorringe, she cannot look to the council for any part of her loss. Its only duty towards her was to maintain the physical condition of the highway as it did and not to ensnare her into unforeseeable danger. On the trial judge's finding that she herself was blameless, one could have understood a further conclusion that she must necessarily therefore have been trapped into her fate by the council's negligence. Once it is recognised, however, that the danger of driving as she did should have been obvious to her, as is now accepted, her claim must fail. Even if, contrary to the conclusions arrived at by the majority of the Court of Appeal, the council failed in its public law duty under s 39 of the 1988 Act, that gave rise to no corresponding breach of a duty of care actionable in private law.

g [105] For these reasons and those of my noble and learned friends Lord Hoffmann, Lord Scott of Foscote and Lord Rodger of Earlsferry, I too would dismiss this appeal.

Appeal dismissed.

Dilys Tausz Barrister.

Super Chem Products Ltd v American Life and General Insurance Co Ltd and others

[2004] UKPC 2

PRIVY COUNCIL

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD RODGER OF EARLSFERRY AND SIR KENNETH KEITH

17 NOVEMBER 2003, 12 JANUARY 2004

Insurance – Claim – Liability – Policy containing condition limiting time period for claims – Insured claiming under policy – Insurer alleging fraud by insured – Whether allegation of fraud precluding insurer from relying on limitation condition – Whether negotiations over claim between insurer and insured continuing beyond time period constituting waiver of condition by insurer or estoppel.

The claimant (the insured) carried on a manufacturing business in Trinidad. The defendant insurers agreed to insure the claimant in respect of its business premises under the terms of two collective fire and special perils insurance policies, which provided cover against loss and damage to stocks and stores at the premises; and against business interruption and other losses consequent upon the loss of, or damage to, stocks and stores at the premises. Both policies contained conditions limiting the time period, after the occurrence of loss or damage, within which the insured could bring claims or commence proceedings. A fire occurred at the premises, which destroyed large parts of the insured's factory, stock and equipment, and offices. Claims were presented under both policies. The insurers denied liability for the claims on the basis of, inter alia, arson with the complicity or connivance of the insured, and the insured commenced proceedings. The judge at first instance dismissed the claims and an appeal to the Court of Appeal of Trinidad and Tobago was unsuccessful. The insured appealed to the Privy Council, where the issues arose, inter alia: (i) whether an assertion of fraud by the insurers precluded them from relying on the limitation conditions in the policies; and (ii) whether the insured had established the necessary ingredients for a successful plea of waiver or estoppel to defeat the limitation defence. It was common ground that waiver and estoppel could be established only if the insurers had made a clear and unequivocal representation to the insured that they would not rely on the time bar. The insured relied, inter alia, on evidence of investigation of and discussion of the claim, which continued after the expiry of the limitation period.

Held – (1) Contract law could not and did not prevent an insurer from resisting a claim on alternative bases, one involving an allegation of fraud and the other breaches of policy conditions. It was contrary to principle and business common sense to require an insurer to choose between alleging fraud, thereby abandoning the right to invoke other conditions of the policy, or to rely on those provisions, thereby giving up the right to allege fraud (see [13]–[19], below); *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499 explained.

(2) The mere fact that a party had continued to negotiate with the other party about the claim after a limitation period had expired, without anything being agreed about what would happen if the negotiations broke down, could not give

- a** rise to a waiver or estoppel. Insurers were entitled to investigate liability and quantum at the same time and to negotiate about both at the same time; prudence often required them so to do. Nothing in the exchanges relied on in the instant case was capable of creating a representation that the time bar would not be relied on. Furthermore, there was nothing to show that the insurers knew whether a protective writ had been issued or not. It was therefore impossible to
- b** say that their silence signified that they would not be relying on the time bar. It was clear that the insurers had done nothing to raise an expectation in the mind of the insured that the time bar would not be relied on. The appeal would therefore be dismissed (see [21]–[23], [36] below); *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271, *Hillingdon London BC v ARC Ltd (No 2)* [2000] 3 EGLR 97 and *Seechurn v ACE Insurance SA* [2002] EWCA Civ 67, [2002] 2 Lloyd's LR 390 applied.
- c**

Notes

For fraudulent claims, and for what constitutes a waiver or estoppel, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) paras 181, 182 and 112, 113.

d

Cases referred to in judgment

Challenge Finance Ltd v State Insurance General Manager [1982] 1 NZLR 762, NZ CA.

Heyman v Darwins Ltd [1942] 1 All ER 337, [1942] AC 356, HL.

Hillingdon London BC v ARC Ltd (No 2) [2000] 3 EGLR 9, UK CA.

- e** *Jureidini v National British and Irish Millers Insurance Co Ltd* [1915] AC 499, [1914–15] All ER Rep 328, HL.

Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga [1990] 1 Lloyd's Rep 391, HL.

Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, [1980] AC 827, [1980] 2 WLR 283, HL.

f

Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star [1980] 3 All ER 257, [1981] 1 WLR 138, HK PC; *rvsg* [1979] 1 Lloyd's Rep 298, Aus HC.

Sanderson & Son v Amour & Co Ltd 1922 SC (HL) 117, HL.

g

Seechurn v ACE Insurance SA [2002] EWCA Civ 67, [2002] 2 Lloyd's LR 390.

Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1966] 2 All ER 61, [1967] 1 AC 361, HL.

Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd (1966) 115 CLR 353.

h

Woodall v Pearl Assurance Co [1919] 1 KB 593, [1918–19] All ER Rep 544, CA.

Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd [1972] 2 All ER 271, [1972] AC 741, HL.

Appeal

j

The claimant, Super Chem Products Ltd (the insured), appealed from the judgment of the Court of Appeal of Trinidad and Tobago (Sharma, Hamel-Smith and Warner JJA) on 5 October 2001 dismissing its appeal against the decision of Sealey J on 29 July 1997 dismissing the insured's claim against the defendants, the American Life and General Insurance Co Ltd and others (the insurers) for indemnities under policies of insurance between the insured and the insurers. The facts are set out in the judgment of the Board.

Murray Pickering QC, Claude Denbow SC and Donna Denbow (instructed by *Saunders and Co*) for the insured. a

Alistair Scheff QC and Ian Benjamin (instructed by *Clyde and Co*) for the insurers.

The Board took time for consideration.

12 January 2004. The following judgment of the Board was delivered. b

LORD STEYN.

THE INSURANCE POLICIES

[1] The appellant, Super Chem Products Ltd, carried on the business of manufacturing detergents, shampoos, disinfectants, adhesives and other chemically based products at its business premises at Plaisance Park, Pointe-a-Pierre, Trinidad. In 1990 it had 193 employees. The respondents agreed to insure the appellant, in respect of the business premises at Plaisance Park, under the terms of two Collective Fire and Special Perils Insurance Policies namely: (a) Policy No P-2190/S (the stock policy), which provided cover against loss and damage to stocks and stores at the premises; (b) Policy No P-2138/S (the consequential loss policy), which provided cover against business interruption and other losses consequent upon the loss of, or damage to, stocks and stores at the premises. In addition the buildings and equipment were insured to a value of \$TT7,500,000 under policy number F21763 (the buildings and equipment policy). The latter policy is, however, not directly relevant to the issues on the appeal. c
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e

THE CLAIMS

[2] On 3 April 1990 a fire occurred at the premises. It destroyed large parts of the insured's factory, stock and equipment, and offices. Claims were presented under both the stock and the consequential loss policies. By a letter dated 11 October 1991 the insurers denied liability for the claims. On 19 September 1991 the insured had commenced proceedings against the insurers under the stock policy. On 18 March 1992 the insured started further proceedings against the insurers under the consequential loss policy. Both writs claimed indemnity for sums allegedly due under the two policies. The insurers disputed liability under both policies. The two actions were subsequently consolidated. f
g

THE TERMS OF THE POLICIES.

[3] The material provisions of the stock policy were as follows:

'Condition 11:

On the happening of any loss or damage the Insured shall forthwith give notice thereof to the Company, and shall within 15 days after the loss or damage, or such further time as the Company may in writing allow in that behalf, deliver to the Company h

(a) a claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or damage, not including profit of any kind. j

(b) particulars of all other insurance, if any.

The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books,

a vouchers, invoices, duplicates or copies thereof, documents, proofs and information with respect to the claim and the origin and cause of the fire and circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the claim and of any matters connected therewith.

b No claim under this Policy shall be payable unless the terms of this Condition have been complied with ...

Condition 13:

c If the claim be in any respect fraudulent, ... or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection ... all benefit under this Policy shall be forfeited ...

Condition 19:

In no case whatever shall the Company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.'

d The relevant provisions of the consequential loss policy were as follows:

'Condition 4:

e On the happening of any Damage in consequence of which a claim is or may be made under this Policy, the Insured shall forthwith give notice thereof in writing to the first named of the insurers and shall with due diligence do and concur in doing and permit to be done all things which may be reasonably practicable to minimise or check any interruption of or interference with the business or to avoid or diminish the loss, and in the event of a claim being made under this Policy shall, not later than thirty days after the expiry of the Indemnity Period or within such further time as the Insurers may in writing allow, at his own expense deliver to the Insurers in writing a statement setting forth particulars of his claim, together with details of all other Insurances covering the Damage or any part of it or consequential loss of any kind resulting therefrom. The Insured shall at his own expense also produce and furnish to the Insurers such books of account and other business books, vouchers, invoices, balance sheets, and other documents, proofs, information, explanation and other evidence as may reasonably be required by the Insurers for the purpose of investigating or verifying the claim together with (if demanded) a statutory declaration of the truth of the claim and of any matters connected therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with and in the event of non-compliance therewith in any respect, any payment on account of the claim already made shall be re-paid to the insurers forthwith ...

Condition 5:

j If the claim be in any respect fraudulent, ... or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection ... all benefit under this Policy shall be forfeited.'

THE DEFENCES

[4] The insurers denied liability inter alia on the following grounds: (1) The fire was caused by arson of, or with the connivance or complicity of, the insured.

(2) Both actions had been commenced out of time in as much as: (i) The stock policy action had not been brought within 12 months of the happening of the loss or damage as required by condition 19 of the stock policy. (ii) They had not complied with the 30 days' notice provision under condition 4 of the consequential loss policy. Further the consequential loss policy action had not been brought within 3 months of the rejection of the claim under condition 5. (3) There were a number of breaches of the claims co-operation provisions of the two policies. Specifically the insurers alleged failures to provide documentation and information which had reasonably been requested of the insured by the insurers, in breach of condition 11 of the stock policy and condition 4 of the consequential loss policy, due compliance with such conditions being alleged to be a condition precedent to liability under the policies.

THE INSURED'S REPLY

[5] By its reply, and by submissions at trial, with particular reference to the limitation and claims co-operation defences, the insured contended that: (1) Once the insurers had alleged that the claims were fraudulent, they could no longer rely on any conditions in the policies dealing with matters of limitation or claims co-operation. The insurers' conduct in alleging fraud amounted to a repudiation of the contracts of insurance and precluded any reliance on any conditions precedent to liability. This argument raised what was described as the *Jureidini* point, that being a contention based on the speech of Viscount Haldane LC, in *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499 at 505. (2) Although the insured admitted that the action on the stock policy had not been brought within 12 months of the happening of the loss and damage for the purposes of condition 19 of the stock policy, it was alleged there had been a waiver of the insurers' right to rely on a limitation defence, or an estoppel precluding any such reliance. (3) Although the insured admitted that it had failed to comply with the 30 days' notice provision under condition 4 of the consequential loss policy and the action on the consequential loss policy had not been brought within 3 months of the rejection of the claim within the meaning of condition 5 of the consequential loss policy, the insured alleged that it had had no knowledge or notice of such limitation conditions and that therefore such limitation provisions were not binding on it. In effect the insured alleged that the relevant provision had not been incorporated into the consequential loss policy. (4) Further, the insured alleged a waiver or estoppel precluding reliance on a limitation defence. (5) No arguments of waiver or estoppel were deployed in relation to the alleged breaches of the claims co-operation clauses under either policy. Apart from the *Jureidini* issue, the insured's case at trial was confined to the factual case that there had been no failure to comply with the obligation to provide the documentation or information reasonably required of it.

JUDGMENT AT FIRST INSTANCE

[6] After a trial lasting 79 days Sealey J gave judgment on 29 July 1997. She dismissed the insured's claims under both policies. The outcome was as follows: (1) During the course of the trial the judge had decided that the insurers' unparticularised case of arson could not be entertained. The Court of Appeal dismissed an appeal against this decision. Subsequently the trial judge refused an application to remedy the deficiency by particulars at a late stage in the trial. Accordingly she did not deal with this aspect in her final judgment. (2) The limitation defence under condition 19 of the stock policy succeeded. Sealey J.

- a rejected the insured's arguments based on (a) the *Jureidini* issue and (b) waiver or estoppel. (3) In the action on the consequential loss policy the limitation defences failed. Although the judge rejected the insured's arguments based on (a) the *Jureidini* issue and (b) waiver and estoppel, she held that since neither the insured nor its brokers (who had prepared the policy) had actual knowledge of the limitation conditions of the consequential loss policy, the limitation conditions
- b were not incorporated into the consequential loss policy. (4) The claims co-operation defences succeeded in respect of both stock policy and the consequential loss policy actions. In this regard, the judge found that there were failures to provide documentation and information in relation to (a) the insured's income tax returns; (b) cancelled or returned cheques; and (c) the names and addresses of the insured's employees. The judge also rejected the insured's
- c reliance on the decision in *Jureidini* as an answer to this defence.

THE COURT OF APPEAL JUDGMENT

- d [7] The insured appealed to the Court of Appeal. The principal issues were (a) the *Jureidini* point and its effect on the insurers' right to rely on the limitation and claims co-operation provisions in both policies; (b) issues concerning waiver and estoppel in relation to the insurers' right to rely on limitation in the stock policy action; and (c) whether breaches of the claims co-operation provisions had been established. By a unanimous judgment dated 5 October 2001 the Court of Appeal (Sharma, Hamel-Smith and Warner JJA) dismissed the insured's appeal. The judgments of the Court of Appeal focused principally on the *Jureidini* issue. The
- e Court of Appeal held that neither the decision in *Jureidini* itself, nor orthodox contractual analysis, supported the insured's contention that by alleging fraud, the insurers had precluded themselves from relying on the conditions of the policies by way of defence to the claims. The Court of Appeal regarded the issues of waiver and estoppel and of breach of the claims co-operation provisions as
- f essentially raising questions of fact and in the result upheld the judge's findings.

THE ISSUES

- g [8] It will be convenient to consider the issues in the following order: (1) The correctness of the judge's conclusion that the limitation provisions contained in the consequential loss policy were not incorporated in the contract. (2) The
- h *Jureidini* question, viz whether the insurers' assertion of fraud precludes them from relying on the limitation condition (i) in the stock policy and (ii) subject to the decision on (1) above, in the consequential loss policy, as well as on the claims co-operation conditions in both policies. (3) The question whether the insured has established the necessary ingredients for a successful plea of waiver or estoppel to defeat the limitation defence under the stock policy and, if it arises, under the consequential loss policy. (4) The question whether the insured's challenge to the judge's findings that there were breaches of the claims co-operation conditions in the stock policy and in the consequential loss policy ought to succeed.

j THE INCORPORATION ISSUE

[9] It is common ground that the consequential loss policy, which was in standard form, was prepared by the insured's brokers. A copy of that policy was placed before the Board. It contains the relevant limitation provision, and in particular condition 4 which provided for 30 days' notice and condition 5 which provided for a three-month limitation period running from the time of the rejection of a claim. It is common ground that a contract was concluded on the

basis of the standard form. But at trial the judge was persuaded that condition 4 and condition 5 were not incorporated. Her reasoning was that in order to establish incorporation of the limitation provisions the insurers 'must prove that the brokers knew about the condition upon which they [the insurers] now rely'. She concluded:

'What the defendants have not shown in their attempt at agency, is that the conditions came to the knowledge of the brokers. Without that information, the knowledge cannot attach to the plaintiff at all. Insofar as [the consequential loss action] is concerned, the limitation point does not succeed.'

On this point the judge wrongly adopted a subjective approach to the formation of the contract. The decisive fact is that the brokers, whatever they may have known, committed the insured to a contract on all the standard form terms of the consequential loss policy. They unquestionably had authority to do so. Conditions 4 and 5 were validly incorporated. The judge erred.

[10] The Board has not overlooked the fact that this point was not a ground of appeal before the Court of Appeal. It should have been. But it is a pure question of law. In order to grapple with the real issues the Board has had to deal with it. It follows that the limitation defences under both policies must be considered.

THE JUREIDINI ISSUE

[11] In *Jureidini v National British and Irish Millers Insurance Company Ltd* [1915] AC 499 an insurance company disputed liability of a claim by an insured, arising out of a fire, on the grounds of fraud and arson. At trial these allegations were found to be unsustainable. The insurer then sought to resist liability on the basis that, by litigating, the insured was in breach of an arbitration clause in the policy. The arbitration clause applied only 'if any difference arises as to the amount of any loss or damage' and provided that 'it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained'. The House of Lords held that the insurance company was not entitled to rely on the arbitration clause.

[12] In the present case the counsel for the insured argued that because the insurers had alleged arson they are not entitled to rely on the limitation provisions and claims co-operations provision in both policies. This contention was based on a passage in the unreserved opinion of Viscount Haldane in *Jureidini*. He stated (at 505):

'there has been in the proceedings throughout a repudiation on the part of the respondents of their liability based upon charges of fraud and arson, the effect of which, if they are right, is that all benefit under the policy is forfeited. But one of the benefits is the right to go to arbitration under this contract, and to establish your claim in a way which may, to some people, seem preferable to proceeding in the Courts; and accordingly that is one of the things which the appellants have, according to the respondents, forfeited with every other benefit under the contract. Now my Lords, speaking for myself, when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced.'

- a If one were to assume that this passage correctly reflected the ratio decidendi of *Jureidini* it would not assist the insured in the present case. There are at least three obstacles in the way of the insured's argument. First, properly understood the insurers' defence of arson was not a repudiation of the contract but rather a defence based on the contract. Secondly, it is part of the very alphabet of contract law that, despite a repudiatory breach, obligations under the contract survive until the breach is accepted by the innocent party as terminating the contract. Here there was no such acceptance. Thirdly, counsel for the insured rightly accepted that if the relevant limitation and claims co-operation defences had come into existence before the insurers rejected the claim on 11 October 1991 the point cannot assist the insured. That is indeed the factual position in the present case. In the circumstances the *Jureidini* defence must be rejected.
- b [13] But the Board cannot leave this aspect without considering whether Viscount Haldane's observations represent good law. Contract law cannot and does not prevent an insurer from resisting a claim on alternative bases, one involving an allegation of fraud and the other breaches of policy conditions. It would be contrary to principle and business common sense, which underpin our commercial law, to require an insurer to choose between alleging fraud, thereby abandoning the right to invoke other conditions of the policy, or to rely on those provisions, thereby giving up the right to allege fraud. With profound respect it must be said that Viscount Haldane's statement of principle was either wrong or required such radical qualification as to leave it with virtually no useful content. The Board has felt it appropriate to address this point because Viscount Haldane's statement has bedevilled our commercial law for too long.
- c [14] The observations of other Law Lords in *Jureidini*, and assessment of that case in subsequent decisions of high authority, have demonstrated that Viscount Haldane's observations do not correctly state the effect of that decision. In *Jureidini* Lord Dunedin based his decision on the view that the arbitration clause applied only to differences concerning the amount of loss and, therefore, not to a claim that was repudiated by the insurer altogether (at 507). Lord Atkinson concurred on the same 'short ground' (at 507). Lord Parmoor also confined his judgment to noting 'that no difference had arisen as regards matters which could come for decision under clause 17, and that consequently the clause had no application' (at 508). Lord Parker of Waddington simply concurred in the result.
- d [15] In *Woodall v Pearl Assurance Co* [1919] 1 KB 593 Bankes LJ made clear that in his view Viscount Haldane's statement was not part of the ratio decidendi of *Jureidini* (at 605). Warrington LJ took the same view (at 609).
- e [16] This view of *Jureidini* was trenchantly reinforced in *Sanderson & Son v Amour & Co Ltd* 1922 SC (HL) 117 at 128 in which Lord Dunedin observed:
- f '... I should say a single word as to the case of *Jureidini*. That case has in my view no application, for the simple reason that the clause of reference there was not a reference of all disputes, but only a reference as to the evaluation of loss. In other words, the clause was not a clause of the universal sort ...'
- g In *Sanderson* Viscount Haldane and Lord Shaw of Dunfermline expressly agreed with Lord Dunedin's opinion. In other words the ratio of *Jureidini* is based on the special wording of the arbitration clause and the fact that no dispute as to quantum had arisen.
- h [17] In *Heyman v Darwins Ltd* [1942] 1 All ER 337 the House of Lords took the view that Viscount Haldane's comments did not form the ratio of *Jureidini*. Viscount Simon LC set out the reasoning behind the decision in *Jureidini* as

expressed by Lords Dunedin, Atkinson and Parmoor, and observed: 'It is on this second ground that I think the majority of the House should be regarded as having decided the appeal' (at 342). Lord Porter concurred (at 362):

'... I agree with the Lord Chancellor in thinking that the true ground of the decision in *Jureidini v National British and Irish Millers Insurance Co Ltd* was the narrowness of the field of submission and the fact that no dispute had arisen on the only point submitted to arbitration.'

Lord Wright discussed what he called the curious case of *Jureidini* (at 385) and preferred the narrow view of its ratio decidendi. Lord Macmillan gave a separate opinion, with which Lord Russell of Killowen agreed, in which the analysis of *Jureidini* is perhaps not entirely clear.

[18] In *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 the House of Lords held that a fundamental breach, whilst bringing to an end primary obligations under the contract, does not necessarily bring to an end secondary obligations, such as exclusion clauses. Lord Diplock made clear that whether or not the secondary obligations survive is a matter of construction (at 564). *Photo Productions Ltd* was a landmark decision. Its relevance in the present context is demonstrated by the subsequent decision of the Privy Council in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257. A question arose, in the context of dispute between a consignee of goods and stevedores, whether the latter could rely on a time bar. The judgment of the Privy Council was given by Lord Wilberforce. He held (at 261–262):

'Third, as to "fundamental breach". The proposition that exemption clauses may be held inapplicable to certain breaches of contract as a matter of construction of the contract, as held by the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1966] 2 All ER 61, [1967] 1 AC 361 and *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, [1980] AC 827, and indorsed in Australia by Windeyer J in *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353 at 376, was not disputed. But counsel for the consignee put forward a special, and ingenious, argument that, because of the fundamental nature of the breach, the stevedore had deprived itself of the benefit of cl 17 of the bill of lading, the time bar clause. A breach of a repudiatory character, which he contended that the breach in question was, entitles the innocent party, unless he waives the breach, to claim to be released from further performance of his obligations under the contract. So far their Lordships of course agree. One of these obligations, counsel proceeded to argue, was to bring any action on the breach within a period of one year, and the innocent party was released from this obligation. An alternative way of putting it was that the bringing of suit within one year was a condition with which the innocent party was obliged to comply; the repudiatory breach discharged this condition ... Their Lordships' opinion on these arguments is clear. However adroitly presented, they are unsound, and indeed unreal. Clause 17 is drafted in general and all-embracing terms: "In any event the Carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after the delivery of the goods or the date when the goods should have been delivered." ... it is quite unreal to equate this clause with those provisions in

- a the contract which relate to performance. It is a clause which comes into operation when contractual performance has become impossible, or has been given up; then, it regulates the manner in which liability for breach of contract is to be established. In this respect their Lordships found it relevantly indistinguishable from an arbitration clause, or a forum clause, which, on clear authority, survive a repudiatory breach (see *Heyman v Darwins Ltd* [1942] 1 All ER 337, [1942] AC 356; *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at 567, [1980] 2 WLR 283 at 295). Counsel for the consignee appealed for support to some observations by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556 at 566–567, [1980] 2 WLR 283 at 294–295, where reference is made to putting an end “to all primary obligations ... remaining unperformed”. But these words were never intended to cover such “obligations”, to use Lord Diplock’s word, as arise when primary obligations have been put an end to. There then arise, on his Lordship’s analysis, secondary obligations which include an obligation to pay monetary compensation. Whether these have been modified by agreement is a matter of construction of the contract. The analysis, indeed, so far from supporting the consignee’s argument, is directly opposed to it. Their Lordships are of opinion that, on construction and analysis, cl 17 plainly operates to exclude the consignee’s claim.’
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Unfortunately, the citation was lengthy but it demonstrates the fallacy of the argument based on *Jureidini* with great clarity and authority.

- e [19] It follows that as a matter of precedent *Jureidini* is not an authoritative decision on insurance law or general contract law. If it has any remaining force it would be in the field of arbitration law, but then only on an arbitration clause on all fours with the clause in that case. The Board rejects all the insured’s arguments on the *Jureidini* issue in both actions.

- f [20] Finally, recognising the obstacles in the way of directly relying on *Jureidini*, counsel for the insured invoked Lord Wright’s observation in *Heyman v Darwins Ltd* [1942] 1 All ER 337 at 354 that ‘it is familiar law that a party who has prevented fulfilment of a condition precedent cannot set up the fact of its non-fulfilment’. Nothing that the insurers did prevented the insured from issuing a writ within the limitation periods of the two policies. Nothing that the insurers did prevented the insured from complying with the claims co-operation provisions of the two policies before the claims were rejected on 11 October 1991. The principle stated by Lord Wright is inapplicable.
- g

WAIVER AND ESTOPPEL

- h [21] It will be convenient to consider in the first place the issues of waiver and estoppel in the context of the time bar in the stock policy. It is common ground that the insured never asked for an extension of the limitation period and that the insurers never volunteered an extension of time. The insured relied in support of its pleas on conduct. Depending on the nature of the conduct that is, of course, a tenable position. The insured enlisted the doctrines of waiver and estoppel.
- j Somewhat tentatively it was also suggested that the insurers could be debarred by election from raising a time bar. Election is more appropriately applicable where a party has a right to choose between two things: *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India, The Kanchenjunga* [1990] 1 Lloyd’s Rep 391 at 398; Meagher, Gummow, and Lehane *Equity: Doctrines and Remedies* (4th edn, 1992) pp 433–435. The Board considers that in the present context the insured must establish either a waiver or an estoppel. If the insured fails to do so, election

cannot assist. The concepts of waiver and estoppel have often been explained. Generally, waiver is of a unilateral character: it involves giving up something. Estoppel by representation is bilateral in character and focuses on the impact on the representee. This is, of course, an extremely general statement. But it is sufficient for present purposes since it is common ground that waiver and estoppel can only be established, in the circumstances of the present case, if the insurers made a clear and unequivocal representation to the insured that they would not rely on the time bar: *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271 at 278 per Lord Hailsham of St Marylebone LC. If the insured cannot establish such a clear and unequivocal representation both pleas must fail.

[22] The insured relied on three categories of evidence. The first category of evidence related to discussions between Mr Doyle, an insurance consultant adjuster acting for the insured, and Mr Romany, the claims manager of the insurers, culminating in a conversation shortly before the expiry of the time bar under the stock policy. The evidence regarding these discussions was reviewed in detail by the trial judge and again in the Court of Appeal. Mr Romany made clear that the insurers were awaiting advice on the question of arson. Both Mr Doyle and Mr Romany were aware of the impending time bar. Mr Doyle knew that liability was in dispute and he said that proceedings would be commenced if the insurers were not going to pay the claim. What Mr Romany did not know was whether the insured had issued a protective writ. It was rightly conceded before the Board that nothing said on behalf of the insurers during the discussions could amount to a representation, let alone an unequivocal one, that the time bar would not be relied on. Moreover, as the Court of Appeal held, the insured was not encouraged by Mr Romany in any way to think that the time bar would not be relied on.

[23] The second category of evidence relied on was evidence of investigation of and discussion of the claim, which continued after the expiry of the limitation period. Reliance was placed on exchanges between 9 May 1991 and 15 July 1991. Except in one case these exchanges related to the claim under the consequential loss policy. The exception is a letter of 21 June 1991 to the bank which is irrelevant. The exchanges about the position regarding the consequential loss claim are irrelevant to the claim under the stock policy. For this reason alone reliance on these exchanges is misconceived. Secondly, insurers are entitled to investigate liability and quantum at the same time and to negotiate about both at the same time, and often prudence will require them to do so. Moreover, the mere fact that a party has continued to negotiate with the other party about the claim after the limitation period had expired, without anything being agreed about what happens if the negotiations break down, cannot give rise to a waiver or estoppel: *Hillingdon London Borough Council v ARC Ltd (No 2)* [2000] 3 EGLR 97 at 104 per Arden LJ and *Seechurn v ACE Insurance SA* [2002] EWCA Civ 67, [2002] 2 Lloyd's LR 390. Nothing in the exchanges in the present case is therefore capable of creating a representation that the time bar would not be relied on. Thirdly, there is nothing to show that the insurers knew whether a protective writ had been issued or not. It is therefore impossible to say that their silence signified that they would not be relying on the time bar. It is further clear that in this case the insurers did nothing to raise an expectation in the mind of the insured that the time bar would not be relied on. The judge and the Court of Appeal were right to conclude that the insurers' conduct in investigating the claims could not give rise to a waiver or estoppel.

- a* [24] The third category of evidence relied on related to interim payments made by some insurers who also subscribed to the separate buildings policy. These payments were not only made under a different policy but were made to mortgagees under a policy provision which provided that the mortgagees' interest 'shall not be invalidated by any act or neglect of the insured. There would have been a reasonable view that arson by the insured (if established)
- b* could not defeat a claim by the mortgagees. This is the context in which the interim payments must be seen. In the circumstances the interim payments could not give rise to the type of representation required for a waiver or estoppel.

- [25] It is now necessary to turn to the issues of waiver and estoppel in the context of the time bars in the consequential loss policy, viz the 30 days' notice provision under condition 4 and the 3 months provision under condition 5.
- c* Having held these conditions to be validly incorporated, it is not disputed that, subject to waiver and estoppel, these time bars took effect. The provision under condition 4 took effect 30 days after the expiry of the indemnity period, ie 30 days after 3 April 1990. The provision under condition 5 took effect on 11 January 1992. The writ was, of course, only issued on 18 March 1992.

- d* [26] The conduct alleged to give rise to the waiver and estoppel in respect of both policies has already been described. The reasons why that conduct cannot amount to waiver or estoppel in respect of the claim under the stock policy are, subject to one point, equally applicable in respect of the claim under the consequential loss policy. The qualification is that the point at para [23], above about the exchanges relating only to the consequential loss policy and not the
- e* stock policy is not relevant in the present context. But the other reasons given are applicable.

[27] It follows that the pleas of waiver and estoppel must also fail in respect of the time bars under the consequential loss policy.

f CLAIMS CO-OPERATION CLAUSES

[28] The claims co-operation provision in condition 11 of the stock policy reads as follows:

- g* 'The Insured shall also at all times at his own expense produce, procure and give to the Company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, proofs and information (i) with respect to the claim and (ii) the origin and cause of the fire and circumstances under which the loss or damage occurred, and (iii) any matter touching the liability or (iv) the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on oath or in other legal form of the truth of the
- h* claim and any matters connected therewith.

No claim under this Policy shall be payable unless the terms of this Condition have been complied with.'

The corresponding provision in condition 4 of the consequential loss policy provides as follows:

- j* 'The Insured shall at his own expense also produce and furnish to the Insurers such books of account and other business books, vouchers, invoices, balance sheets, and other documents, proofs, information, explanation and other evidence as may reasonably be required by the Insurers for the purpose of investigating or verifying the claim together with (if demanded) a statutory declaration of the truth of the claim and any matters connected

therewith. No claim under this Policy shall be payable unless the terms of this condition have been complied with and in the event of non-compliance therewith in any respect, any payment on account of the claim already made shall be re-paid to the Insurers forthwith.' a

[29] At trial the judge cited a decision of the New Zealand Court of Appeal in *Challenge Finance Ltd v State Insurance General Manager* [1982] 1 NZLR 762 on the correct approach to such clauses. The relevant passage in the judgment of the court, (delivered by Somers J) read as follows (at 766–767): b

'It is not to be supposed that the condition in the policy required of the insured by way of information more than he had or could practically ascertain. Both parties accepted as applicable the statement in *25 Halsbury's Laws of England* (4th edn) para 505: c

"Particulars required. The particulars required necessarily vary according to the nature of the insurance. They must be furnished with such details as are reasonably practicable. Whether the details given are sufficient or not is a question of degree, depending partly upon the materials available which, particularly in the case of a fire, may be scanty, and partly upon the time within which they have to be furnished. In any case, the assured has not performed his duty adequately unless he has furnished the best particulars which the circumstances permit." d

That is how the judge approached the issue in the present case. The Court of Appeal approached the matter in a similar way. At neither level was there any dispute about this legal approach to the claims co-operation provisions. e

[30] During oral argument the question was raised whether the clauses in question could be construed not as conditions but as innominate terms. The Board is satisfied that it is too late to entertain such an argument. In declining to consider this point the Board is satisfied that, if the provisions were to be interpreted as innominate terms, the result would nevertheless have been the same. f

[31] Only one other question of law needs to be mentioned. Hamel-Smith JA appeared to conclude that insurers could not rely on the claims co-operation condition once they had 'repudiated' the policy. The judgments of Sharma and Warner JJA do not contain any such conclusion. Hamel-Smith JA's analysis appears to be focussing on the separate question of whether, after repudiation, an insured could be required to provide continued performance of a primary obligation to provide claims documentation and information, rather than whether or not accrued breaches of that obligation (as found by the trial judge) could still be relied on by way of defence. The point raised by Hamel-Smith JA does not arise in the present case. g h

[32] In these circumstances the issues in respect of claims co-operation are entirely factual in nature. Sealey J made her findings under this heading on three matters, viz requests for the insured's income tax returns, cancelled cheques, and the names and addresses of employers. In respect of all three categories the judge observed that it was not suggested that the documents were not reasonably required for the claims to be processed. Her findings on the request for the insured's income tax returns were as follows: j

'The defendants requested the plaintiff's income tax returns. These were never provided. The plaintiff's explanation was that they were destroyed by fire and efforts by their auditor to obtain them were unsuccessful.

- a Attorney-at-law for the plaintiff said that the plaintiff's servants and/or agents made strenuous effort to obtain same. All that Mr Sawh said is that he requested the documents from the Board of Inland Revenue and that their auditor Mr Omar Ali made the same request also without success. What is difficult for me to conceive is that the accountant/auditor was unable in 1990 to supply at least copies of tax returns for the year 1989, or that sufficient effort was made to obtain them from the Board of Inland Revenue. I am fortified in this view, by the statement made by Mr Sawh on the 3rd July 1995, that the efforts to obtain the tax returns were not successful, and that he did not mean by that that all methods to obtain the tax returns were exhausted. Did the plaintiff do all that was reasonably required to obtain the Income tax returns? I do not think so, the evidence of strenuous effort on the part of the plaintiff is not there.'
- b
- c

The Court of Appeal affirmed these findings of fact. In the result there are concurrent findings of fact. The Board has carefully considered the oral and written arguments of the insured but concludes that the judge and Court of Appeal came to the correct conclusion on this aspect.

- d [33] The judge dealt with the findings of fact on cancelled cheques as follows:

- e 'It is a fact that some of the information was provided, so that I have not accepted the statement of Mr Zoe that he did not receive any information. However, there was other significant information which was not supplied to the defendants. One such request was for the cancelled cheques. According to Mr Sawh, when the request was made for the returned cheques, he sought to put them together and when it dawned upon him that there were so many, they thought that Mr Zoe should come to their premises to inspect them. That suggestion was not responded to and sometime after, a break-in occurred at the premises. Several documents were taken and the intruder was found to be an employee who had been defrauding the company. One wonders whether one should attach any significance to the timing of the break-in. Blame for not getting the documents in a timely fashion has been attributed to each side. Mr Sawh is saying that Mr Zoe did not come in when he was invited, and Mr Zoe is saying that he was put off several times, until the events related herein. Then it was suggested that the defendants could go to the bank and view the cheques there, as it was going to be quite costly to have them copied by the bank. Attorney for the defendants submitted that that was not a realistic approach since according to the clause in the policy, they were to be supplied at the cost of insured. It seems to me that the approach taken by the plaintiff cannot be in compliance with the terms of the policy.'
- f
- g
- h

- j Again, the Court of Appeal affirmed the judge's findings of fact. This aspect is, however, more troublesome, notably because the judge did not resolve the dispute between Mr Sawh and Mr Zoe. The Board prefers to express no concluded view on it.

[34] On the third matter the judge found:

'Another request which was made, was for the names and address of employees. This was not done, and Mr Sawh in evidence said that in hindsight, he could have obtained this information by going directly to the employees and requesting their addresses.'

The Court of Appeal affirmed this finding of fact. It is a concurrent finding of fact. None of the oral or written arguments advanced on this appeal have caused the Board to question the correctness of this finding. a

[35] It follows that at least in respect of the income tax returns and the list of employees' names and addresses the judge, and the Court of Appeal, were right to conclude that the insured was in breach of the claims co-operation provisions. Independent of the time bar defences, which the Board have already upheld, the breaches of the claims co-operation provisions afford the insurers complete defences in both actions. b

CONCLUSION

[36] The appeal must be dismissed with costs. c

Appeal dismissed.

James Wilson Barrister (NZ).

a **Hackney London Borough Council v Side
by Side (Kids) Ltd**
[2003] EWHC 1813 (QB)

b QUEEN'S BENCH DIVISION
STANLEY BURNTON J
11, 14 JULY 2003

c *Landlord and tenant – Recovery of possession – Order for possession – Enforcement order – Writ of possession stayed – Application to set aside stay – Statute providing for limitation on period of stay – Whether statutory provision applying to proceedings in High Court – Whether statutory provision applying to consent orders – Housing Act 1980, s 89(1).*

d The claimant local authority was the owner of the site on which the defendant operated a nursery for handicapped children. The authority brought proceedings in the county court seeking possession of the site, on the basis that the defendant was a trespasser. Those proceedings were compromised by way of a consent order. Nevertheless, the defendant remained in occupation. The authority applied to the High Court for an enforcement order, and a writ of possession was issued. The defendant applied to the deputy master to stay the writ of execution.

e That application did not contain any submission that the defendant would suffer exceptional hardship if required to give up possession. The deputy master granted a stay and the claimant applied to the interim applications judge to set aside the order. The authority argued, inter alia, that the consent order made by the county court was clearly an order for possession within the meaning of

f s 89(1)^a of the Housing Act 1980, and since it appeared that no exceptional hardship would be caused to the defendant if it was required to give up possession under that section, the court had no power to stay execution for more than 14 days after the making of the order. The defendant argued, inter alia, that s 89 did not apply to an order for possession made by the High Court, or alternatively,

g that it did not apply to a consent order.

Held – Section 89(1) of the 1980 Act was, on its face, of general application. It was not expressly restricted to county court orders but applied equally to proceedings in the High Court. The wording of Pt IV of the Act in which s 89 appeared and of s 89 itself were clear and left no room for the words 'a court' in s 89 to be construed as limited to a county court. Indeed when Pt IV referred only to the county court, it did so expressly. Furthermore, there was nothing in the wording of s 89 to suggest that it did not apply to consent orders. It would be illogical for the powers of the court to postpone the order for possession being given effect to be enlarged because both parties consented to the possession order. The court

h should encourage parties to reach agreements to compromise their litigation without fear that by doing so they were either advantaged or disadvantaged as against their position if their litigation was decided with the same result by the court after an adversarial hearing. If anything, normally the court's powers to enlarge time were more restrictively exercised when the order in question was a

j

a Section 89, so far as material, is set out at [13], below

consent order rather than one made in the normal course. If s 89 did not apply to consent orders, a claimant seeking a possession order could not sensibly agree to any order for possession being made in his favour without losing its protection. It followed that the deputy master had lacked jurisdiction to make the order for a stay and it would, accordingly be set aside (see [18]–[20], [25], [26], [32], [33], below).

Bain & Co v Church Comrs for England [1989] 1 WLR 24 not followed.

Notes

For restricted discretion of the court in making orders for possession, see 27(1) *Halsbury's Laws* (Reissue) para 552.

For the Housing Act 1980, s 89, see 23 *Halsbury's Statutes* (1997 Reissue) 336.

Cases referred to in judgment

Bain and Co v Church Comrs for England [1989] 1 WLR 24.

International Tin Council, Re [1987] 1 All ER 890, [1987] Ch 419, [1987] 2 WLR 1129; *affd sub nom Maclaine Watson & Co Ltd v Dept of Trade and Industry, Re International Tin Council, Maclaine Watson & Co Ltd v International Tin Council, Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1988] 3 All ER 257, [1989] Ch 309, [1988] 3 WLR 1159, CA.

Cases referred to in skeleton arguments

Aglionby v Cohen [1955] 1 All ER 785, [1955] 1 QB 558, [1955] 2 WLR 730.

Columbia Pictures Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, [1986] 3 WLR 542.

Application

The claimant, the London Borough of Hackney, applied to set aside an order of 9 July 2003 by Deputy Master Partridge, sitting in the Central London County Court, granting a stay of execution on the writ of possession issued by the claimant, which sought possession of the nursery site at Egerton Road and Rockwood Road, Hackney, occupied by the defendant charity, Side by Side (Kids) Ltd. The facts are set out in the judgment.

Jonathan Koras (instructed by *Herbert Smith*) for the authority.

Neil Mendoza (instructed by *Bude Nathan Iwanier*) for the defendant.

Cur adv vult

14 July 2003. The following judgment was delivered.

STANLEY BURNTON J.

[1] This is an application by the claimant to set aside an order dated 9 July 2003 made by Deputy Master Partridge granting a stay of execution on the writ of possession issued by the claimant, which seeks possession of the nursery site at Egerton Road and Rockwood Road, Hackney, occupied by the defendant.

[2] The defendant is a charity. It operates a nursery for mentally handicapped children, of whom there are about 50, at the school.

[3] On 14 April 2003, there were proceedings in the Central London County Court between the claimant and the defendant in which the claimant sought possession of the nursery site, which was occupied by the defendant, according to the claimant without its consent. On that date, the solicitors for the parties

- a entered into an agreement, principally in the form of a Tomlin order, for the settlement of all claims and counterclaims between them. Their agreement was not made an order of the court on that date. The essence of the agreement, contained as is customary in the schedule to the consent order, was that the defendant would give up possession of the nursery site on 25 June 2003, in return for the grant to it by the claimant of a lease of an alternative site known as the
- b One O'clock club site and a licence of a playground site known as the Big Hill Site, and payment by the claimant of £70,000 as a contribution to the defendant's relocation expenses. In order to enable the defendant to move onto the Big Hill Site, the claimant was to carry out specified works, including fencing it with a secure chain link fence and works to make the site fit for portacabins that the defendant would occupy. The schedule to the order required the works to
- c ensure that the Big Hill Site was suitable for the installation of portacabins to be carried out within 21 days of the date of the consent order (ie by 5 May 2003), with other works being carried out within 45 days and with a proviso that the claimant was not to be obliged to carry out any works costing more than £50,000. The terms of the actual consent order were as follows:
- d 'UPON the parties by the signatures of their solicitors herein having agreed to the terms of this order in full and final settlement of all claims and counterclaims whatsoever in this action
- e AND UPON the parties hereby jointly applying to the Court pursuant to section 38(4)(b) of the Landlord and Tenant Act 1954 to authorise the Claimant and the Defendant to enter into the agreement to surrender annexed hereto at Appendix D in the circumstances and on the terms set out in the schedule to this Consent Order
- AND BY CONSENT
IT IS ORDERED THAT
- f 1. All claims and counterclaims herein be stayed upon the terms set out in the Schedule hereto save as regards enforcing those terms in which respect there be liberty to apply
2. Notwithstanding any application pursuant to 1 above, the Defendant do give up possession of the Nursery Site (as defined in the particulars of Claim) no later than by 5pm on 25th June 2003.
- g 3. There be no Order for Costs save as may arise in respect of any application pursuant to 1 above ...'
- [4] The consent order was made an order of the Central London County Court on 5 June 2003. On the same date, the defendant's solicitors for the first time alleged in correspondence that because the site had not been made suitable
- h for the installation of portacabins within 21 days of the consent order, the defendant could not give up possession of the site. That contention was disputed by the claimant in correspondence.
- [5] The defendant did not give up possession of the nursery site on 25 June 2003, and remains in occupation.
- j [6] Article 8B of the High Court and County Court Jurisdiction Order 1991, SI 1991/724 provides that a judgment or order of a county court for possession of land made in a possession claim against trespassers may be enforced in the High Court or a county court.
- [7] On 26 June 2003, the claimant's solicitors requested an order for enforcement of the possession order in the High Court by presenting to the Court Office a standard form combined certificate of judgment and request for a writ of

possession. The certificate of judgment had been signed by an officer of the Central London County Court and bore the county court seal. The note to that document reads as follows: a

‘Please note:

This judgment or order has been sent to the High Court for enforcement by (writ of Fieri Facias)(Writ of Possession against trespassers) only.

The county court claim has not been transferred to the High Court. Applications for other methods of enforcement or ancillary applications must be made to the county court in which the judgment or order was made, unless the case has since been transferred to a different court, in which case it must be made to that court.’ b

[8] The order for possession was thereafter treated as an order transferred pursuant to s 42 of the County Courts Act 1984, to which s 42(5) applies. A writ of possession was issued immediately, on 26 June 2003. c

[9] The defendant contends that it has been prevented from giving up possession of the nursery site by the claimant’s breaches of the terms of the consent order, in failing to carry out works to the Big Hill Site, in particular failing to fence it securely until late June 2003, which have made it impossible for it to relocate to its new site. On the basis of those allegations, it sought without notice to the defendant, and obtained, the order of the deputy master referred to above. The witness statement before the deputy master did not in terms state that exceptional hardship would be caused to the defendant if it had to quit the site immediately, probably because the solicitors for the defendant were unaware of the possible application of s 89 of the Housing Act 1980. The witness statement did state that the term for the school the defendant operates would end on 1 August 2003. The order made by the deputy master provides that an application to set aside the order for a stay should be given the earliest possible hearing date, if possible by 18 July 2003. d

[10] The claimant for its part disputes the defendant’s contentions, and itself contends that it will suffer substantial loss if it is unable to take possession of the site before the end of the month. On this basis it applied to me, as the interim applications judge, to set aside the order of the deputy master. e

[11] The present dispute is very unfortunate since it involves only what is to happen to the school and the site in the period between now and the end of the school term at the end of this month. In the absence of agreement between the parties, however, the court must decide whether the claimant is entitled to enforce the order for possession. f

[12] Both parties recognised that, within the time constraints of an application to the interim applications judge, I could not consider and rule on the factual disputes between the parties assuming it would be possible to do so without examination and cross-examination of the witnesses. The claimant contended that it is entitled to set aside the order of the deputy master on the grounds: (i) that by reason of s 89 of the 1980 Act the court does not have jurisdiction to stay execution of the possession order; (ii) that the facts alleged by the defendant could not justify a stay of execution by reason of the terms of the consent order. g

SECTION 89 OF THE 1980 ACT

[13] Section 89 is as follows: h

‘Restriction on discretion of court in making orders for possession of land.—(1) Where a court makes an order for the possession of any land in a i

a case not falling within the exceptions mentioned in subsection (2) below, the giving up of possession shall not be postponed (whether by the order or any variation, suspension or stay of execution) to a date later than fourteen days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order.

b (2) The restrictions in subsection (1) above do not apply if—(a) the order is made in an action by a mortgagee for possession; or (b) the order is made in an action for forfeiture of a lease; or (c) the court had power to make the order only if it considered it reasonable to make it; or (d) the order relates to a dwelling-house which is the subject of a restricted contract (within the meaning of section 19 of the 1977 Act); or (e) the order is made in proceedings brought as mentioned in section 88(1) above.'

[14] It is common ground that this case does not fall within any of the exceptions specified in s 89(2).

d [15] Mr Karas submitted that the order for possession made by the county court is plainly an order for possession within the meaning of s 89; accordingly, this court has no power to stay execution for more than 14 days after the making of the order, unless it appears to the court that exceptional hardship would otherwise be caused, and even then the maximum postponement is to a date six weeks from the making of the order. Six weeks from the making of the order of the county court in this case expire on 18 July 2003; the order made by the deputy master will, unless set aside, continue after that date; it is therefore an order he had no power to make.

e [16] Mr Mendoza, for the defendant, disputed these submissions. He relied on the judgment of Harman J in *Bain and Co v Church Comrs for England* [1989] 1 WLR 24, in which he decided that s 89 does not apply to an order for possession made by the High Court. He further submitted that s 89 has no application to a consent order.

f [17] Mr Karas countered: (i) that the *Bain* case was wrongly decided; (ii) that in any event the order for possession in the present case was an order of the county court, so that s 89 applies even if the *Bain* case was correctly decided.

g DOES S 89 APPLY TO ORDERS FOR POSSESSION MADE IN THE HIGH COURT?

[18] On the face of it, s 89 is of general application. It is not expressly restricted to county court orders. The expression 'court' is not specially defined so as to mean the county court. Looking at the section by itself, the natural meaning of 'a court' is any court.

h [19] Leaving aside the decision in the *Bain* case, I find nothing in the 1980 Act to indicate that the expression 'the court' means the county court in s 89, and clear indications that it includes the High Court. The long title to the Act includes the following:

j 'An Act to give security of tenure, and the right to buy their homes, to tenants of local authorities and other bodies ... to make other provision with respect to housing; to restrict the discretion of the court in making orders for possession of land; and for connected purposes.'

[20] This does not hint at a restriction to county court orders. Nor does the context of s 89 itself. It is in Pt IV of the 1980 Act, which includes ss 86–89. Section 86 refers to a county court as such when it refers to it and to the High

Court as such when it refers to it. While it confers jurisdiction on the county court in respect of proceedings under Pts 1 or 3 of the Act, as originally enacted it expressly envisaged that such proceedings might be taken in the High Court under those parts of the Act and, in sub-s (3), imposed a costs penalty on a claimant who brought proceedings in the High Court that could have been taken in the county court. Subsection (3) has been prospectively repealed, but it is still in force. Given the express references to the county court and the High Court in s 86, it would be illogical to read the references to 'a court' in the following sections as restricted to a county court. Moreover, the exceptions referred to in s 89(2) include proceedings that may be brought in both the county court and the High Court.

[21] In *Bain and Co v Church Comrs for England* [1989] 1 WLR 24 at 27, Harman J seems to have relied on the fact that in s 87 'a court' must mean the county court because, he believed, only a county court has jurisdiction in proceedings in which possession is sought of a dwelling house let under a secure tenancy, to which that section relates, and that in s 88 it must have the same meaning because—

'possession of a dwelling house under a rental purchase agreement is a matter which prima facie would be a county court matter and I suspect is not a matter the High Court has ever had to consider.'

[22] I am not sure that the first of these premises is correct, given the provisions of s 86(3), and the second is not a good reason to restrict the meaning of 'a court', given the fact that the definition of a rental purchase agreement in s 88(4) is not limited in terms of the value of the dwelling house at all. More importantly, these reasons ignore the fact that s 89 is not restricted to dwelling houses let under secure tenancies and those subject to rental purchase agreements, or even to dwelling houses, but applies to 'any land'.

[23] Harman J also referred (at 28) to counsel for the plaintiff's submission that—

'the jurisdiction of the High Court, derived in this sort of case originally from the jurisdiction of the Court of Chancery which itself, of course, derived from the prerogative of Her Majesty, is not to be taken to be fettered unless Parliament plainly intends so to do.'

[24] But the words of s 89 are plain. Harman J finally said:

'I confess to finding the point puzzling. I started, as I observed, with a disposition to sense that the ordinary jurisdiction cannot have been intended to be so radically altered and cut down so as to restrict every court in this country, including the other part of the Supreme Court, the Court of Appeal, in its jurisdiction to limit orders for possession. I have no help from the text books which simply assume that the matter is a county court matter. I can, I think, take some help from the chapter heading to Part IV of the statute, and in the end, more by way of a bold leap in the dark than by way of reasoned proposition, I assert that "a court" in section 89 means a county court.'

[25] I regret that I am unable to follow Harman J's leap in the dark. The wording of Pt IV of the 1980 Act and of s 89 are clear, and in my judgment leave no room for the words 'a court' in s 89 to be construed as limited to a county court. No justification has been put forward for treating all possession orders made by the county court, including those relating to commercial property, as

a subject to s 89, whereas all High Court possession orders, even if made in relation to residential property, are not.

[26] I am bound to follow the decision in the *Bain* case, which I am told is the only authority on s 89, unless I conclude that it is clearly wrong. With respect to Harman J, I have so concluded. In my judgment, s 89 applies equally to possession orders made in the High Court as it applies to orders made by the county court.

b [27] It follows that I do not have to consider whether, if the *Bain* case had been correctly decided, the transfer of enforcement proceedings by the county court to the High Court made this possession order a High Court order for the purposes of s 89. It would be curious indeed if such a transfer took a possession order out of the scope of s 89, but on the basis of my judgment, such a transfer has no effect on its application.

c [28] I add that Mr Mendoza contested whether the enforcement proceedings had been validly transferred to the High Court under s 42 of the 1984 Act in the absence of an order by a county court judge or district judge. The transfer was made in this case in accordance with the normal procedure. In any event, the premise of his application for a stay made to the deputy master was that the enforcement proceedings had been transferred to the High Court, which therefore had jurisdiction to order a stay of execution. Be that as it may, no order of a county court judge or district judge is necessary by virtue of CCR Ord 25, r 13(1) of the County Court Rules which provides:

e 'Where the judgment creditor makes a request for a certificate of judgment under Order 22, rule 8(1) for the purpose of enforcing the judgment or order in the High Court by execution against goods, the grant of a certificate by the proper officer shall take effect as an order to transfer the proceedings to the High Court and the transfer shall have effect on the grant of that certificate.'

f DOES SECTION 89 APPLY TO ORDERS MADE BY CONSENT?

[29] There is much to be said for the view that Parliament cannot have intended the restrictions in s 89 to apply to consent orders. The object of the section is presumably to prevent courts keeping out of possession, and of his rights, a person who is ex hypothesi entitled to possession, save in the excepted cases. But why should a person entitled to possession be precluded from reaching an agreement giving the occupier an extended time to quit? The generality of the wording of s 89 is not necessarily an obstacle to a restricted interpretation, applying it to orders made non-consensually only: cf *Re International Tin Council* [1987] 1 All ER 890, [1987] Ch 419 (Millett J), [1988] 3 All ER 257, [1989] Ch 309 (Court of Appeal). The present case highlights the desirability of such an interpretation: the parties signed their consent order on 14 April 2003, providing for possession to be given up on 25 June 2003, and even the order made by the court on 5 June 2003 gave more than the 14 days stipulated by s 89 unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up. There is nothing to suggest that the county court had before it any evidence on 5 June, when the order was made, that exceptional hardship would be caused if the date for possession were not postponed, and s 89 of the 1980 Act requires that there should be sufficient material before the court for it to appear to it that exceptional hardship would be caused unless the date for possession were postponed more than 14 days from the date of judgment. The reference to the power of the court to extend the time for possession in cases where it appears to the court that exceptional hardship would otherwise be

caused suggests that the court has evidence before it rather than simply an agreement of the parties. a

[30] Against this, it would be illogical for the powers of the court to postpone the order for possession being given effect to be enlarged because both parties consented to the possession order. The court should encourage the parties to reach agreements to compromise their litigation without fear that by doing so they are either advantaged or disadvantaged as against their position if their litigation is decided with the same result by the court after an adversarial hearing. b If anything, normally the court's powers to enlarge time are more restrictively exercised when the order in question is a consent order rather than one made in the normal course. If s 89 does not apply to consent orders, a claimant seeking a possession order could not sensibly agree to any order for possession being made in his favour without losing its protection. c

[31] Furthermore, the parties can agree to a postponed date for possession without infringing the requirements of s 89. The easiest means of doing so is for the parties to make an agreement in Tomlin order form, with no order for possession as such, but only an order for a stay of proceedings with the normal proviso. If the defendant fails to deliver up possession at the date required by the terms of the schedule to the Tomlin order, at that stage the claimant may apply for an order for possession pursuant to the leave to apply for the purposes of enforcing the terms of the schedule. d

[32] Not without hesitation, I conclude that the general words of s 89 do not permit me to find that it does not apply to consent orders. e

[33] It follows that the deputy master did not have jurisdiction to make his order. Even if he considered that there was evidence of exceptional hardship, he could not have postponed the date for possession beyond 18 July 2003. e

DOES THE DEFENDANT HAVE ANY GROUND AT LAW FOR PREVENTING THE CLAIMANT FROM OBTAINING POSSESSION?

[34] Under this head I consider whether, apart from s 89, the defendant has any ground for resisting the enforcement of a possession order. f

[35] Mr Mendoza submitted that the effect of the conduct of the claimant, of which the defendant complains, was that the claimant was in breach of a condition precedent to its right to possession under the agreement between the parties, or had waived its right to possession or was estopped from asserting it. g

[36] In my judgment, the terms of the consent order are inconsistent with the first of these submissions. The wording of para 2 of the order makes it clear that the giving up of possession by the defendant on 25 June 2003 is independent of any disputes as to the compliance of the parties with the terms of the schedule. The ceiling on the cost of the works to be carried out by the claimant reinforces this conclusion. It cannot have been intended that possession would be deferred if the works to be carried out by the claimant cost more than £50,000, with the result that neither it nor the defendant had any contractual obligation to complete them. The possibility of that figure being exceeded was not academic, as the correspondence between the parties shows. For the same reason, the allegations of waiver and estoppel are unfounded. In any event, no express or implied representation by the claimant is alleged on which either a waiver or estoppel could be based, but only a failure to carry out works within an agreed time. h j

[37] While, if the court otherwise has jurisdiction to stay execution, the terms of the order do not necessarily exclude the exercise of the power, where the

a parties have made it clear in their agreement that enforcement of the terms of the schedule is not to affect the date for possession, the court should not, in the absence of exceptional circumstances, make an order that is inconsistent with their agreement.

CONCLUSION

b [38] I sympathise with the defendant charity. I do not find it easy to accept that the postponement of its leaving the site to 1 August will cause substantial damage to the claimant. However, the stay of execution is inconsistent with the agreement it entered into, and is inconsistent with the requirements of s 89 of the 1980 Act. For these reasons, the order of the deputy master will be set aside.

Order accordingly.

Aaron Turpin Barrister.

Note

Haggis v Director of Public Prosecutions

[2003] EWHC 2481 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

BROOKE LJ AND SULLIVAN J

7 OCTOBER 2003

Practice – Appeals – Filing of skeleton arguments and bundle of authorities – Guidance – CPR PD 52, paras 5.9, 7.7, 15.11.

In the course of adding a short judgment to the judgment of Sullivan J, in order to draw attention to certain points of practice, **BROOKE LJ** said:

[24] This was an appeal by way of case stated from a magistrates' court to the High Court. Because it is an appeal relevant practice and procedure are set out in CPR Pt 52 and its practice direction. The practice direction in particular sets out the court's requirements in relation to the filing of skeleton arguments and bundles of authorities. Paragraphs 18.1–18.6 of CPR PD 52, which are found in section II, make special provision for appeals by way of case stated by the Crown Court or the magistrates' court and, in particular CPR PD 52, para 18.5 makes special provision for the documents to be lodged by the appellant with the appellant's notice.

[25] So far as other requirements are concerned, CPR PD 52, para 16.2, at the start of s II of the practice direction, states:

"Where any of the provisions in this section provide for documents to be filed at the appeal court, these documents are in addition to any documents required under Part 52 or section I of this practice direction."

[26] It is to section I that one has to turn to see the requirements in relation to skeleton arguments and agreed bundles of authority in a case of this kind. So far as the appellant's skeleton argument is concerned, this is governed by CPR PD 52, para 5.9. And if the appellant's notice is for some reason not itself accompanied by a skeleton argument CPR PD 52, para 5.9(2) provides:

"Where it is impracticable for the appellant's skeleton argument to accompany the appellant's notice it must be lodged and served on all respondents within 14 days of filing the notice."

[27] In this appeal the notice was filed on 19 May 2003 so that the skeleton argument had to be lodged and served on the respondent at the latest by 2 June 2003. In the event, it bears the date 18 September 2003, which is just under three weeks ago. If the appellant's solicitors had asked for an order that the time for lodging a skeleton argument should not start to run until a representation order was granted to their client on 10 July 2003, no doubt the court would have made an order accordingly.

[28] So far as the respondent's skeleton argument is concerned that is governed by CPR PD 52, para 7.7 and it provides:

a 'Where the skeleton argument is not included within a respondent's notice [as was the case on this appeal] it should be lodged and served no later than 21 days after the respondent receives the appellant's skeleton argument.'

b [29] This casts in extremely sharp relief the difficulties that are caused when the appellant delays serving its skeleton argument and the respondent does nothing to expedite service because the 21 days from 18 September have not yet expired. As it was [counsel for the respondent] faxed his skeleton to the court on 5 October, two days ago. He came under a good deal of criticism from the court during the course of the hearing and it would certainly have been very helpful if we could have had his skeleton considerably earlier, but now that I have had an opportunity to consider the language of the practice direction, it is quite clear that the problem was initially caused by the very late service of the appellant's skeleton.

c [30] So much for skeleton arguments, and the judges of this court and the Court of Appeal are likely in future to be very much less forbearing in relation to the late service of skeleton arguments. Their lack of forbearance may well lead to disagreeable orders in relation to costs if this is the only way in which discipline can be achieved.

d [31] I turn now to the bundles of authorities. A bundle of authorities was lodged on behalf of the appellant on 30 September 2002, seven days ago. [Counsel for the respondent] caused four additional authorities, to which he referred in his skeleton argument, to be faxed to the court this morning. The practice direction in relation to bundles of authorities is largely unknown by most practitioners who are asked about its requirements. It is set out in CPR PD 52, para 15.11 and it reads:

e 'Once the parties have been notified of the date fixed for hearing the appellant's advocate shall file, after consulting his opponent, for the purpose of pre-reading by the court, one bundle containing photocopies of the principal authorities upon which each side will rely at the hearing, with the relevant passages marked. There will in general be no need to include authorities for propositions not in dispute. The bundle should be made available 28 days before the hearing, unless the period of notice of the hearing is less than 28 days, in which case the bundle should be filed immediately. Such bundles should not normally contain more than 10 authorities ...'

Needless to say, the important practice direction on citation of authorities is also relevant in this context.

h [32] The judges of the Court of Appeal and the Heads of Division have recently considered the language of this practice direction. They take the view that what is really important is that this agreed bundle should be filed not less than seven days before the hearing. This appears to be a more reasonable time. If an agreed bundle with each side's authorities is not filed at least seven days before the hearing, again the judges of this court and in the Court of Appeal are likely to show very much less forbearance than they have in the past.

j [33] I draw particular attention to the need to mark in the authorities the passages on which the advocates wish to rely. It is also very helpful if the page number can be mentioned in the skeleton argument, although that is not specified in the practice direction. The reason for this is that the judges wish to be able to pre-read whenever they reasonably can. If they are simply referred to

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b
a case which may have 20 or 25 pages in it, it is unlikely that they are going to be enthusiastic about reading all 25 pages in order to run to earth, if they spot it, the principle on which the advocate seeks to rely.

[34] I mention all these matters because it is now high time that practice in this respect is tightened up so that unnecessary time is not wasted either by the parties waiting for the other side to file skeleton arguments in accordance with the rules, or by the court in being bombarded at a very late stage, sometimes after it has already done its pre-reading, with the late arrival of skeleton arguments and important authorities.'

Dilys Tausz Barrister.

Barber v Somerset County Council

[2004] UKHL 13

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY AND LORD WALKER OF GESTINGTHORPE

16–18 FEBRUARY, 1 APRIL 2004

Negligence – Duty to take care – Employer – Duty to protect employee from foreseeable risk of danger to health – Liability for employee’s psychiatric illness caused by stress at work – Guidance.

The claimant was a teacher employed by the defendant council. The post he held as head of a department was abolished in a restructuring of staffing and the claimant reapplied for a new post in his subject. In order to maintain his salary level he also applied to be the school’s project manager for public and media relations. He worked long hours in discharging his new responsibilities and began to suffer from stress. In February 1996 he spoke of ‘work overload’ to one of the senior management team. He was away from work in May 1996 for three weeks, returning with sick notes signed by his doctor recording his condition as ‘overstressed/depression’. He completed his employer’s form of sickness declaration stating his trouble as ‘overstressed/depression’. That form was signed by the claimant and countersigned by another of the senior management team. During June and July he had meetings with the senior management team about his workload and his health but no steps were taken to investigate or remedy the situation. In November the claimant suffered a mental breakdown at school and he took early retirement at the end of March 1997, when he was 52 years old. He was unable to work as a teacher, or to do any work other than undemanding part-time work. The claimant brought proceedings against the council, claiming damages for personal injuries, principally in the form of serious depressive illness. The trial judge gave judgment for the claimant, holding that a prudent employer, with the knowledge that the senior management team had had, would have investigated the claimant’s situation to see how his difficulties might have been improved, and that the response of the senior management team to the claimant’s difficulties had been inadequate. The council appealed. The Court of Appeal concluded that the judge had been wrong in finding a breach of the council’s duty of care to the claimant. The claimant appealed.

Held – (Lord Scott of Foscote dissenting) The judge had been entitled to form the view that the school’s senior management team, measured by the general principle of the conduct of a reasonable and prudent employer taking positive thought for the safety of its workers in the light of what it knew or ought to have known, was in a position of continuing breach of the employer’s duty of care, and that that had caused the claimant’s serious nervous breakdown. It was not a clear case of a flagrant breach of duty any more than it was an obviously hopeless claim. But the judge had seen and heard the witnesses, and there was insufficient reason for the Court of Appeal to set aside his finding (see [1], [2], [36], [61], [65], [67], [70], [71], below).

Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776 applied.

Decision of the Court of Appeal [2002] 2 All ER 1 reversed.

Notes

For the nature and extent of an employer's duty of care at common law, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 32.

Cases referred to in opinions

- Clarke v Edinburgh and District Tramways Co Ltd* 1919 SC (HL) 35. b
Cross v Highlands and Islands Enterprise [2001] IRLR 336, Ct of Sess (OH).
Johnstone v Bloomsbury Health Authority [1991] 2 All ER 293, [1992] QB 333, [1991] 2 WLR 1362, CA.
Paris v Stepney BC [1951] 1 All ER 42, [1951] AC 367, HL.
Ross v Associated Portland Cement Manufacturers Ltd [1964] 2 All ER 452, [1964] 1 WLR 768, HL. c
Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776.
Walker v Northumberland CC [1995] 1 All ER 737, [1995] ICR 702.
Watt (or Thomas) v Thomas [1947] 1 All ER 582, [1947] AC 484, HL.
Withers v Perry Chain Co Ltd [1961] 3 All ER 676, [1961] 1 WLR 1314, CA. d

Cases referred to in list of authorities

- Allen v British Rail Engineering Ltd* [2001] EWCA 242, [2001] ICR 942.
Armstrong v British Coal Corp [1997] 8 Med LR 259, CA.
Blyth v Birmingham Waterworks Co (1856) 11 Ex 781, [1843-60] All ER Rep 478. e
Bolton v Stone [1951] 1 All ER 1078, [1951] AC 850, HL.
Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615, [1956] AC 613, [1956] 2 WLR 707, HL.
Bryce v Swan Hunter Group plc [1988] 1 All ER 659.
Cartwright v GKN Sankey Ltd (1973) 14 KIR 349, CA.
Dingle v Associated Newspapers Ltd [1961] 1 All ER 897, [1961] 2 QB 162, [1961] 2 WLR 523, CA. f
Fairchild v Glenhaven Funeral Services Ltd [2001] EWCA Civ 1881, [2002] IRLR 129, [2002] 1 WLR 1052; *rvsd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32, [2002] 3 WLR 89.
Garrett v Camden London BC [2001] EWCA Civ 395, [2001] All ER (D) 202 (Mar).
General Cleaning Contractors Ltd v Christmas [1952] 2 All ER 1110, [1953] AC 180, [1953] 2 WLR 6, HL. g
Gillespie v Commonwealth of Australia (1991) 104 ACTR 1, ACT SC.
Gogay v Hertfordshire CC [2000] IRLR 703, CA.
Griffiths v Vauxhall Motors Ltd [2003] EWCA Civ 412, [2003] All ER (D) 167 (Mar).
Heyes v Pilkington Glass Ltd [1998] PIQR P303, CA. h
Holtby v Brigham & Cowan (Hull) Ltd [2000] 3 All ER 421, CA.
Holton v East Berkshire Health Authority [1987] 2 All ER 909, [1987] AC 750, [1987] 3 WLR 707, HL.
Jeromson v Shell Tankers UK Ltd, Dawson v The Cherry Tree Machine Co Ltd [2001] EWCA Civ 101, [2001] ICR 1223. j
Jolley v Sutton London BC [2000] 3 All ER 409, [2000] 1 WLR 1082, HL.
Knott v Newham Healthcare NHS Trust [2003] EWCA Civ 771, [2003] All ER (D) 164 (May).
Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

- Mallett v McMonagle* [1969] 2 All ER 178, [1970] AC 166, HL.
- a *Matthews v Kuwait Bechtel Corp* [1959] 2 All ER 345, [1959] 2 QB 57, [1959] 2 WLR 702.
- McGhee v National Coal Board* [1972] 3 All ER 1008, [1973] 1 WLR 1, HL.
- Page v Smith* [1995] 2 All ER 736, [1996] 1 AC 155, [1995] 2 WLR 644, HL; *rvsg* [1994] 4 All ER 522, CA; *rvsg* [1993] PIQR Q55.
- b *Pape v Cumbria CC* [1992] 3 All ER 211, [1992] ICR 132.
- Petch v Comrs of Customs and Excise* [1993] ICR 789, CA.
- Rahman v Arearose Ltd* [2001] QB 351, [2000] 3 WLR 1184, CA.
- Spencer v Boots The Chemist Ltd* [2002] EWCA Civ 1691, [2002] All ER (D) 465 (Oct).
- c *State of New South Wales v Seedsman* (12 May 2000, unreported), NSW CA.
- Tame v New South Wales, Annetts v Australian Stations PTY Ltd* [2002] ALR 449, Aus HC.
- Taylor v City of Glasgow Council* 2002 SC 364.
- Thompson v Smiths (Shiprepairers) (North Shields) Ltd* [1984] 1 All ER 881, [1984] QB 405, [1984] 2 WLR 522.
- d *Tomlinson v Congleton BC* [2003] UKHL 47, [2003] 3 All ER 1122, [2004] 1 AC 46, [2003] 3 WLR 705.
- Wagon Mound, The (No 2), Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617, PC.
- Waters v Comr of Police of the Metropolis* [2000] 4 All ER 934, [2000] WLR 1607, HL.
- e *White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1, [1999] 2 AC 455, [1998] 3 WLR 1509, HL.
- Wilson and Clyde Coal Co Ltd v English* [1937] 3 All ER 628, [1938] AC 57, HL.
- Wyong Shire Council v Shirt* (1980) 146 CLR 40, Aus HC.

f Appeal

- The claimant, Leon Alan Barber, appealed with the permission of the Appeal Committee of the House of Lords given on 17 July 2002 from the decision of the Court of Appeal (Brooke, Hale and Kay LJ) on 5 February 2002 ([2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613) allowing the appeal of the defendant, Somerset County Council, the employer of the claimant, from the order of Judge Roach at Exeter County Court on 8 March 2001 awarding the claimant damages and interest on his claim against the defendant for personal injury.

- Brian Langstaff QC* and *Andrew Buchan* (instructed by *Graham Clayton*, Exeter) for Mr Barber.
- h *Andrew Collender QC*, *Andrew Hogarth QC* and *Charlotte Reynolds* (instructed by *Veitch Penny*, Exeter) for the council.

Their Lordships took time for consideration.

- j 1 April 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Walker of Gestingthorpe. I am in full agreement with it, and for these reasons would allow the appeal and make the order which he proposes.

LORD STEYN.

[2] My Lords, I have had the privilege of reading the opinion of my noble and learned friend Lord Walker of Gestingthorpe. I agree with it. I too would make the order which he proposes.

LORD SCOTT OF FOSCOTE.

[3] My Lords, the issue in this case is whether the Somerset County Council (the council), who employed Mr Barber as a teacher at their East Bridgwater Community School, are liable to him in damages for the mental breakdown he suffered brought about by the pressures and stresses of his workload. I have had the advantage of reading in advance the opinion of my noble and learned friend Lord Walker of Gestingthorpe and gratefully adopt his exposition of the relevant facts and the history of this litigation.

[4] As Lord Walker has explained the Court of Appeal heard four conjoined appeals ([2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613) of which Mr Barber's case was one. In each case a defendant employer appealed against a finding of liability for an employee's psychiatric illness caused by stress at work. Two of the employees were teachers in public sector comprehensive schools—Mr Barber was one of them. Another of the employees was an administrative assistant at a local authority training centre. The fourth was a raw materials operative in a factory. The Court of Appeal heard the four cases together in order to try and provide guidance as to the principles that should be applied to cases where an employee's complaint about the system of work provided by his employer and under which he had had to work was not that the system had subjected him to some degree of unnecessary and unreasonable physical danger but that it had subjected him to a degree of mental stress carrying the risk of psychiatric illness.

[5] The judgment of the Court of Appeal was given by Hale LJ. In my respectful opinion her judgment succeeded in succinctly and accurately expressing the principles that ought to be applied. Lord Walker has cited para [29] of her judgment but has preferred, as a statement of general principle, the statement of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776. My Lords, my own preference is the other way round. Swanwick J did not have in mind the problems of psychiatric illness caused by stress. In *Stokes'* case the employee had been exposed at work over a long period to mineral oil which, on a daily basis, had saturated his clothing and come into contact with his skin. As a result of this he developed cancer of the scrotum from which he eventually died. The question (at 1782–1783) was whether there were steps or precautions that the employers ought to have taken to protect Mr Stokes from the risk of contracting the disease. The question, in short, was whether his employers were providing for him a reasonably safe system of work.

[6] An appreciation of the existence of physical dangers of the sort that Mr Stokes, unbeknownst to himself, was facing is dependent on scientific and medical knowledge. The factory doctor at the factory where Mr Stokes worked had known of the risk of scrotal cancer, had failed to draw the workforce's attention to the risk and had failed to institute periodic medical examinations of workers exposed to the risk. Swanwick J held that those failures constituted negligence. The contrast with psychiatric illnesses caused by stress is obvious. Take Mr Barber's case. The school authorities could only know what Mr Barber

a told them. This was the point Hale LJ was making in the passages in italics ([2002] 2 All ER 1 at [29]–[30]):

b *‘Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job ... Generally he is entitled to take what he is told by or on behalf of the employee at face value ... an employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before.’*

c Mr Langstaff QC, counsel for Mr Barber, protested that this approach was placing the onus on the employee to alert the employer. He is quite right. Such an approach would probably be unwarranted if the complaint was of a system of work which exposed the employee, or others, to a physical danger. An employer ought to take steps to understand the implications for the physical safety of his employees of the system of work he is imposing on them. But how can this approach be right where stress caused by a heavy workload is concerned? Most employees can cope. A few may have problems in coping. Only a tiny fraction of them will be at risk of psychiatric illness. And how can the employer even start to consider whether any special steps need to be taken unless the employee keeps the employer informed about his problems? Swanwick J was dealing with a completely different problem. Hale LJ was providing guidance as to the approach to a new problem.

e [7] Hale LJ formulated (at [43]) a number of ‘practical propositions’ applicable to cases where complaint is made of psychiatric illness brought about by stress at work. All are valuable but some are particularly pertinent to this case:

f *‘(2) The threshold question is whether [psychiatric] harm to this particular employee was reasonably foreseeable ... this has two components (a) an injury to health (as distinct from occupational stress) which (b) is attributable to stress at work (as distinct from other factors) ... (3) Foreseeability depends upon what the employer knows (or ought reasonably to know) about the individual employee. Because of the nature of mental disorder, it is harder to foresee than physical injury, but may be easier to foresee in a known individual than in the population at large ... An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability ...*

g *(4) The test is the same whatever the employment: there are no occupations which should be regarded as intrinsically dangerous to mental health ...*

h *(5) Factors likely to be relevant in answering the threshold question include: (a) The nature and extent of the work done by the employee ... Is the workload much more than is normal for the particular job? ... Are demands being made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs? ... (6) The employer is generally entitled to take what he is told by his employee at face value, unless he has good reason to think to the contrary. He does not*

j *generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisers ... (7) To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it ... (9) The size and scope of the employer’s operation, its resources and the demands it faces are relevant in*

deciding what is reasonable; these include the interests of other employees and the need to treat them fairly, for example, in any redistribution of duties ... (12) If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not be in breach of duty in allowing a willing employee to continue in the job ... (13) In all cases, therefore, it is necessary to identify the steps which the employer both could and should have taken before finding him in breach of his duty of care ...'

[8] Hale LJ applied these propositions to the primary facts of Mr Barber's case, as found by the trial judge, and expressed her disagreement with the trial judge's conclusions. She did so at [57]–[59] of her judgment (cited at [66], below). The trial judge, of course, did not have the advantage of Hale LJ's para [43] guidance. If he had, I do not think he would have said, as he did, that the 'crucial question' was—

'whether the pressures to which [Mr Barber] was exposed put him at a materially higher risk of mental illness than that which would affect a teacher working with [Mr Barber's] responsibilities under a heavy workload.'

He would have appreciated that the crucial questions were, first, whether Mr Barber's breakdown in November 1996, caused, as the judge held, by his heavy workload and responsibilities, was reasonably foreseeable by the school authorities (see Hale LJ's propositions (2), (3), (5), (6) and (7) at [43]); and, second, whether there were steps that the school authorities could, and should, have taken to prevent the breakdown (see Hale LJ's propositions (9), (12) and (13)).

[9] It may be that if the judge had had the advantage of the guidance provided by Hale LJ he would still have concluded that Mr Barber's breakdown was indeed reasonably foreseeable and that there were steps that the school authorities could, and should, have taken that would have prevented the breakdown. A fair reading of his judgment suggests the probability that he would have come to these conclusions. The council would have appealed. Would it have been open to the Court of Appeal to disagree with the trial judge's conclusions?

[10] It is at this point that, to my regret, I find myself in disagreement with a majority of your Lordships. Your Lordships are all agreed in approving the statements of legal principle and the practical guidance to be found in the judgment of Hale LJ. But your Lordships disagree with Hale LJ's reversal of the trial judge's conclusions. As Lord Walker of Gestingthorpe puts it, at [67], below 'there was insufficient reason for the Court of Appeal to set aside [the trial judge's] finding' that Mr Barber's employer was in breach of duty; and, at [70], below: 'The judge was entitled to form the view that the school's senior management team were in a position of continuing breach of the employer's duty of care ...' My noble and learned friend Lord Rodger of Earlsferry expresses himself in similar terms (at [16], below): 'I am satisfied that there was material on which the judge was entitled to take the opposite view.'

[11] My Lords the question, in my respectful opinion, is not whether the trial judge 'was entitled' on the material before him to come to the conclusions he came to. The question is whether his conclusions were correct. The Court of Appeal thought they were not. A statement that the trial judge was entitled to come to the conclusions leaves that question unanswered. The conclusions are judgmental. They are not findings of primary fact; they are not conclusions as to how some judicial discretion should be exercised. They constitute the judgment of the trial judge based upon his findings of primary fact. Why cannot the Court

a of Appeal substitute their own judgment if it thinks the trial judge's judgment was wrong? The Court of Appeal's function in hearing Mr Barber's appeal, and the other three appeals, was to review the conclusions of the trial judge. CPR 52.11(1) says, subject to some exceptions not here relevant: 'Every appeal will be limited to a review of the decision of the lower court ...' A 'review' surely entitles the appeal court in a case such as this to consider the standard of care that the trial judge has held the defendant should have observed and, if it thinks the standard to be too strict, or not strict enough, to substitute its own standard. That is what the Court of Appeal did in the present case.

[12] After the primary facts have been found and proper directions as to the legal principles to be applied have been given, the decision as to whether a defendant was in breach of the duty of care owed to the claimant has still to be taken and will in every case depend on the standard of care that is thought requisite. This is so in the simplest of cases. Take the case where a pedestrian has stepped off the pavement and been hit by a car. The car was travelling at 25 mph and the motorist could have foreseen the possibility that the pedestrian might step into the road but did not do so. What standard of care is to be required of the motorist? The trial judge may conclude that the speed of 25 mph, in view of the traffic conditions and the likelihood of jaywalkers, was excessive and, accordingly, hold the motorist to be in breach of his duty of care. An appeal court, conducting a review, and accepting all the primary findings of fact, may take the view that the trial judge set too high a standard of care and that the motorist should not have been held to be in breach of his duty of care. It is, I repeat, a legitimate and important function of the Court of Appeal in negligence cases to review the standard of care set by the decisions of the lower courts and to correct the lower courts' rulings if it thinks them to be wrong.

[13] The critical issue in the present case relates to the standard of care required to be observed by school authorities in relation to teachers who they have reason to know, or believe, are having difficulty in coping with their heavy workload and are consequently suffering from some degree of stress. The trial judge thought that the school authorities, given what they knew about Mr Barber's problems in the 1996 summer term, should have relieved him of some of his workload and responsibilities in the autumn term. That would be setting a high standard of care. Mr Barber was an experienced teacher who had, in the summer term, taken three weeks off work after seeing his doctor who had diagnosed stress and depression. The decision to see his doctor was a decision that he, himself, was able to take. He then followed his doctor's advice. Again, that was his, Mr Barber's, decision. It was one he was able to take. It might have been expected that, in the autumn term, if again he found himself unable to cope, he would have followed the same course. But the trial judge thought that the school authorities, because they knew of his problems in the previous term, and although he had not given them any indication that his problems were continuing and increasing, owed him a duty that required them to relieve him of some of his workload in the autumn term. Hale LJ, however, thought (at [59]) that that was setting too high a standard of care:

'... it is difficult indeed to identify a point at which the school had a duty to take the positive steps identified by the judge ... it is expecting far too much to expect the school authorities to pick up the fact that the problems were continuing without some such indication.'

[14] In my opinion, the correction by Hale LJ of the standard set by the judge was justifiable and should be upheld by the House. Schools operate under considerable difficulties. I do not suppose there are many, if any, teachers whose workload does not place them under considerable continuous pressure apt to cause stress and sometimes depression. The same, I suspect, would apply to many professional employees. Nurses and doctors working in the NHS are an obvious example. Employed lawyers working in busy city firms are probably another. Pressure and stress are part of the system of work under which they carry out their daily duties. But they are all adults. They choose their profession. They can, and sometimes do, complain about it to their employers. In underfunded institutions providing vital social services there is often very little that the employers can do about stress problems. Colleagues in the school, or hospital, are likely to be carrying an equally heavy workload. Is it fair to ask them to assume a greater burden in order to relieve the stress on a particular teacher? Can the school afford to ask for a supply teacher? As a last resort the school may have to do so. But the school is entitled to expect, first, to be kept fully informed by the teacher in question of his or her problems. Mr Barber communicated nothing to his school authorities in the two months of the autumn term that preceded his breakdown. The school is entitled to expect, also, that the teacher, an adult, will take his own decisions as to whether he needs to consult his doctor and will, if so advised by his doctor, take time off. Mr Barber had done so in the summer term. These comments of mine do no more than express in different words what Hale LJ said (at [58] and [59]) in explaining why she disagreed with the conclusions of the trial judge.

[15] In my opinion, the trial judge set the standard of care required of Mr Barber's school authorities at too high a level and Hale LJ adjusted the standard to a proper, more realistic, level. The standard set by the trial judge was too demanding. She was entitled on a review of his decision to reverse him. Your Lordships may, in disagreement with the standard set by her and in agreement with the standard set by the judge, restore his order. But, for my part, I think the standard set by Hale LJ was a realistic recognition of the particular difficulties posed by complaints by teachers of psychiatric illness caused by heavy workload and consequent stress. I would dismiss this appeal. I would add only that, having had the advantage of reading in advance the opinion of my noble and learned friend Lord Rodger of Earlsferry, I agree with everything he has said save his conclusion that the appeal should be allowed.

LORD RODGER OF EARLSFERRY.

[16] My Lords, as my noble and learned friend, Lord Walker of Gestingthorpe, has explained, at the hearing before your Lordships the main emphasis in the submissions of counsel was on the facts of this particular case. More precisely, counsel addressed the question whether, on the evidence, Judge Roach had been entitled to hold that the school authorities ought to have foreseen that, if he continued with his existing workload, Mr Barber was liable to develop a mental illness. The Court of Appeal considered the same question and, having read the transcript of the evidence for themselves, they concluded ([2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613) that it was expecting far too much to expect the school authorities to pick up the fact that Mr Barber's problems were continuing in the autumn term of 1996, when he had not gone to Mr Gill at the beginning of the term and told him that things had not improved over the holidays. I have considerable sympathy with that view. Having carefully considered the analysis

a of the evidence in Lord Walker's speech, however, I am satisfied that there was material on which the judge was entitled to take the opposite view. Counsel for Somerset County Council (the council) did not suggest that he had applied the wrong test. In these circumstances I am unable to say that the judge, who had enjoyed the advantages, 'sometimes broad and sometimes subtle', of seeing and hearing the witnesses, was 'plainly wrong' (see *Clarke v Edinburgh and District Tramways Co Ltd* 1919 SC (HL) 35 at 37 per Lord Shaw of Dunfermline, quoted with approval by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 at 587, [1947] AC 484 at 488). It follows that the Court of Appeal should not have disturbed the judge's conclusion that the school authorities ought to have foreseen that Mr Barber's mental health would be impaired if he continued to work the same hours as he had been working since September 1995.

c [17] It is apparent from the pleadings, and from counsel's closing skeleton argument for the council in the county court, that the parties went into battle on a number of issues: in particular the foreseeability of Mr Barber developing a mental illness, as opposed to suffering from stress, the causes of his illness and the measure of damages. The judge resolved all these issues in Mr Barber's favour.

d The content of the employers' duty of care does not appear to have been addressed as a specific topic.

[18] The employer's duty is to take reasonable care to avoid injuring his employee's health. Therefore, as the Court of Appeal stressed (2002] 2 All ER 1 at [33], [34]), even where a court finds that such injury was foreseeable, it must go on to consider what steps the employer could reasonably be expected to take once he was aware of that risk and whether they would have been effective.

e [19] In his pleadings Mr Barber simply alleged that the council 'failed to provide the plaintiff with proper help and assistance' which the council, equally simply, denied. There is nothing to suggest that at the trial the parties explored the nature of the help and assistance which the council were said to be under a duty to provide. Against that background it is perhaps not surprising that, having expressed the view that a prudent employer would have investigated his employee's situation 'to see how his difficulties might be improved', the judge went on to say: 'The prudent approach would have been to investigate [the possible risks to Mr Barber's health] and provide assistance if only in the short term.' He then concluded:

'The failure to investigate or provide at the least temporary assistance led in my judgment to the claimant attempting to cope and in the result inevitably failing in that attempt by November 1996.'

h [20] This conclusion is not a proper basis for holding the council liable in damages to Mr Barber. The judge assumes that *either* the failure to investigate *or* the failure to provide at least temporary assistance led to Mr Barber's breakdown in November 1996. But any failure to investigate would not have had a bearing on the onset of Mr Barber's illness unless the council would have been under a duty to take steps that would actually have alleviated the situation and so prevented the illness. Unfortunately, the judge does not explain what 'assistance' the council were under a duty to provide or for how long. Nor does he explain why he thinks that 'temporary assistance' would have prevented the illness in November 1996 or after the assistance was withdrawn, when evidence that he accepts indicates that the three weeks' absence on sick leave in May did not effect a cure.

[21] Although the amount of the damages to be awarded is now agreed, it is worth noticing that in assessing them the judge appears to have envisaged that the 'temporary' assistance to Mr Barber might have been quite long-lasting. The council argued that the damages should be reduced to take account of the possibility that Mr Barber would not have continued as a teacher because of his disenchantment with the profession. The judge rejected this argument, saying:

'Had he received assistance to alleviate his work overload and the pressures to which he was subject at work in 1996 I take the view on a balance of probability that he would have continued in his chosen profession until retirement age.'

Here the judge seems to assume that assistance to alleviate Mr Barber's workload would have been provided on a basis that would have meant that, for the rest of his career, Mr Barber would not have been under the same pressures as in 1996.

[22] My Lords, for my part, I find the judge's conclusions on this crucial part of the case very far from satisfactory. Indeed, were it not for the fact that the council do not really seem to have fought the case on this issue, I would have been disposed to dismiss the appeal on the basis that Mr Barber had failed to prove that, if the council had taken reasonable care, he would not have developed the illness. But, in the absence of any significant evidence on behalf of the council dealing with this issue and in the absence of any direct challenge by them, they cannot complain if the most favourable inferences of which it is reasonably capable are drawn from the evidence led on behalf of Mr Barber (*Ross v Associated Portland Cement Manufacturers Ltd* [1964] 2 All ER 452 at 454, [1964] 1 WLR 768 at 775 per Lord Reid). So, on balance, I would not disturb the judge's finding on the point.

[23] Lord Walker of Gestingthorpe has spelled out in more detail the nature of the assistance which he envisages the council would have been under a duty to provide. The senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work and in 'making some reduction in his workload to ease his return' (see [68], below). Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might have made a real difference. If his condition did not improve, some more drastic action would have had to be taken. Employing a supply teacher would have been one possible remedy and preferable to the permanent loss through psychiatric illness of a valued member of the school staff. I must explain briefly why I do not feel able to go as far as Lord Walker in identifying what the council should have done in this case.

[24] The arguments of counsel before the House took account of certain aspects of the wider context in which any common law duty of care would operate. In particular, reference was made to the health and safety legislation and to the relevant code of practice as well as to the guidelines on the effects of stress at work. On the other hand much less attention was paid to the contract(s) between the council and Mr Barber. It is frequently said that, as between the parties to a contract, any duty of care in tort can be equated with an implied contractual term to the same effect. So in a case involving a teacher, the conditions of employment of teachers of the relevant grade are relevant. Teachers' pay and conditions are the product of national negotiations between representatives of the education authorities and the teachers' unions. Government education and funding policies form the backdrop to these negotiations which result in a complex set of terms and conditions. During the hearing your Lordships

a were supplied with a copy of those that applied in 1996. In determining the content of any duty of care that the council owed to Mr Barber, it would be necessary to have due regard to the relevant provisions of his contract with them, embodying these terms and conditions.

b [25] In fact, in his case there was a contract governing his position as mathematical area of experience co-ordinator (mathematics co-ordinator) and another contract governing his position as project manager responsible for publicity and media relations. In 1995 Mr Barber's salary in his new position as mathematics co-ordinator was to be less than his previous salary as head of department before restructuring and he took on the additional post as project manager in order to try to maintain his income. It was the combined workload of these two positions that Mr Barber found intolerable.

c [26] Mr Barber's problem arose from doing the work which he had contracted to do and for which the council paid him under his contracts. Moreover, the judge was not satisfied that this pressure of work 'in itself' placed him at a materially higher risk of mental illness than another teacher working in a comparable position with a heavy workload. In other words, the demands placed on Mr Barber were d not excessive in themselves, but only excessive in the case of Mr Barber because of some factor in his own personality or some condition that made him more vulnerable to developing a mental illness as a result of the stress involved in his work. There is therefore no question of the council having reduced staffing to such a level as to put all their teachers at risk of developing a mental illness. Such a case would raise very different issues. Rather, the question is: what steps did the council e have to take when, by reason of some individual vulnerability, Mr Barber was liable to suffer material injury to his (mental) health if he carried out the duties which were stipulated in his contract(s) and for which he was paid his salary?

[27] As the Court of Appeal point out, it is really impossible to begin to answer that question without first knowing what steps might have been effective to f safeguard Mr Barber's health. But the judge made no finding as to whether Mr Barber would have fully recovered his health and been able to tackle his entire workload if he had been given some (particular kind of) assistance for a (short) time. This would have required expert psychiatric evidence. In the absence of such evidence, one might incline to the view that, since Mr Barber was soon unable to cope when the autumn term began after the summer holidays, he would have been g equally unable to cope when he returned to his full duties after some period of lighter work. If so, temporary assistance would not have provided an effective solution. At most, it would have postponed the start of his illness.

[28] On the judge's findings the school authorities were faced with a situation where Mr Barber was unfit, through no fault of his or theirs, to carry out the duties h which he had agreed to perform. In his particular case, one possible way of alleviating the problems might have been for him to give up his position as project manager and concentrate on his work as mathematics co-ordinator. Again, there is nothing in the judge's findings in fact to show whether that step would have relieved the pressure on him sufficiently to allow him to carry on with his duties as j mathematics co-ordinator without any risk to his health. Nor is there anything to suggest that Mr Barber ever contemplated taking that step—which would, of course, have meant a reduction in his total salary.

[29] Mr Barber might well have resisted any suggestion that he should give up his work as project manager and take a corresponding reduction in salary. And there must be situations where, just as an adult cannot be required to undergo medical treatment against his will, he is entitled to continue working at high

pressure, even though he runs the risk of damaging his health, whether mental or physical. For example, a university teacher employed to do research can surely choose to work all hours of the day and night, at possible or even obvious risk to his health, in the hope of making a breakthrough in deciphering an ancient language or unravelling some secret in genetics. The university authorities can hardly be under any duty to do more than warn of the possible dangers: they cannot be obliged to lock away the photographs of the texts or bar the laboratory doors to prevent him from working into the night. Not only would that be to interfere with his right to carry out his duty of research under his contract: it would risk depriving the world of the benefits of his discovery.

[30] Most people are not engaged in work of that kind. It could be said that, in other cases, where an employee is liable to develop some illness if he carries out the job which he is employed to do, the employer owes him a duty of care not to continue to employ him to perform that job. That might be one possible view in a case like Mr Barber's. But such a duty would have to mesh with the provisions of the relevant employment contract regulating sickness absences and ill-health retirement. More importantly, at least where the risk is small, the common law has taken the view that the employee can decide whether to run it. Devlin LJ explained the position in a well-known passage in *Withers v Perry Chain Co Ltd* [1961] 3 All ER 676 at 680, [1961] 1 WLR 1314 at 1320. An employee had chosen to go on working even though there was a risk that she would develop dermatitis. Devlin LJ said:

'In my opinion there is no legal duty upon an employer to prevent an adult employee from doing work which he or she is willing to do. If there is a slight risk, as the judge has found, it is for the employee to weigh it against the desirability, or perhaps the necessity, of employment. The relationship between employer and employee is not that of a schoolmaster and pupil. There is no obligation on an employer to offer alternative safe employment, though no doubt a considerate employer would always try to do so—as the defendants thought they had done here. Nor is there any obligation on an employer to dismiss an employee in such circumstances. It cannot be said that an employer is bound to dismiss an employee rather than allow her to run a small risk. The employee is free to decide for herself what risks she will run. I agree with what Sellers LJ has said, that if the common law were to be otherwise it would be oppressive to the employee, by limiting his ability to find work, rather than beneficial to him ... It may be also (on the principle of *Paris v Stepney Borough Council* ([1951] 1 All ER 42, [1951] AC 367)) that when the susceptibility of an employee to dermatitis is known there is a duty on the employer to take extra or special precautions to protect such an employee.'

I do not pause to consider how far, if at all, the reasoning in this passage is affected by the current requirements on employers to carry out risk assessments, but I draw particular attention to Devlin LJ's view that the employer is under no common law obligation to offer alternative safe employment. That is, in effect, the obligation which Mr Barber would impose on the council—not in the sense of finding him a job in some other part of the school, but in the sense of changing his job by supplying assistance that would reduce his workload and make it safe for him to carry on as mathematics co-ordinator and project manager at the same pay. In contract terms, that amounts to saying that his job specification should be changed and the employers' obligations under the contract correspondingly increased in these circumstances.

a [31] In support of a duty of care of that kind Mr Langstaff QC relied on *Walker v Northumberland CC* [1995] 1 All ER 737, [1995] ICR 702, a decision that has often been cited in subsequent cases on mental illness caused by stress at work. In that case the plaintiff, a social worker, had suffered a mental breakdown when he was driven to the point of despair by the council's failure to provide him with what he considered to be sufficient resources to satisfy the urgent needs of the people, and particularly the children, of his area for social services. He returned to work on the basis that he would be provided with assistance but, due to additional demands on the social services in the area, it did not materialise. Colman J held ([1995] 1 All ER 737 at 760, [1995] ICR 702 at 721), that the standard of care to be expected of a reasonable local authority required that—

c 'additional assistance should be provided, if not on a permanent basis, at least until restructuring of the social services had been effected and the workload on Mr Walker thereby permanently reduced.'

d The assistance should have been provided 'notwithstanding that it could be expected to have some disruptive effect on the council's provision of services to the public'. The decision is distinguishable, but what matters is the view that an employer can be under a duty of care to provide an employee with assistance, of uncertain scope and duration, to enable him to perform his contractual duties.

e [32] That view also lies at the heart of the judge's perception of the council's duty of care in this case. Mr Barber would be at work, drawing his normal pay, but doing less than his contractual duties—the council being obliged to provide him with assistance to top up the deficit. It is easy to see that, in practice, colleagues would often rally round to help a teacher when he returned after being off sick. And they might well do so at other times when they felt that, perhaps because of a family illness, a colleague was going through a difficult patch. No doubt, a head teacher f would try to create an atmosphere that would be conducive to such mutual assistance. But it is rather a different thing to say that the council's duty of reasonable care to an employee requires them to provide him with assistance for an indefinite period even to the extent of employing a supply teacher so that he can do the amount of work he can cope with, but less than the amount for which he is being paid in terms of his contract. The difficulty of framing an implied term to that g effect and reading it into a contract of employment is obvious. I refer generally to the instructive discussion of implied terms relating to working hours in the opinion of Browne-Wilkinson V-C in *Johnstone v Bloomsbury Health Authority* [1991] 2 All ER 293, [1992] QB 333.

h [33] Contracts of employment will often have provisions dealing with the employee's sickness. If an employee is off work because of illness, he will be entitled to statutory sick pay at a particular rate. His colleagues may be asked to provide cover for him, but this puts extra pressure on them and, in the case of teachers, the terms of their contracts strictly limit the time for which they can be required to do this. Beyond that, the school authorities will have to try to find a suitable supply teacher. By contrast, teachers' contracts do not oblige them to j provide cover for a colleague who is present but not doing his full workload. The school authorities would have to bear the cost of any supply teacher. Not surprisingly, the assumption underlying the conditions of contract appears to be that the authorities can expect teachers, who are not off sick, to carry out their contractual duties. Pupils and their parents also might think that the person chosen and employed as best fitted to lead the mathematics team would be able to do the

job and not have to hive off part of it to someone else who had not been selected for the post. a

[34] The contract of employment will usually regulate what is to happen if an employee becomes unable, due to illness or injury, to carry out his duties. There may be provision for a defined period on full pay, followed by a further defined period on reduced pay, followed by termination of the contract. At the end of the process the employer is free to make new arrangements. While the timetable is likely to be definite, the exact legal analysis of the employee's position when off work under such provisions is by no means free from difficulty. Whatever the position, however, the introduction of a tortious duty of reasonable care on the employer to provide assistance so that the employee can return to work and draw his normal pay, but do less than his full duties for an indefinite period, does not sit easily with such contractual arrangements. Nor does it seem likely to promote efficiency within the enterprise or department. b

[35] When the contractual position, including the implied duty of trust and confidence, is explored fully along with the relevant statutory framework, your Lordships may be able to give appropriate content to the duty of reasonable care upon which employees, such as Mr Barber, seek to rely. But the interrelationship of any such tortious duty with the parties' duties under the contract of employment has not been examined in any depth in the cases to which we were referred and was not analysed in this appeal. For that reason I would not wish to express any view on the content of the council's duty of care in this case. c

[36] Subject to these observations, I respectfully agree that, for the reasons Lord Walker of Gestingthorpe gives, the appeal should be allowed. d

LORD WALKER OF GESTINGTHORPE. e

[37] My Lords, Mr Alan Barber (the claimant at first instance and the appellant in this House) was a schoolteacher. He took early retirement at the end of March 1997 (when he was 52 years old) after suffering a mental breakdown at school in November 1996. Since then he has been unable to work as a teacher, or to do any work other than undemanding part-time work. He sued his employer, the Somerset County Council (the council), for damages for personal injuries (principally in the form of serious depressive illness). His claim was heard in the Exeter County Court by Judge Roach, who gave judgment in his favour on 8 March 2001. Mr Barber was awarded general and special damages amounting to just over £101,000, including interest, with costs. f

[38] The council appealed to the Court of Appeal which heard the appeal together with three other appeals. They were all appeals by employers against awards made to employees for psychiatric illness caused by stress at work. On 5 February 2002 the Court of Appeal allowed three of the appeals (including the council's appeal against Mr Barber) in a composite judgment reported as *Hatton v Sutherland* [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613. The Court of Appeal held that the council had not been in breach of their duty as an employer. It also held that in any event the judge should have calculated Mr Barber's loss of future earnings on a lower multiplier because of the chance that, if he had continued with a similar teaching job, his health might have broken down in the same way. Mr Barber appeals to this House with leave granted by an Appeal Committee (but does not challenge the Court of Appeal's reduction of the multiplier). There has been no further appeal in any of the other three cases. g

[39] As the argument before your Lordships developed, it became apparent that the area of dispute between the parties was quite limited. Mr Barber did not h

a challenge, except on peripheral points and matters of emphasis, the principles of law set out in the judgment of the Court of Appeal (delivered by Hale LJ). The council, while not uncritical of the judge's judgment, did not challenge any of his findings of primary fact. In the event the main issue for your Lordships is whether the Court of Appeal was right to conclude, as it did, that the evidence before the judge did not, even taken at its highest, sustain a finding that the council were in breach of the duty of care which they owed, as employer, to Mr Barber. It is b therefore necessary to go into the facts in some detail.

[40] Mr Barber trained as a teacher in London, specialising in mathematics and physical education. After qualifying in 1970 he moved out of London, and between 1971 and 1984 he held teaching posts at two different schools in Wiltshire. He married in 1972 and had three children, all now adult. His wife left him in 1989 and c they were divorced in 1990, but the divorce was not acrimonious.

[41] In 1983 Mr Barber applied successfully for the post of head of the mathematics department at the East Bridgwater Community School (then called Sydenham Comprehensive School). He started in his new post in January 1984. The school was then facing serious problems, which seem to have got worse rather d than better during Mr Barber's time at the school. Its catchment area contained many disadvantaged families. The school roll was dropping from a high point of over 1,000. It eventually reached less than half that number. This had a direct effect on the school budget, including the amount available for teachers' salaries. Nevertheless Mr Barber saw his new job as a challenge. The judge recorded that it e was common ground that Mr Barber was regarded by those with whom he worked as a dedicated and conscientious teacher. The judge also described Mr Barber as diligent and industrious.

[42] In consequence of the falling school roll there was in 1995 a restructuring of staffing at the school. The posts of heads and deputy heads of department were abolished and Mr Barber reapplied for the post of 'mathematical area of experience f co-ordinator'. His two deputies (two highly regarded women teachers) lost their status as his deputies and (while continuing to teach mathematics) were required to take on new and demanding pastoral duties. Mr Barber was told that in order to maintain his salary level he would have to take on further responsibilities. He was interested in taking on an environmental project, but instead was invited to apply g to be project manager for public and media relations, and he was appointed to that position. Public and media relations were regarded as important by the school's senior management team, because of the need to improve the school's reputation (and so increase its enrolment). All these changes took effect at the beginning of the autumn term in September 1995.

[43] It is common ground that Mr Barber worked long hours in discharging his h new responsibilities. He regularly came back into school to work on weekday evenings. He had always done some schoolwork at weekends, but the weekend hours lengthened. He estimated that he was working between 61 and 70 hours a week. Under the terms set out in the School Teachers' Pay and Conditions Document 1996 (and it was not suggested that the earlier version was materially j different) a full-time teacher has one very specific obligation (that is, to be available for work on 195 days in any school year, 190 days being teaching days, for a total of 1,265 hours) and one much more general and open-ended obligation, in that para 40.7 provides that a full-time teacher shall—

'work such additional hours as may be needed to enable him to discharge effectively his professional duties, including, in particular, the marking of

pupils' work, the writing of reports on pupils and the preparation of lessons, teaching material and teaching programmes. The amount of time required for this purpose beyond the 1,265 hours referred to in para 40.3 and the times outside the 1,265 specified hours at which duties shall be performed shall not be defined by the employer but shall depend upon the work needed to discharge the teacher's duties'. a

[44] The judge's findings about Mr Barber's workload were as follows: b

'In total the claimant worked long hours per week. The precise number was not agreed between the parties but ranged from something in the order of 61 to 70 hours per week. These hours in themselves are perhaps not truly exceptional for a professional man but I accept that the week's work was arduous, hectic and perforce extended well beyond the normal working day and encroached to a material degree into the weekend'. c

[45] Mr Barber was not the only teacher who found school life stressful after the restructuring. Even before 1995, there were tensions between the school's senior management team (that is the head teacher and her two deputies) and other members of the staff. The judge recorded that Mr Barber was not the only teacher who gave evidence about the 'autocratic and bullying style of leadership' of the head teacher, Mrs Hayward. d

[46] Towards the end of 1995 Mr Barber was beginning to feel the strain. Your Lordships were urged by Mr Collender QC (for the council) to distinguish clearly between what Mr Barber himself thought or felt about his state of health at different times during the last year of his teaching career, and what he communicated about it to his employer (in the persons of the senior management team at the school, or officials of the council's education department based at Taunton or Street). I readily accept that that is a point of great importance to the disposal of this appeal. At the beginning of the autumn term in 1995 the council had no reason to think that there was any particular problem with Mr Barber. The documentary evidence shows that he was sometimes mildly criticised for being slow to make up his mind, and sometimes regarded as reluctant to co-operate in managing change. But these were minor matters. In general he was regarded as a mature, skilled and conscientious teacher with no problems other than those which he shared with all his hard-pressed colleagues. In March 1995 Mr Gill (one of the deputy heads) had written in a testimonial supporting Mr Barber's application for his new post: e
f
g

'He has a cheerful disposition and is well liked by colleagues from all areas within the school. His health, reliability and punctuality are good. I have no doubt that he will respond to the challenge of organising the [mathematical] area of experience and always give of his best.' h

The school records of absence for medical reasons show that between 1992 and 1995 (inclusive) Mr Barber was absent for an average of about four school days a year, in each case for minor physical ailments. j

[47] In his witness statement Mr Barber gave his own account of the onset of his troubles:

'I first realised that I was not coping very well with all these changes and additional pressures in the last two months of 1995. I found that I was losing weight and I think that I looked drawn. I would wake up regularly in the night.'

a I felt as if I was having out of body experiences where I would be looking at myself from outside the room I was sitting in. I believed I had completed tasks which I hadn't completed and I became confused. I felt that I was losing the ability to control my classes.'

b Over Christmas close relatives of his expressed concern and urged him to look for another job or (after Mr Barber suggested this alternative) to take early retirement. But on returning to school in the new year he found himself too busy to investigate early retirement. During the spring term of 1996 he felt even worse. On 20 February, at one of his regular monthly meetings with Mr Gill (the deputy head in charge of the timetable), Mr Barber was recorded as speaking of 'work overload'. His general practitioner's medical records (not then known to the school) show that c on 4 March and again on 4 April he consulted his doctor about 'work stress'. On each occasion there was a discussion with his doctor but no medication or referral.

[48] During the spring term attention focused on the prospect of an Ofsted inspection due in the autumn. This was a cause of general anxiety in the school and an official of the council's education department, Mrs Murray, visited the school to listen to the views of those teachers who were regarded as 'middle management'. d Mr Barber and a colleague of his, Mr Johnson, had a long meeting with her. They expressed concern about the extra workload caused by the restructuring, and about other matters including school discipline.

[49] During the Easter holidays Mr Barber did obtain figures from County Hall for early retirement, either on the normal basis or on grounds of ill-health. The e crucial period begins with the summer term of 1996. Mr Barber said in his witness statement:

'I returned to school for the summer term on 7 April 1996. The Easter holidays had afforded me little relief due to the work I had had to carry out during that break. The pressures continued and eventually in May 1996 I saw f my general practitioner who signed me off work for two weeks. He told me I was suffering from stress and depression. I recall being astounded. I was not surprised that the doctor said I was suffering from stress. I was perfectly aware that I was stressed and overworked. I was astounded that I had been diagnosed as suffering from depression.'

g [50] The medical records show a slightly different sequence of events. On 2 May Mr Barber took a day off work with 'flu-like symptoms'. On 8 May he saw his doctor whose notes recorded:

'E: Stress

h S: Tried several strategies to handle his stress at work. However, is feeling worse. Sleeping disorders, awakes early, concentration problems, sooner irritated, shaking, hardly to relax.

P: Had a long conversation. Is starting to [accept?] his stress. Decided to stop with working for next week. Offered him a beta blocker but he wanted to try without.

j Review 1/52'

According to the school sickness records his first day off work with stress and depression was 13 May (a Monday) and he returned to work three weeks later, on Monday 3 June. He had sick notes (form MED 3) signed by his doctor on 11 May ('over stressed/depression') and 16 May ('stress'). The medical notes for 16 May record:

'E: Stress

S: Going much better. Went away to the coast for some days, with many benefits. a

P: Advised to stay away from his work for 1–2 weeks more.

MED 3 issued for 1 week. Review Dr Gardiner 2/52.'

The notes for 30 May (with Dr Gardiner, a more senior partner in the practice) record: b

'E: [D] Work Stress

S: Feeling vmb, re-structuring happening at work and keen to get back to influence it.'

On his return to work on 3 June, Mr Barber filled in the council's form of sickness declaration stating his trouble as 'overstressed/depression'. This form was signed by Mr Barber on 4 June and countersigned on 5 June by Mrs Newton, one of the deputy heads. c

[51] I have set out this documentary evidence in some detail because it records the first occasion on which the school's senior management team might have realised that something was going seriously wrong with Mr Barber. He had already spoken to Mr Gill about overwork. But here was a senior, hard-working and conscientious teacher missing three weeks in the middle of the summer term, despite the extra work which (as he must have known) his absence would place on the shoulders of his hard-working colleagues. It can hardly have escaped Mrs Hayward and her deputies, Mrs Newton and Mr Gill, that this was a disturbing development which called for inquiry. d

[52] Mr Barber's account of his return to work was as follows: e

'On my return to work nothing much had changed. I had posted in my sick certificates to Mrs Newton, the Deputy Head at school who was responsible for staff absences. The certificates had clearly stated that I was suffering from overstress and depression. I was surprised that no one approached me to discuss my illness and what could be done to ease my burden at work. In fact, nothing had changed. If anything, there was a slight backlog created by the fact that only very urgent administrative tasks had been undertaken and my pigeonhole had "exploded" in my absence. There was also some additional marking which had not been done.' f

[53] Mr Barber decided to take the initiative in arranging a meeting with the head teacher. A meeting took place at some date in June. There was a conflict of evidence as to what happened at the meeting, at which no one else was present. The judge heard oral evidence from Mr Barber and Mrs Hayward and his findings were as follows: g

'On his return he had an informal but confidential meeting with the headmistress, Mrs Hayward. I accept the timing of this meeting as assessed by Mr Barber and I accept too that he raised with her his concerns that he was finding things difficult and was not coping very well with his workload. Mrs Hayward in her evidence to me could not remember this meeting but remembered a meeting which she thought had taken place at an earlier date when the issue of early retirement for the claimant had been discussed. I prefer the evidence of the claimant on this aspect of the matter. Here in my view was a senior member of the management team at East Bridgwater School being made aware positively of the stresses to which the claimant was subject and h

a that he felt he was not coping. Set against a background where the claimant had just returned to work suffering from stress, this was a clear warning to the management that this man required assistance to carry out his duties even if because of budgetary constraint that help would have had to be limited in time. In the result Mrs Hayward treated the claimant unsympathetically, telling him as she indicated in evidence to me that all the staff were under stress'.

b [54] During July Mr Barber had separate meetings with the two deputy heads. The judge's findings about these meetings were as follows:

c [There was] a meeting with the deputy headmistress, Mrs Newton, on 16 July 1996. In that meeting Mrs Newton was told by the claimant that he could not cope with his workload and the situation was becoming detrimental to his health. Mrs Newton's reaction to him was similar to that of Mrs Hayward. Despite being told that the claimant had already had to take time from work for stress and depression and that he could not see himself in his post in the immediate future if the work content remained the same, Mrs Newton took no steps to investigate or remedy the situation. Instead she referred the claimant to Mr Gill and ended the meeting abruptly. Subsequently, the claimant told Mr Gill of his problems and the background to his problem being referred to Mr Gill. But whilst Mr Gill was more sympathetic in his approach to the claimant's difficulties he took no steps to improve or consider the situation beyond urging Mr Barber to prioritise his work.'

d The meeting with Mr Gill was probably on 19 or 20 July 1996, at the very end of the summer term.

e [55] Just before the end of the summer term the mathematics department was moved from the school's second floor to the third floor. This added to Mr Barber's distress. During the summer holidays he went camping in Cornwall. But just after his return home from holiday he had a panic attack during the night. He saw his doctor on 20 August and again on 21 August; the provisional diagnosis was asthma (from which he had not suffered before).

f [56] It appears that when Mrs Hayward told Mr Barber in June 1996 that early retirement was out of the question for him, she was arranging her own early retirement. This was announced about five weeks before the end of the summer term. At the beginning of the autumn term Mr Gill was acting temporarily as head teacher, with the Ofsted inspection due in November. Mr Gill told Mr Johnson, a colleague of Mr Barber, that he was concerned about Mr Barber. He hoped that Mr Johnson would keep an eye on Mr Barber, but did not actually ask him to do so. Nor did Mr Gill (who must have had many urgent demands on his time) take the initiative in asking Mr Barber how he was getting on.

g [57] The judge did not make any detailed findings about the events of the autumn term. Mr Barber's account (and the judge accepted him as a truthful witness) was that he found himself with the same or even possibly a slightly heavier workload. He had only four free periods a week. He went to see his doctor on 19 September. He was not advised not to go to work. The doctor's notes of this consultation are as follows:

h 'E: Asthma

S: OK. Chat. Pressures returning at work.'

[58] Mr Barber evidently felt that he had failed to explain to the doctor just how bad his condition was. On 25 October he wrote a long letter to his doctor since (as he said) he found that a better way of communicating. He described his problems and symptoms in detail. The letter ended:

‘The whole secondary school scene acts as an automatic trigger reaction that sets off these problems within me that I can’t control so that now I feel sleepy and drained in the classroom and I know that at school and at home things are spiralling out of control. I therefore seek your support to be referred for some counselling and I assume you will not deny me this opportunity for help at a time when I am struggling to stay on top of my job.’

The doctor replied promptly asking Mr Barber to come and see him. But before Mr Barber had complied with this invitation a crisis occurred at school. Mr Barber lost control of himself and started shaking a pupil. He left school that day and never returned to his teaching post. The two psychiatrists who subsequently examined Mr Barber as expert witnesses agreed that he was suffering from moderate or severe depression.

[59] The judge gave a careful reserved judgment divided into 12 sections. The sixth and seventh sections (headed ‘Basic findings of fact’ and ‘The alleged breach of duty’) are the longest and the most relevant to this appeal. The judge has been criticised for dealing with questions of causation under the heading of ‘Basic findings of fact’ before he had found (as he did in the next section) a breach of the council’s duty of care as an employer.

[60] In my opinion there is not much substance in that criticism. After putting in a defence which consisted largely of blank non-admissions and denials, the council at trial put forward a case, largely based on the evidence of Mrs Hayward, that Mr Barber was a malingerer, or something close to it, who had been trying to work the system so as to get a larger pension on early retirement on grounds of ill-health. The judge had to make an assessment of the credibility of the witnesses whom he saw and heard. He did not find Mrs Hayward to be a convincing or impartial witness. He found Mr Barber to be an honest witness. It seems to me that it was right for the judge to make these findings at an early stage in his judgment. He found it convenient, in the same part of his judgment, to make findings about the three theories which had been put forward, largely it seems by Mrs Hayward, as to the reasons for Mr Barber’s mental breakdown (that is the failure or non-development of an incipient relationship with a woman teacher, Mr Barber’s apprehension about the pending Ofsted inspection, and the accusation of malingering already mentioned). I do not think the judge can be criticised for structuring his judgment in this way.

[61] The judge’s conclusions as to the breach of the employer’s duty of care came after his findings on Mr Barber’s meeting with Mrs Hayward in June 1966:

‘In my judgment this response to the claimant’s difficulties was inadequate. At the least his position needed investigation. However the claimant was not given any help to alleviate his workload.’

Similarly the judge observed, after his findings on the meetings with Mrs Newton and Mr Gill:

‘This response was inadequate given the history, which I have set out above. In my view a prudent employer, faced with the knowledge of work overload dating back to the autumn 1995 and increasing into 1996 such that the

a employee had had to take time off work for stress, would have investigated the employee's situation to see how his difficulties might be improved. This becomes the more clear when the senior management team became aware through the meetings with Mrs Hayward, Mrs Newton and Mr Gill that the claimant was in difficulty coping and was expressing to each that his health was declining. The prudent approach would have been to investigate and provide assistance if only in the short term. It must have been apparent that with time off work for stress in May 1996 that the risk of injury to the claimant's mental health was significant and higher than that which would have related to a teacher in a similar position with a heavy caseload.'

[62] The judge also attached importance, in reaching these conclusions, to the guide *Managing Occupational Stress: A Guide for Managers and Teachers in the Schools Sector* published in 1990 by the Health and Safety Commission:

d 'That document ... highlighted the need to be sensitive to stress in teaching staff. It also highlighted the need to be aware of stress and the need to develop a supportive culture for teachers. The senior management team at East Bridgwater were not aware of this HSE guide nor did they in any sense follow its content. Had they done, the crisis which affected the claimant would in all probability have been averted.'

[63] The Court of Appeal's composite judgment (on the council's appeal and the three appeals heard with it) begins with three sections: introduction; background considerations; and the law. Mr Barber rightly directed hardly any criticism towards these. The exposition and commentary in this part of the judgment is a valuable contribution to the development of the law (although your Lordships have heard no argument on the section dealing with apportionment and quantification of damage, and I think it better to express no view on those topics).

f [64] In particular the Court of Appeal has recognised that although injury which takes the form of psychiatric illness is no different in principle (for a primary victim) than physical illness or injury, the causes of mental illnesses ([2002] 2 All ER 1 at [5])—

g 'will often be complex and depend upon the interaction between the patient's personality and a number of factors in the patient's life. It is not easy to predict who will fall victim, how, why or when.'

This uncertainty has two important consequences. First, the reaction of some of Mr Barber's colleagues—'We are all overworked, and your workload is no worse than anyone else's'—is entirely understandable, but ultimately irrelevant. Overworked people have different capacities for absorbing stress, and different breaking points. Hence (and this is the second point) the importance of what the employee tells the employer. Senior employees—especially professionals such as teachers—will usually have quite strong inhibitions against complaining about overwork and stress, even if it is becoming a threat to their health. Personal and professional pride, loyalty to the head teacher and to colleagues, and the wish not to add to their problems and workload, may all influence a teacher not to complain but to soldier on in the hope that things will soon get a little better.

j [65] The Court of Appeal set out its view on this point at [29]:

'But when considering what the reasonable employer should make of the information which is available to him, from whatever source, what assumptions is he entitled to make about his employee and to what extent he

is bound to probe further into what he is told? *Unless he knows of some particular problem or vulnerability, an employer is usually entitled to assume that his employee is up to the normal pressures of the job.* It is only if there is something specific about the job or the employee or the combination of the two that he has to think harder. But thinking harder does not necessarily mean that he has to make searching or intrusive inquiries. *Generally he is entitled to take what he is told by or on behalf of the employee at face value.* If he is concerned he may suggest that the employee consults his own doctor or an occupational health service. But he should not without a very good reason seek the employee's permission to obtain further information from his medical advisors. Otherwise he would risk unacceptable invasions of his employee's privacy.' a

This is, I think, useful practical guidance, but it must be read as that, and not as having anything like statutory force. Every case will depend on its own facts and the well-known statement of Swanwick J in *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd* [1968] 1 WLR 1776 at 1783 remains the best statement of general principle: b

'... the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.' c

[66] The Court of Appeal concluded that the judge had been wrong in finding a breach of the council's duty of care. Its reasons are set out in [2002] 2 All ER 1 at [57]–[59] (with a fuller statement and discussion of the facts at [139]–[174] in the appendix). I will set out [57]–[59] in full: d

'[57] This was a classic case in which it is essential to consider at what point the school's duty to take some action was triggered, what that action should have been, and whether it would have done some good. Instead, the judge first considered whether the illness was caused by stress at work and reached the conclusion that it was. No doubt this was because the school had argued that Mr Barber's breakdown was caused by other things, and the judge had to resolve that issue. There was certainly evidence entitling him to hold that stress at work had made a material contribution. But that in itself was not enough to lead to the conclusion that the school was in breach of duty or that its breach caused the harm. e

[58] Mr Barber did not think of himself as a candidate for psychiatric illness until it was diagnosed in May 1996. The first the school knew of any possible adverse effects upon his health of the difficulties at work which they were all experiencing was after his return. He simply told Mrs Hayward that he was f

- a not coping very well. He made a more explicit reference to his health to Mrs Newton and Mr Gill, but did not explain the symptoms from which he was suffering. This was just before the summer holidays, which are usually a source of relaxation and recuperation for hard-pressed teachers. Indeed he was unable to tell his own doctor about his symptoms until the month before the crisis arose. He told no one at school of any problems during that term.
- b [59] In those circumstances it is difficult indeed to identify a point at which the school had a duty to take the positive steps identified by the judge. It might have been different if Mr Barber had gone to Mr Gill at the beginning of the autumn term and told him that things had not improved over the holidays. But it is expecting far too much to expect the school authorities to pick up the fact that the problems were continuing without some such indication. Given
- c the speed with which matters came to a head that term it might be difficult to sustain the judge's finding that temporary help would have averted the crisis. But in our view the evidence, taken at its highest, does not sustain a finding that they were in breach of their duty of care towards him.'
- d [67] My Lords, the issue of breach of the council's duty of care to Mr Barber was in my view fairly close to the borderline. It was not a clear case of a flagrant breach of duty any more than it was an obviously hopeless claim. But the judge, who saw and heard the witnesses (including Mr Barber himself, Mrs Hayward and Mr Gill) came to the conclusion that the employer was in breach of duty, and in my view there was insufficient reason for the Court of Appeal to set aside his finding. The
- e Court of Appeal was concerned about the timing of the breach, but for my part I do not think there is much room for doubt about that. The employer's duty to take some action arose in June and July 1996, when Mr Barber saw separately each member of the school's senior management team. It continued so long as nothing was done to help Mr Barber. The Court of Appeal evidently considered that
- f Mr Barber was insufficiently forceful in what he said at these interviews, and that he should have described his troubles and his symptoms in much more detail. But he was already suffering from depression, and neither Mrs Hayward nor Mrs Newton was a sympathetic listener. What the Court of Appeal failed to give adequate weight to was the fact that Mr Barber, an experienced and conscientious teacher, had been off work for three weeks (not two weeks, as the Court of Appeal
- g thought) with no physical ailment or injury. His absence was certified by his doctor to be due to stress and depression. The senior management team should have made inquiries about his problems and seen what they could do to ease them, in consultation with officials at the council's education department, instead of brushing him off unsympathetically (as Mrs Hayward and Mrs Newton did) or
- h sympathising but simply telling him to prioritise his work (as Mr Gill did).
- [68] It was argued that the school as a whole was facing such severe problems (with all the teachers stressed and overworked, no budget for more staff, and the Ofsted inspection looming) that there was nothing that the school could have done to help Mr Barber other than advising him to resign, or in the last resort terminating
- j his employment (a point on which the Court of Appeal (at [34]) made some observations). I would not accept that. At the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work, and making some reduction in his workload to ease his return. Even a small reduction in his duties, coupled with the feeling that the senior management team was on his side, might by itself have made a real difference. In any event Mr Barber's condition should have been monitored, and if

it did not improve, some more drastic action would have had to be taken. Supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff. a

[69] Although it is generally unprofitable to contrast the facts of one case with those of another, I would refer briefly to the Scottish case of *Cross v Highlands and Islands Enterprise* [2001] IRLR 336, which was cited by Mr Collender. That was a very sad case of a promising 39-year-old executive, employed in a job in which (because of geographical factors) close day-to-day supervision of his work was impossible. He became ill with depressive illness and killed himself. The employer was held not liable because no causative breach of duty was established. After the employee had been off work with depression, his line manager travelled to see him and spent almost the whole day discussing his work and his future with him. He reduced his responsibilities and continued to maintain contact with him by telephone (at 356 (para 84)). Unfortunately the depression continued, but the employer was not liable for the tragedy which ensued because (at 357 (para 86))— b

‘the evidence does not establish that objectively the job was the problem. For all the defenders knew, they were dealing with an employee who, for reasons that were not clear, had become unable to cope with a job that he had previously managed successfully.’ c

The facts were therefore very different from those of the present case. There is no doubt, in Mr Barber’s case, that the job was the problem. d

[70] The Court of Appeal also attached weight to the fact that Mr Barber did not make any further complaint during the autumn term. The judge had to assess the significance of that but he evidently saw Mr Barber’s nervous breakdown in November 1996 as caused by failures on the employer’s part which had continued since the summer term. During the autumn term Mr Barber was still ill with depression, and he seems to have concluded, after his experiences in the summer, that further complaint would be pointless. He had also (as he saw it) failed to obtain help when he went to his doctor on 19 September 1996 and his doctor did not advise him not to go to work. But as the senior management team did not know that Mr Barber had been to see his doctor, they cannot take much comfort from the doctor’s opinion. The judge was entitled to form the view that the school’s senior management team were in a position of continuing breach of the employer’s duty of care, and that that caused Mr Barber’s serious nervous breakdown on 12 November 1996. e

[71] I would allow this appeal and restore the judge’s judgment in favour of Mr Barber, but in the reduced agreed sum of £72,547.02 together with interest at the judgment rate from 8 March 2001. f

Appeal allowed. g

Celia Fox Barrister.

Re McKerr

[2004] UKHL 12

a

HOUSE OF LORDS

b

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD RODGER OF EARLSFERRY AND LORD BROWN OF EATON-UNDER-HEYWOOD
2, 3 FEBRUARY, 11 MARCH 2004

c

Human rights – Right to life – State’s obligation to investigate death – Death occurring in 1982 – Whether state obliged to investigate death occurring before statute incorporating human rights convention coming into force – Whether common law right to arrange for effective investigation – Human Rights Act 1998, s 6, Sch 1, Pt I, art 2.

d

The claimant’s father was shot dead by members of a unit of the Royal Ulster Constabulary in November 1982. Between 1982 and 1994, criminal proceedings were brought against the police officers, which led to their acquittal; a police investigation was conducted by two different police forces in England; and an inquest was opened but later abandoned. An application was made to the European Court of Human Rights invoking art 2^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as later set out in Sch 1 to the Human Rights Act 1998). That article imposed two obligations

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on the state: (i) a substantive obligation not intentionally to take life, and also to take reasonable protective measures to protect an individual whose life was at risk from the criminal acts of others or from suicide; and (ii) a procedural obligation to investigate deaths where arguably there had been a breach of the substantive obligation. The allegation was that there had been an unjustifiable killing and no effective investigation into the circumstances of the death. In 2001,

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the European Court of Human Rights gave judgment finding that there had been a violation and awarding the claimant compensation in respect of the frustration, distress and anxiety. The government paid the sum awarded but stated that it did not propose to take any steps to hold a further investigation into the death. The claimant sought judicial review on the ground, inter alia, that the Secretary of State for Northern Ireland’s continuing failure to provide an art 2 compliant investigation was unlawful and in breach of s 6^b of the 1998 Act and art 2 of the convention. That application was dismissed on the basis that the 1998 Act did not have retrospective effect. The claimant appealed to the Court of Appeal, which allowed the appeal holding that the obligation to hold an investigation, which complied with the requirements of art 2, was a continuing one. The Secretary of

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State appealed. He submitted that s 6 of the 1998 Act was not applicable to deaths occurring before that Act came into force on 2 October 2000. The claimant argued that the right to an effective official investigation was as much a feature of the common law as it was of the convention.

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Held – (1) There was no obligation to hold an investigation into a killing which occurred before the 1998 Act came into force since that obligation was triggered by the occurrence of a violent death and did not exist in the absence of such a death. Had Parliament intended that the Act should apply differently to the

a Article 2, so far as material, is set out at [18], below

b Section 6, so far as material, is set out at [42], below

primary obligation, which was to protect life, and a consequential obligation, to investigate a death it would have so legislated. Nor could it be argued that a continuing breach of art 2 gave rise to such a duty. Before 2 October 2000 there could not have been any breach of a human rights provision in domestic law because the 1998 Act had not come into force. The distinction between the rights arising under the convention and the rights created by the 1998 Act by reference to the convention had to be borne in mind. The former existed before the enactment of the 1998 Act and they continued to exist, but they were not part of United Kingdom law because the convention did not form part of that law. That was still the position. It followed that, in the instant case, no duty arose to investigate and the judicial review proceedings were misconceived; *R (on the application of Khan) v Secretary of State for Health* [2003] All ER (D) 220 (Jun) approved; *Wilson v First County Trust Ltd* [2003] 4 All ER 97 and *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] 4 All ER 1264 considered. *R (on the application of Khan) v Secretary of State for Health* [2003] 4 All ER 1239 disapproved (see [22], [23], [26], [50], [68]–[70], [75], [91], [93], below).

(2) There was no separate overriding common law right corresponding to the procedural right implicit in art 2. To hold otherwise would be to create an obligation on the state corresponding to art 2 of the convention, in an area of the law for which Parliament had long legislated. The courts had always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. That was so because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament. Accordingly, the appeal would be allowed; *R v Lyons* [2002] 4 All ER 1028 applied (see [32], [34], [35], [55], [73], [74], and [93], below).

Notes

For the right to life and failure to conduct an effective investigation, see respectively, 8(2) *Halsbury's Laws* (4th edn reissue) para 123 and 2003 Supp to 8(2) *Halsbury's Laws* (4th edn) 123.

For the Human Rights Act 1998, Sch 1, Pt I, art 2, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553.

Cases referred to in opinions

Devine v A-G for Northern Ireland, Breslin v A-G for Northern Ireland [1992] 1 All ER 609, [1992] 1 WLR 262, HL.

Finucane v UK (2003) 37 EHRR 656, [2003] ECHR 29178/95, ECt HR.

Jordan v UK (2001) 11 BHRC 1, ECt HR.

Lewis v A-G of Jamaica [2001] 2 AC 50, [2000] 3 WLR 1785, CA.

Maclaine Watson & Co Ltd v Dept of Trade and Industry, Maclaine Watson & Co Ltd v International Tin Council [1989] 3 All ER 523, [1990] 2 AC 418, [1989] 3 WLR 969, HL.

McCann v UK (1996) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR and E Com HR.

McCaughy, Re (20 January 2004, unreported).

McKerr v Armagh Coroner [1990] 1 All ER 865, [1990] 1 WLR 649, HL.

McKerr v UK (2002) 34 EHRR 553, [2001] ECHR 28883/95, ECt HR.

R (on the application of Amin) v Secretary of State for the Home Dept [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169.

- a *R (on the application of Hurst) v Northern District of London Coroner* [2003] EWHC 1721 (Admin), [2003] All ER (D) 80 (Jul).
- R (on the application of Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin), [2003] All ER (D) 220 (Jun); *rvsd* [2003] EWCA Civ 1129, [2003] 4 All ER 1239.
- R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 WLR 800.
- b *R (on the application of Wright) v Home Office* [2001] EWHC 520 (Admin), (2001) 62 BMLR 16.
- R v Chief Constable of the Royal Ulster Constabulary, ex p Begley, R v McWilliams* [1997] 4 All ER 833, [1997] 1 WLR 1475, HL.
- R v Kansal (No 2)* [2002] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69, [2001] 3 WLR 1562.
- c *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206.
- R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, [2002] 3 WLR 1562.
- d *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696, [1991] 2 WLR 588, HL.
- Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568.

Cases referred to in list of authorities

- e *Acar and Acay v Turkey* App No 36088/97 (27 November 2001, unreported), ECt HR.
- Acar v Turkey* (2004) 38 EHRR 12, [2003] ECHR 26307/95, ECt HR.
- Agdas v Turkey* App No 34592/97 (19 June 2001, unreported), ECt HR.
- Altun v Germany* (1984) 36 DR 209, E Com HR.
- f *Angelova v Bulgaria* App No 38361/97 (13 June 2002, unreported), ECt HR.
- Bankovic v Belgium* (2001) 11 BHRC 435, ECt HR.
- Bayram v Turkey* App No 38587/97 (29 January 2002, unreported), ECt HR.
- Botta v Italy* (1998) 4 BHRC 81, ECt HR.
- Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
- g *D v Germany* (1984) 36 DR 24, E Com HR.
- De Becker v Belgium* (1962) 1 EHRR 43, [1962] ECHR 00214/56, ECt HR.
- De Wilde v Belgium (No 2)* (1972) 1 EHRR 438, ECt HR.
- Doyle v UK* App No 36157/97 (6 July 1999, unreported), ECt HR.
- Dundar v Turkey* App No 26972/95 (24 August 1999, unreported), ECt HR.
- h *Eckle v Germany* (1983) 5 EHRR 1, [1982] ECHR 8130/78, ECt HR.
- Edwards v UK* (2002) 12 BHRC 190, ECt HR.
- Ergi v Turkey* (2001) 32 EHRR 388, [1998] ECHR 23818/94, ECt HR.
- Gulec v Turkey* (1999) 28 EHRR 121, [1998] ECHR 21593/93, ECt HR.
- Hatton v UK* (2003) 37 EHRR 611, [2003] ECHR 36022/97, ECt HR.
- j *Inhabitants of Ruigoord (46) v Netherlands* App No 14443/88 (6 September 1991, unreported), E Com HR.
- Ireland v UK* (1978) 2 EHRR 25, [1978] ECHR 5310/71, ECt HR.
- Johnson v Ireland* (1987) 9 EHRR 203, [1986] ECHR 9697/82, ECt HR.
- Leech v Deputy Governor of Parkhurst Prison* [1988] 1 All ER 485, [1988] AC 533, [1988] 2 WLR 290, HL.
- Loffler v Austria* (2002) 34 EHRR 49, ECt HR.

- M v Belgium* (1991) 71 DR 230, E Com HR.
- McDaid v UK* (1996) 85-A DR 134, E Com HR. a
- Mckieran's Application, Re* [1985] NI 385, NI CA.
- McShane v UK* (2002) 35 EHRR 593, [2002] ECHR 43290/98, ECt HR.
- Montion v France* (1987) 52 DR 227, E Com HR.
- Osman v UK* (1998) 5 BHRC 293, ECt HR. b
- Papamichalopoulos v Greece* (1995) 21 EHRR 439, [1995] ECHR 14556/89, ECt HR.
- Peach v Metropolitan Police Comr* [1986] 2 All ER 129, [1986] QB 1064, [1986] 2 WLR 1080, CA.
- R (on the application of Howard) v Secretary of State for Health, R (on the application of Wright-Hogeland) v Secretary of State for Health* [2002] EWHC 396 (Admin), [2003] QB 830, [2002] 3 WLR 738. c
- R (on the application of Q) v Secretary of State for the Home Dept* [2003] EWCA Civ 364, [2003] 2 All ER 905, [2004] QB 36, [2003] 3 WLR 365.
- R v Chief Constable of the West Midlands Police, ex p Wiley, R v Chief Constable of the Nottinghamshire Constabulary, ex p Sunderland* [1994] 3 All ER 420, [1995] 1 AC 274, [1994] 3 WLR 433, HL. d
- R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860, [2000] 1 WLR 1855.
- Sentges v The Netherlands* App No 27677/02 (8 July 2003, unreported), ECt HR.
- Stamoulakatos v Greece* (1993) 17 EHRR 479, [1993] ECHR 12806/87, ECt HR.
- Tepe v Turkey* [2003] ECHR 27244/95, ECt HR. e
- Toman, Re* (11 July 1994, unreported).
- Tsovolas v Greece* App No 20339/92 (14 May 1996, unreported), E Com HR.
- Van Laak v The Netherlands* App No 17669/91 (31 March 1993, unreported), ECt HR.
- Walker v UK* (2000) 29 EHRR CD 276, [2000] ECHR 34979/97, E Com HR. f
- X and Church of Scientology v Sweden* (1979) 16 DR 68, E Com HR.

Appeal

- The appellant, the Secretary of State for Northern Ireland, appealed from the decision of the Court of Appeal (Carswell LCJ, McCollum LJ and Coghlin J) on 10 January 2003 whereby allowing the appeal of the claimant, Jonathan McKerr, from the decision of Campbell LJ on 26 July 2002 dismissing his application for judicial review of the decision of the Secretary of State for Northern Ireland to refuse to provide an investigation into the death of his father, Gervaise McKerr, which was compliant with art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in breach of s 6 of the Human Rights Act 1998. The facts are set out in the opinion of Lord Nicholls of Birkenhead. g
- Seamus Treacy QC SC* (of the Northern Ireland and Republic of Ireland Bars) and *Karen Quinlivan* (of the Northern Ireland Bar) (instructed by *Madden & Finucane*, Belfast) for the claimant. h
- Lord Goldsmith QC, A-G, Declan Morgan QC* (of the Northern Ireland Bar), *Philip Sales* and *Paul Maguire* (of the Northern Ireland Bar) (instructed by the *Treasury Solicitor*) for the Secretary of State for Northern Ireland. j

a Their Lordships took time for consideration.

11 March 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

b [1] My Lords, this is a test case. It arises out of the absence of adequate public investigations into some fatal shootings in Northern Ireland over 20 years ago. This particular case relates to the death of Mr Gervaise McKerr. His son Jonathan seeks an order compelling the Secretary of State for Northern Ireland to hold an effective investigation into the circumstances of his father's death. He bases his claim primarily on the provisions of the Human Rights Act 1998 even though his
c father died many years before the Act came into force. He also advances a claim based on the common law.

THE DEATHS

d [2] Gervaise McKerr died on 11 November 1982. He was driving a Ford Escort car in East Lurgan with two passengers, Eugene Toman and Sean Burns. All three men were shot dead by members of a unit of the Royal Ulster Constabulary (RUC). Many of the facts surrounding the deaths are disputed. But it seems clear that the men were not armed and that over 100 rounds were fired at the car.

e [3] This was not an isolated incident. Two further fatal shooting incidents occurred soon afterwards, both involving the RUC in County Armagh. On 24 November 1982 Michael Tighe was shot dead and Martin McAuley seriously wounded. On 12 December 1982 Peter Grew and Roderick Carroll were shot and killed. These six fatal shootings occurred amid allegations that some members of the RUC were operating a shoot-to-kill policy against suspected
f terrorists.

g [4] Currently nine cases, including proceedings brought by the next of kin of Eugene Toman and Sean Burns, are pending in the courts of Northern Ireland awaiting the outcome of this appeal. In addition numerous requests have been made to the police and the Director of Public Prosecutions of Northern Ireland for new investigations into deaths involving the police or security forces many years ago. This surge of activity has been prompted by four judgments given by the European Court of Human Rights (ECHR) in May 2001 and the government's response to them.

THE INVESTIGATIONS

h [5] The issues arising on this appeal before your Lordships are points of law. But I must first summarise briefly the protracted history of the steps taken by the United Kingdom authorities to investigate the circumstances of the death of Gervaise McKerr. A fuller record can be found in the judgment of the ECHR in *McKerr v UK* (2002) 34 EHRR 553 at 568–582 (paras 11–61). The history extends
j over 12 years, from November 1982 to September 1994, and falls essentially into three parts. First, criminal proceedings: one police officer was charged with the murder of Eugene Toman, a passenger in the car when the shooting occurred, and two other police officers were charged with aiding, abetting, counselling and procuring the officer to commit that offence. The trial took place between 29 May 1984 and 5 June 1984. At the end of the trial all three officers were acquitted on the direction of the judge.

[6] Second, a police investigation was conducted, initially by John Stalker, then Deputy Chief Constable of the Greater Manchester Police Force, and thereafter by Colin Sampson, Chief Constable of the West Yorkshire Police. An interim report was followed by a lengthy final report presented in three sections, in October 1986, March 1987 and April 1987. On 25 January 1988 the Attorney General made a statement in Parliament in which he said that in the public interest no prosecutions would result from the Stalker/Sampson reports.

[7] Third, at the conclusion of the criminal trial an inquest was opened by the Armagh coroner on 4 June 1984. It was subsequently adjourned to await completion of the Stalker/Sampson investigation and because of two sets of judicial review proceedings. Both sets of proceedings came to your Lordships' House: see *McKerr v Armagh Coroner* [1990] 1 All ER 865, [1990] 1 WLR 649 and *Devine v A-G for Northern Ireland, Breslin v A-G for Northern Ireland* [1992] 1 All ER 609, [1992] 1 WLR 262. The inquest resumed in May 1992 but was adjourned again later in the same month. On 31 January 1994 the inquest was closed and the jury discharged. The inquest was reopened on 22 March 1994. The coroner said the public had a proper interest in knowing whether any further relevant evidence had come to light. On 5 May 1994 the Secretary of State issued a public interest immunity certificate stating that disclosure of the Stalker/Sampson report would cause serious damage to the public interest. On 8 September 1994 the coroner abandoned the reopened inquest. He could no longer hope to achieve his purpose in reopening the inquest.

THE APPLICATION TO STRASBOURG

[8] Meanwhile on 7 March 1993 Gervaise McKerr's widow lodged an application with the ECHR. After her death the application was continued by Mr Jonathan McKerr. The applicant invoked art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). He alleged that his father had been unjustifiably killed and that there had been no effective investigation into the circumstances of his death. This application proceeded simultaneously with three others, two of which concerned deaths at the hands of the security forces and the third an allegation of police complicity in a murder by paramilitaries.

[9] The court gave its judgment in all four cases on 4 May 2001. In McKerr's case the court made no finding on the lawfulness or proportionality of the use of lethal force which killed Gervaise McKerr. Nor did the court reach any conclusions on the circumstances, including Gervaise McKerr's own activities, which led up to the killing. But the court found that the various investigatory proceedings disclosed a number of shortcomings. These included: lack of independence of the investigation carried out by the RUC; lack of public scrutiny and information to the victim's family concerning the independent (Stalker/Sampson) investigation, including lack of reasons for the failure to prosecute any police officer for perverting or attempting to pervert the course of justice; the inquest procedure did not allow verdicts or findings which might play an effective role in securing prosecutions in respect of any criminal which might be disclosed; no advance disclosure of witness statements at the inquest; the public interest immunity certificate had the effect of preventing the inquest examining matters relevant to outstanding issues; the police officers who shot Gervaise McKerr could not be compelled to attend the inquest as witnesses; the inquest proceedings did not start promptly, and neither they nor the Stalker/Sampson investigation proceeded with reasonable expedition.

a [10] The court held unanimously that art 2 of the convention had been violated by failure to comply with the obligation, implicit in art 2, to hold an effective official investigation when an individual has been killed by the use of force ((2002) 34 EHRR 553 at 612–613 (paras 157–161)). The court awarded Mr Jonathan McKerr £10,000 as just satisfaction in respect of the frustration, distress and anxiety he must have suffered. A finding of violation was not sufficient compensation.

b [11] The government duly paid the sum awarded. In response to the judgment the United Kingdom also presented a package of proposals to the Committee of Ministers of the Council of Europe. Under art 46(2) of the convention the Committee of Ministers has responsibility for supervising execution of the judgment of the court. This includes considering what are the practicable steps a state should be required to take in order to make good the violations found by the court: see *Finucane v UK* (2003) 37 EHRR 656 at 678 (para 89). The government's package did not include any proposal to carry out a further investigation into the death of Gervaise McKerr. The government's stance is that, subject to any ruling of the courts, it does not propose to take any steps to hold a further investigation. The Committee of Ministers has not yet ruled on the adequacy of the government's proposals as an effective implementation of art 2.

THE PRESENT PROCEEDINGS

e [12] Mr Jonathan McKerr was not disposed to accept this as an adequate governmental response to the judgment of the ECHR. The government ought to fulfil its obligation under art 2 of the convention and remedy the deficiencies in the investigations so far undertaken into his father's death. Armed with the rights newly afforded him by the 1998 Act, Mr McKerr sought the assistance of the court in compelling the government to conduct an effective investigation, in the form of a further coroner's inquest. On 30 January 2002 he commenced these judicial review proceedings. The relief claimed comprises: (a) declarations that the Secretary of State's continuing failure to provide an art 2 compliant investigation is unlawful and in breach of s 6 of the 1998 Act and art 2 of the convention, (b) a mandatory order compelling the Secretary of State to conduct an art 2 compliant investigation and (c) damages.

g [13] On 26 July 2002 Campbell LJ dismissed the application. The 1998 Act did not have retrospective effect. But the obligation to hold a proper investigation into a pre-Act death continued until either the obligation was fulfilled or a competent court vindicated the right in some other way. In the present case the continuing obligation to hold an investigation compliant with art 2 came to an end when the ECHR made a finding of violation of art 2 and ordered payment of just satisfaction to Mr Jonathan McKerr.

j [14] Mr Jonathan McKerr appealed, and on 10 January 2003 the Court of Appeal allowed the appeal. Carswell LCJ delivered the judgment of himself and McCollum LJ and Coghlin J. The court agreed with Campbell LJ that the obligation to hold an investigation which complied with the requirements of art 2 was a continuing one. Counsel for the Secretary of State did not seek to uphold the judge's view that payment of compensation automatically brought the art 2 obligation to an end. Counsel contended that once just satisfaction had been awarded and paid, Mr Jonathan McKerr was no longer a 'victim' within s 7 of the 1998 Act and accordingly he could not complain of any breach of the continuing obligation. The Court of Appeal rejected this argument. The court made a

declaration that the government has failed to carry out an investigation complying with art 2. The court considered it inappropriate to grant any other relief because the Committee of Ministers had not yet ruled on the proposals made to them by the United Kingdom government. From that decision the Secretary of State appealed to your Lordships' House. a

RETROSPECTIVITY

[15] The primary contention advanced by the Attorney General on behalf of the Secretary of State was not advanced in the courts below. In short, the Attorney General submitted to your Lordships' House that s 6 of the 1998 Act is not applicable to deaths occurring before the Act came into force on 2 October 2000. I shall consider this submission first. b

[16] It is now settled, as a general proposition, that the 1998 Act is not retrospective. The Act itself treats s 22(4) as an exception. This general proposition, however, raises almost as many questions as it answers. Past events have continuing effects. For instance, agreements made before the 1998 Act came into force will often generate obligations requiring performance after 2 October 2000. Some of the problems to which this gives rise were considered by your Lordships' House, in the context of ss 3 and 4 of the Act, in *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568. c
d

[17] In the present case the question of retrospectivity arises in the context of s 6 of the 1998 Act and art 2 of the convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7(1)(a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by s 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of s 6(1), these proceedings brought by his son fall squarely within s 7; if not, not. e

[18] So the key question is whether the government's failure to hold a further investigation in this case is conduct which is prohibited by s 6(1). Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a 'Convention right' as defined in the statute. An act includes a failure to act. The relevant convention right is art 2. Article 2 of the convention concerns the most fundamental right of all: the right to life. The sanctity of life is a principle which finds expression in all civilised societies throughout the world. Article 2 provides: f
g

'1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. h

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.' j

[19] This article expressly imposes a positive obligation on the state to protect everyone's life. The state must take appropriate steps to safeguard the lives of those within its bounds. But the state's obligation does not stop there. The ECHR has held that by implication art 2 also requires there should be some form

a of effective official investigation when individuals have been killed as a result of the use of force: see *McCann v UK* (1996) 21 EHRR 97 (the 'death on the Rock' case), and *McKerr v UK* (2002) 34 EHRR 553 at 598–599 (para 111). The ECHR has described this as a 'procedural' obligation imposed by art 2. The purpose of the investigation is to secure that domestic laws protecting the right to life are effectively implemented and, in cases involving state agencies, to ensure those responsible for deaths are made properly accountable: see *Jordan v UK* (2001) 11 BHRC 1 at 30 (para 105). The requisites of an investigation, if it is to fulfil this procedural obligation inherent in art 2, were considered recently by your Lordships' House in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169.

b
c [20] Thus art 2 may be violated by an unlawful killing. The application of s 6(1) of the 1998 Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.

d [21] The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?

e [22] In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of s 6, because it occurred before the Act came into force, it would be
f surprising if s 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for s 6 to apply, the death which is the subject of investigation must itself be a death to which s 6 applies. The event giving rise to the art 2 obligation to investigate must have occurred post-Act.

g [23] I think this is the preferable interpretation of s 6 in the context of art 2. This interpretation has the effect, for the transitional purpose now under consideration, of treating all the obligations arising under art 2 as parts of a single whole. Parliament cannot be taken to have intended that the 1998 Act should apply differently to the primary obligation (to protect life) and a consequential obligation (to investigate a death). For this reason I consider these judicial review proceedings are misconceived so far as they are sought to be founded on the
h enabling power in s 7 of the 1998 Act.

i [24] I refer briefly to the court decisions on this point. There have been several cases where everyone concerned appears to have assumed that s 6 of the 1998 Act could apply to a failure to investigate a death which took place before the Act came into force. These include two decisions of your Lordships' House:
j *Amin's case* and *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 WLR 800. In none of these cases, so it seems, was this point the subject of argument. So they do not assist.

[25] In other cases, where the point has arisen for decision, differences in judicial view have emerged. In *R (on the application of Wright) v Home Office* [2001] EWHC 520 (Admin), (2001) 62 BMLR 16, a case concerning a death in prison in 1996, Jackson J (at [67]) held the claimants were entitled to a remedy under the

Act in respect of the Secretary of State's 'continuing breach of the procedural obligations under arts 2 and 3' of the convention. In *R (on the application of Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin), [2003] All ER (D) 220 (Jun) Silber J reached a contrary conclusion. He regarded the time of death as the governing factor. There the death occurred in October 1999. In *R (on the application of Hurst) v Northern District of London Coroner* [2003] EWHC 1721 (Admin), [2003] All ER (D) 80 (Jul), which concerned a death in May 2000, the Divisional Court disagreed with Silber J. The relevant time was when the decision was made in relation to the art 2 duty. At that time 'art 2 was part of English law' (see [2003] All ER (D) 80 (Jul) at [20]). This decision of the Divisional Court was followed by the Court of Appeal when *Khan's* case reached that court ([2003] EWCA Civ 1129, [2003] 4 All ER 1239). The 1998 Act had been in force for nearly two years when, in July 2002, the Secretary of State first denied the parents of the dead child the relief they were seeking (see [2003] 4 All ER 1239 at [85]).

[26] Having had the advantage of much fuller arguments I respectfully consider that some of these courts, including the Divisional Court in *Hurst's* case and the Court of Appeal in *Khan's* case, fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the convention and (2) rights created by the 1998 Act by reference to the convention. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the convention does not form part of this country's law. That is still the position. These rights, arising under the convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act. It by no means follows that the continuing existence of a right arising under the convention in respect of an act occurring before the 1998 Act came into force will be mirrored by a corresponding right created by the 1998 Act. Whether it finds reflection in this way in the 1998 Act depends upon the proper interpretation of the 1998 Act.

THE 'VICTIM' POINT

[27] Had I reached the contrary conclusion I would not have accepted the Secretary of State's argument that Mr Jonathan McKerr had no standing to bring these proceedings because he ceased to be a 'victim' within the meaning of s 7 of the 1998 Act once he had been paid the amount of money awarded by the ECHR as just satisfaction. Mr McKerr was awarded this amount for his frustration, distress and anxiety over the years. All too obviously he is still not in the position intended to be achieved by fulfilment of the obligation to hold an effective investigation into his father's death. Crucial questions remain unanswered. As already noted, the ECHR did not itself decide whether Gervaise McKerr had been killed by the use of unnecessary or disproportionate force. Nor did the court decide whether Gervaise McKerr had been the victim of a shoot-to-kill policy operated by some members of the RUC.

AN OVERRIDING COMMON LAW RIGHT?

[28] Before your Lordships' House Mr Treacy advanced a further basis for Mr McKerr's judicial review proceedings. He submitted that the right to an

a effective official investigation is as much a feature of the common law as it is of the convention. The rationale which underlies the procedural obligation under art 2 must also underpin the common law. He relied heavily upon an observation made by Lord Bingham of Cornhill in *Amin's case* [2003] 4 All ER 1264 at [30]:

b 'A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under arts 1 and 2 of the convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it.'

c [29] This submission, I note in passing, is not being used as a foundation for a challenge to the lawfulness of the conduct of the coroner inquiring into Gervaise McKerr's death. For many centuries coroners' inquests, with their inquisitorial process, have been a primary means employed in Northern Ireland as well as England and Wales for investigating violent or unnatural deaths or other deaths requiring investigation. The law provides, in the form of judicial review, a means whereby the lawfulness of coroners' decisions can be challenged. In an

d appropriate case a court may review a coroner's premature closure of an inquest. [30] That is not the route being followed in this case. In these proceedings Mr McKerr is not challenging any decision of the Armagh coroner. This is perhaps hardly surprising, given the years which have elapsed since the coroner closed his inquest into Gervaise McKerr's death. Nor is Mr McKerr asking the House to interpret the statutory provisions relating to coroners in a way which

e would make them compliant with the investigative requirements of art 2. [31] Instead, counsel propounded a separate overriding common law right corresponding to the procedural right implicit in art 2 of the convention. He submitted that the Secretary of State is, or should be, subject to a common law obligation to arrange for an effective investigation into Gervaise McKerr's death. f This obligation would be satisfied by holding a coroner's inquest which complies with the requirements of art 2. In the absence of such a right the common law would afford less protection to the right of life than the convention. Under s 6 of the 1998 Act the court, as a public authority, is obliged to develop the common law in a manner consistent with convention rights and Strasbourg jurisprudence.

g [32] I have grave reservations about the appropriateness of the common law now fashioning a free-standing positive obligation of this far-reaching character. Such a development would be far removed from the normal way the common law proceeds. But I need not pursue this wider question. The submission fails for more straightforward, orthodox reasons. The effect of counsel's submission, if accepted, would be that the court would create an overriding common law

h obligation on the state, corresponding to art 2 of the convention, in an area of the law for which Parliament has long legislated. The courts have always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. Rightly so, because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with

j those prescribed by Parliament. *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976 is a recent instance where the House rejected a submission having this effect. [33] The argument in the present case suffers from the same flaw. The suggested new common law right is sought as a means of supplementing, or overriding, the statutory provisions relating to the holding of coroners' inquests. That is not an appropriate role for the common law.

[34] This view is confirmed by another feature of the case. As already emphasised, by enacting the 1998 Act Parliament created domestic law rights corresponding to rights arising under the convention. When doing so Parliament chose not to give the legislation retroactive effect. In relation to art 2 the intention of Parliament, as interpreted above, was not to create an investigative right in respect of deaths occurring before the Act came into force. The common law right urged on behalf of Mr McKerr would accord ill with this legislative intention. The effect of the propounded right would be to impose positive human rights obligations on the state as a matter of domestic law in advance of the date on which a corresponding positive obligation arose under the 1998 Act. a
b

[35] These considerations point ineluctably to the conclusion that the suggested common law right cannot properly be fashioned by the courts. I would allow this appeal and dismiss these proceedings. c

LORD STEYN.

[36] My Lords, the deliberate killing of individuals under suspicion of subversive activities by agents of the state is something that one associates with lawless totalitarian regimes. That is not to say that in liberal democracies such events cannot occur. The difference between totalitarian states and democracies lie in their response to a serious allegation that such targeted killings took place. It would be antithetical to the nature of a totalitarian state to permit such killings to be investigated. On the other hand, in modern times liberal democracies have progressively become ready to undertake investigations in such cases. In the domain of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) art 2 spells out a fundamental right to life, and by the jurisprudence of the European Court of Human Rights (ECHR), a fundamental right of the family of a person killed by agents of the state to demand that the state must promptly and effectively investigate the circumstances in which the death occurred. d
e
f

[37] In a period of about a month between November and December 1982, in three separate incidents, six men were shot and killed by police officers of a special mobile support unit of the Royal Ulster Constabulary. The killings took place in Armagh. None of the men killed were armed. One man was shot in the back. There were two trials but none of the police officers were convicted. The present case relates to Gervaise McKerr who was shot and killed, with others, on 11 November 1982. A criminal trial of three police officers resulted in their acquittal. Gervaise McKerr's family wanted a proper and effective inquest into the circumstances of his death. The government strongly resisted an investigation. g

[38] On 7 March 1993 an application was lodged with the ECHR alleging various breaches of the convention. On 4 May 2001 the ECHR unanimously found that there had been a failure to comply with the procedural obligation implied in art 2 to investigate promptly and effectively a case where an individual had been killed as a result of the use of force: see *McKerr v UK* (2002) 34 EHRR 553. h

[39] The ECHR identified the following concerns in its decision (at 605–606): j

‘136 ... the scope of the criminal trial was restricted to the criminal responsibility of the three officers. The applicant, relying *inter alia* on the Minnesota Protocol argued that the trial was not capable of addressing wider concerns about other aspects of official involvement in the killings. One of these aspects was the deliberate instructions of a senior officer to the suspects

a to conceal information from the investigating officers, which raised doubts
as to what other information or obstruction might have occurred. Another
b was the fact that there had been two other incidents in Armagh within a
month in which police officers from the special mobile support units had
used lethal force, killing Michael Tighe on 24 November 1992 and Seamus
Grew and Roddy Carroll on 12 December 1992, all of whom had been
unarmed. A prosecution had occurred concerning the latter incident and
had also resulted in an acquittal. It was alleged that police officers involved
in these incidents had similarly been instructed to conceal evidence.

c 137 The Court considers that there may be circumstances where issues
arise that have not, or cannot, be addressed in a criminal trial and that
Article 2 may require a wider examination. Serious concerns arose from
these three incidents as to whether police counter-terrorism procedures
involved an excessive use of force, whether deliberately or as an inevitable
by-product of the tactics that were used. The deliberate concealment of
evidence also cast doubts on the effectiveness of investigations in uncovering
what had occurred. In other words, the aims of reassuring the public and the
d members of the family as to the lawfulness of the killings had not been met
adequately by the criminal trial. In this case therefore, the Court finds that
Article 2 required a procedure whereby these elements could be examined
and doubts confirmed, or laid to rest. It considers below whether the
authorities adequately addressed these concerns.'

e The court concluded (at 612 (para 157)) that the concerns had not been
adequately addressed and listed the shortcomings of the procedures adopted.
The question whether there had been a policy to kill individuals suspected of
subversion activities was unresolved. The court concluded that there had been a
violation of the procedural obligation. The court made an award of £10,000 by
way of compensation. This sum has been paid.

f [40] The supervision of the judgment in the present case is being conducted
by the Committee of Ministers pursuant to art 46 of the convention. The
outcome is not yet known.

g [41] Reinforced by the judgment in Strasbourg, and 21 years after the death of
his father, Mr Jonathan McKerr wants an effective investigation of the
circumstances in which his father died. Despite the judgment of the ECHR, the
Secretary of State refuses to permit such an investigation. The Court of Appeal
of Northern Ireland found in favour of the son. The court concluded:

h 'We accordingly consider that the appellant's claim is well founded, that
there is a continuing breach of art 2(1) which requires to be addressed by the
respondent government. Since, however, the Committee of Ministers has
not yet ruled on the proposals made to them by the government in respect
of the four cases heard by the ECHR, we would not regard it as appropriate
to do more than make a declaration. In these circumstances we propose to
allow the appeal and make a declaration that the respondent government has
j failed to carry out an investigation which complies with the requirements of
art 2 of the convention, but not to grant any other relief.'

Still resisting any investigation the government challenges the decision of the
Court of Appeal.

[42] Mr McKerr's case is crucially dependent on the applicability of s 6(1) of
the 1998 Act. It provides: 'It is unlawful for a public authority to act in a way

which is incompatible with a Convention right.' The relevant convention right is art 2. It provides expressly that everyone's right to life shall be protected by law. By necessary implication it places an independent procedural obligation on the state to investigate promptly and effectively cases where agents of the state cause death by the use of force. The existence of this implied obligation under art 2 was first spelt out by the ECHR in *McCann v UK* (1996) 21 EHRR 97: for a review of the subsequent European jurisprudence see Lester and Pannick *Human Rights Law and Practice* (2nd edn, 2004) pp 120–128 (paras 4.2.31–4.2.39) and Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) pp 27–41. In order to have a cause of action under the 1998 Act, Mr McKerr must however have the status of being a 'victim' within the meaning of s 7(1).

[43] On the facts of the present case, and because Mr McKerr has received compensation, the government argues that he lacks the standing of being a victim. On this simple ground it is said that the door of the court is closed to him. In my view this argument is wrong. But for the receipt of compensation Mr McKerr was unquestionably a victim. After all, he is a son questioning why his father was killed by agents of the state. The ECHR made the award of compensation on the basis that, due to the violation of the procedural obligation, the son 'suffered feelings of frustration, distress and anxiety' (see (2002) 34 EHRR 553 at 617 (para 181)). In other words, the failure to carry out an investigation promptly and effectively caused the son mental suffering and for that an award of compensation was made. The procedural obligation remains unfulfilled. The state has never conducted a proper investigation into the death of Mr McKerr's father. The compensation was plainly not intended by the ECHR to be the price which, if paid, relieved the government of its unfulfilled procedural obligation even in circumstances where such an obligation was still capable of being fulfilled. Nothing in the judgment of the ECHR supports such an implausible idea. I would reject this argument.

[44] It is now necessary to turn to the principal issues. They are formulated in the agreed statement of facts and issues as follows:

'(1) ... has the Secretary of State acted or failed to act on or after 2 October 2000 in a way which is incompatible with the respondent's art 2 convention rights contrary to s 6(1) of the 1998 Act (the retrospectivity issue)?'

(2) Does the common law now impose an obligation upon the United Kingdom government to hold an effective official investigation into the circumstances of the respondent's father's death irrespective of the 1998 Act (the common law issue)?'

Before I consider these legal issues it is necessary to consider a separate and anterior point which, if meritorious, makes it unnecessary to consider these important points of law.

[45] On behalf of the government the Attorney General placed before the House in written and oral submissions an argument that an effective inquiry is as a matter of fact no longer possible. He referred the House to the decision of the ECHR in *Finucane v UK* (2003) 37 EHRR 656, and in particular to the decision of the court (at 678 (para 89)) which reads as follows:

'As regards the applicant's views concerning provision of an effective investigation, the Court has not previously given any indication that a Government should, as a response to such a finding of a breach of Art. 2,

a hold a fresh investigation into the death concerned and has on occasion expressly declined to do so. Nor does it consider it appropriate to do so in the present case. It cannot be assumed in such cases that a future investigation can usefully be carried out or provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses, may inevitably render such an investigation an unsatisfactory or inconclusive exercise, which fails to establish important facts or put to rest doubts and suspicions. Even in disappearance cases, where it might be argued that more is at stake since the relatives suffer from the ongoing uncertainty about the exact fate of the victim or the location of the body, the Court has refused to issue any declaration that a new investigation should be launched. It rather falls to the Committee of Ministers acting under Art. 46 of the Convention to address the issues as to what may practicably be required by way of compliance in each case.'

d The Attorney General submitted that in this case an effective inquiry is no longer possible. He submitted that there cannot be a continuing duty to do something when it is impossible to do it. If this premise is right, I would accept that it would be the end of the matter under domestic law. The domestic court, in this case the House of Lords, would not make an order designed to ensure that a plainly useless inquiry is embarked on. This would be a sufficient basis for allowing the appeal of the government. The question is whether this submission is right. It having been advanced I must deal with it.

e [46] One would have expected an affidavit from the state explaining why an investigation is impossible. To such an affidavit I would have paid the closest attention. There is no affidavit. The strategy has been to steer clear of the facts. The observations of the Attorney General that an inquiry is no longer possible, f unsupported by evidence, have no more weight before the House than that of any other advocate or litigant in this case who is *parti pris*. In any event, counsel for Mr McKerr pointed out that the fruits of police investigations are still in existence; the transcripts of the criminal trials are available; and there is available the Stalker/Sampson report consisting of 3609 pages in 20 separate volumes g including one album of maps and photographs. If an inquest were to be held, it would be up to the coroner to read the latter report and consider whether it should be put in evidence. So far neither the coroner in Northern Ireland nor any judge considering the matter has read the report. In Northern Ireland judicial review proceedings it was held that the report is irrelevant. How one can say, in h advance of studying it, that it is not relevant I do not understand. The ECHR was clearly sceptical. So am I.

j [47] A subtext of the Attorney General's submission was the suggestion that there are legal impediments to holding an inquiry. So far as the Attorney General said that witnesses would not be compellable, this problem has been removed by legislation: see the Coroners (Practice and Procedure) (Amendment Rules (Northern Ireland) 2002, SI (NI) 2002/37. In the domestic legal system there is also no impediment to making an order that the inquest should be reopened: see Leckey and Greer *Coroners' Law and Practice in Northern Ireland* (1998) p 292 (para 15-02); *In re McCaughey* (20 January 2004, unreported) per Weatherup J.

[48] I am not persuaded that on the basis of materials available an effective investigation of sensible scope is impossible.

[49] The critical question in this case is, however, whether the court has jurisdiction to make an order designed to lead to the investigation of a death which occurred before the 1998 Act came into force. a

[50] The retrospectivity issue now arises. Mr McKerr's case is founded on s 6 of the 1998 Act. Leaving aside proceedings taken at the instigation of a public authority, which are not under consideration, it is now settled law that s 6 is not retrospective: see s 22(4) of the 1998 Act, *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, *R v Kansal (No 2)* [2002] UKHL 62, [2002] 1 All ER 257, [2002] 2 AC 69, *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568. Mr McKerr's father was killed in 1982. The 1998 Act came into force on 2 October 2000. The Court of Appeal held that there is a continuing breach of art 2 which requires to be addressed by the government. In my view the Attorney General has demonstrated that this reasoning cannot be sustained. The government may have been in breach of its obligations under international law before 2 October 2000 to set up a prompt and effective investigation. But those treaty obligations created no rights under domestic law, not even after the right to petition to Strasbourg was created by the United Kingdom government in 1966. The very purpose of the 1998 Act was 'to bring home rights' which were previously justiciable only in Strasbourg: see the government White Paper, *Rights Brought Home: The Human Rights Bill* (Cm 3782) (October 1997). That appears, in any event, to be the consequence of the rule enunciated by the House of Lords in the *International Tin Council* case that an unincorporated treaty can create no rights or obligations in domestic law: see *MacLaine Watson & Co Ltd v Dept of Trade and Industry*, *MacLaine Watson & Co Ltd v International Tin Council* [1989] 3 All ER 523, [1990] 2 AC 418. As Lord Hoffmann has pointed out this rule has been affirmed by the House in *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696 and in *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, and in particular in the leading judgment of Lord Hoffmann in the latter case (at [27]). The later decisions rest, however, on the pivot of the *International Tin Council* decision. b
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[51] Since the *International Tin Council* decision is regularly cited in our courts, a brief reference to its reception in subsequent jurisprudential analysis may not be out of place. In doing so I acknowledge that the point has not been the subject of argument. A comprehensive re-examination must await another day. But distinguished commentators have criticised what has been called the narrowness of the decision in the House of Lords: see the criticism of Sir Robert Jennings in his 1989 FA Mann Lecture ((1990) 39 ICLQ 513 at 524–526); and of Dame Rosalyn Higgins 'The Relationship between International and Regional Human Rights Norms and Domestic Law', in *Developing Human Rights Jurisprudence* (1993) vol 5, pp 16–23. The latter writer observed (p 20): g
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'... international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international instrument, partly because relatively "new" rights may also be included, and partly because the treaty may involve procedural undertaking for the States Parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such—and even were j

a these rights not already secure through a separate domestic historic provenance—they would be part of the common law by virtue of being rules of general international law.’

b There is also growing support for the view that human rights treaties enjoy a special status: Murray Hunt *Using Human Rights Law in English Courts* (1998) pp 26–28. Commenting on *Lewis v A-G of Jamaica* [2001] 2 AC 50, [2000] 3 WLR 1785 Lawrence Collins J commented that ‘it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases’: see *Foreign Relations and the Judiciary* (2002) 51 ICLQ 485 at 496. That is not to say that the actual decision in the *International Tin Council* case was wrong. On the contrary, the critics would accept the principled analysis of Kerr LJ in the Court of Appeal that the issue of the liability of member states under international law is justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation: see Lawrence Collins J (2002) 51 ICLQ 485 at 497.

d [52] The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future.

e [53] That brings me to the common law issue. In a careful and helpful argument Mr Treacy QC invited the House to hold that the common law should be developed to recognise a substantive right to life, coupled with a procedural right co-extensive with that enunciated in 1995 in *McCann’s* case. He pointed out that, unlike cases such as *R v Lyons* where there was what he called a legislative force. The fact that there is no authority for such a development is not in itself fatal. In *R v Chief Constable of the Royal Ulster Constabulary, ex p Begley, R v McWilliams* [1997] 4 All ER 833, [1997] 1 WLR 1475, Lord Browne-Wilkinson, in giving the unanimous opinion of the House, observed ([1997] 4 All ER 833 at 838, [1997] 1 WLR 1475 at 1480):

‘It is true that the House has a power to develop the law. But it is a limited power. And it can be exercised only in the gaps left by Parliament. It is impermissible for the House to develop the law in a direction which is contrary to the expressed will of Parliament.’

h Before embarking on such a course the House would have to take into account that, by and large, the law regarding inquests has been developed in Northern Ireland by statute: see Leckey and Greer *Coroner’s Law and Practice in Northern Ireland* (1998) *passim*. Moreover, the House would have to confront another difficulty. It must be sound principle for a supreme court to develop the law only when it has been demonstrated that the just disposal of cases compellingly requires it. Given that the right to life is comprehensively protected under art 2 of the convention as incorporated in our law by the 1998 Act, why is there now a need to create a parallel right to life under the common law? Given that the procedural obligation under art 2 is comprehensively protected under our law, as held by the House of Lords in *R (on the application of Amin) v Secretary of State for*

the Home Dept [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169, why is there now a need to create a parallel right under the common law? a

[54] At a late stage of the appeal before the House I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law. The idea was suggested to me by a valuable article: Andrew J Cunningham *The European Convention on Human Rights, Customary International Law and the Constitution* (1994) 43 ICLQ 537. The writer stated the following propositions (at 538): b

‘First, that treaties may generate rules of customary international law: the accepted view that unenacted treaties “cannot be a source of rights and obligations” in England is thus effectively sidestepped, since it is not the treaty itself which is the source of rights. Second, that the numerous human rights treaties and other instruments, of which the European Convention is but one, have given or, at least, may give rise to rules of customary international human rights law. Third, that customary international law forms part of the common law of England. If these three be accepted, it follows that, to the extent that the content of any right encompassed in the European Convention is the same as its content in customary international law, the right in question will be recognised in English law as a part thereof.’ c
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Along these lines there may be an argument that the right to life has long been recognised in customary international law, which in the absence of a contrary statute has been part of English law since before the 1998 Act came into force. One has to remember, however, that the procedural obligation recognised in *McCann’s* case only dates from 1995, ie 13 years after the deceased was shot and after the inquest in Northern Ireland was closed. It may be unrealistic to suggest that the procedural obligation was already part of customary international law at a time material to these proceedings. The point has not been in issue in the present case. It has not been researched, and it was not the subject of adversarial argument. It may have to be considered in a future case. The impact of evolving customary international law on our domestic legal system is a subject of increasing importance. e
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[55] I conclude that the common law development has not been made out.

[56] I would allow the appeal and dismiss the application for judicial review. g

LORD HOFFMANN.

[57] My Lords, on 11 November 1982 a member or members of a unit of the Royal Ulster Constabulary shot and killed Gervaise McKerr while he was driving a car in East Lurgan. They also killed his two passengers. The ensuing investigation into the deaths was protracted and unsatisfactory. Three policemen were tried for murder in 1984 but the judge ruled that the evidence adduced by the prosecution did not raise a case to answer. There was a suspicion that important evidence had been suppressed. The coroner opened an inquest but adjourned it while officers from English police forces conducted further investigations. In 1986–1987 they delivered reports to the Director of Public Prosecutions (DPP). In 1988 the Attorney General announced that he had considered all the available material and decided that it would not be in the public interest to initiate further criminal proceedings. The inquest resumed but the coroner was unable to obtain access to much of the evidence he required. Finally in 1994 the Secretary of State issued a public interest immunity certificate preventing disclosure of the reports of the independent police investigations. At h
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a that point the coroner abandoned the inquest, saying that the reasons for which it had been held were no longer achievable.

[58] Mr McKerr's mother (and after her death, his son) petitioned the European Commission of Human Rights in 1993, alleging that the United Kingdom was in breach of art 2 of the convention: 'Everyone's right to life shall be protected by law'. In *McCann v UK* (1996) 21 EHRR 97 the Strasbourg court b held (at 163 (para 161)) that this requires the state to provide 'some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State'.

[59] In Mr McKerr's case, the Strasbourg court decided on 4 May 2001 that the United Kingdom had not complied with this obligation: see *McKerr v UK* (2002) 34 c EHRR 553. The shortcomings were summarised in the judgment (at 612 (para 157)): the police officers who investigated were not independent from the officers implicated; there was no public scrutiny or involvement of the victim's family in the investigation or the decision of the DPP not to prosecute; the abandonment of the inquest prevented any findings which could have played an effective role in securing a prosecution for any criminal offence disclosed; d statements by witnesses who appeared at the inquest were not disclosed in advance to the family; the public interest immunity certificate deprived the inquest of relevant evidence; the police officers who shot Mr McKerr were not compellable witnesses; the police investigation was too slow; the inquest did not commence promptly and then went on too long.

[60] The court accordingly found a violation of art 2 and awarded the e applicant non-pecuniary damages of £10,000 for 'feelings of frustration, distress and anxiety' caused by the inadequacy of the investigation. This sum has been paid. Pursuant to art 46(2) of the convention, the judgment was sent to the Committee of Ministers which is charged with supervision of its execution. It has, f in accordance with its rules, invited the United Kingdom government to inform the Committee of the measures which it has taken in consequence of the judgment. The government has supplied information about legal and administrative changes which have been made but does not propose to hold a fresh investigation into Mr McKerr's killing. The Committee has not yet decided whether the measures notified by the government amount to compliance with g the judgment and with the state's duty under art 52 to satisfy the Committee that its internal law enables the rights under the convention to be effectively implemented.

[61] Mr McKerr's son was dissatisfied with this outcome and on 30 January 2002 commenced judicial review proceedings against the Secretary of State for h Northern Ireland seeking a declaration that 'in breach of section 6 of the Human Rights Act 1998 and article 2 of the European Convention', he had failed to provide an 'article 2 compliant' investigation and an order of mandamus to compel him to provide such an investigation. The principal ground was stated to be that as the Strasbourg court had found a breach of art 2, it was a breach of s 6 of the 1998 Act for the Secretary of State not to hold an investigation which j complied with that article.

[62] Section 6 says that it is unlawful for a public authority (such as the Secretary of State) to 'act in a way which is incompatible with a Convention right'. Section 1(1) defines 'Convention rights' as 'the rights and fundamental freedoms set out in' certain articles of the convention which s 1(3) says are set out in Sch 1.

[63] So Mr McKerr says (1) the convention gives him the right to an effective investigation, (2) the Strasbourg court has decided that the United Kingdom has not provided him with one, (3) he therefore has a continuing right to such an investigation, and (4) the Secretary of State, in refusing to provide one, is acting in breach of his convention rights. Campbell LJ did not accept stage (3) of this reasoning because he said that the obligation to provide an investigation was discharged by the declaration and order for payment of compensation made by the Strasbourg court. The Court of Appeal, in a judgment given by Carswell LJ, accepted all four stages of the reasoning and made a declaration that the government had 'failed to carry out an investigation which complies with the requirements of article 2'.

[64] In my opinion the reasoning which the Court of Appeal accepted does not sufficiently distinguish between the obligations under international law which the United Kingdom (as a state) accepted by accession to the convention and the duties under domestic law which were imposed upon public authorities in the United Kingdom by s 6 of the 1998 Act. These obligations belong to different legal systems; they have different sources, are owed by different parties, have different contents and different mechanisms for enforcement.

[65] It should no longer be necessary to cite authority for the proposition that the convention, as an international treaty, is not part of English domestic law. *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 All ER 720, [1991] 1 AC 696 and *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976 are two instances of its affirmation in your Lordships' House. That proposition has been in no way altered or amended by the 1998 Act. Although people sometimes speak of the convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the convention. But they are domestic rights, not international rights. Their source is the statute, not the convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.

[66] This last point is demonstrated by the provision in s 2(1) that a court determining a question which has arisen in connection with a convention right must 'take into account' any judgment of the Strasbourg court. Under the convention, the United Kingdom is bound to accept a judgment of the Strasbourg court as binding: art 46(1). But a court adjudicating in litigation in the United Kingdom about a domestic 'Convention right' is not bound by a decision of the Strasbourg court. It must take it into account.

[67] If one keeps the distinction between international and domestic obligations firmly in mind, the fallacy in the respondent's reasoning becomes apparent. It can be illustrated by reference to a passage in the judgment of Jackson J in *R (on the application of Wright) v Home Office* [2001] EWHC 520 (Admin), (2001) 62 BMLR 16. Mr Wright was a prisoner who died after an asthma attack in 1996. The judge found that the investigation into his death did not comply with arts 2 and 3 of the convention. He then considered whether this gave rise to any rights enforceable in judicial review proceedings:

'[64] ... the [Home Secretary] came under an obligation pursuant to arts 2 and 3 of the Convention to set up an effective official investigation ... [He] never discharged that obligation. [His] breach of that obligation was not actionable in the English courts before 2 October 2000 ...

a [65] Can the claimants now claim any remedy pursuant to ss 6, 7 and 8 of the Act for the continuing breach of arts 2 and 3 since 2 October 2000?

b [68] After rejecting a floodgates argument, the judge decided that he could. But the fallacy of the reasoning lies in the notion of a 'continuing breach' of arts 2 and 3. The judge was concerned with the rights of the claimants in domestic law. Before 2 October 2000, there could not have been any breach of a human rights provision in domestic law because the 1998 Act had not come into force. So there could be no continuing breach. There may have been a breach of art 2 as a matter of international law and this may have 'continued' after 1 October 2000, although, for the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood, I think it unlikely. But that is irrelevant to whether the claimants had rights in domestic law, for which there can be no source other than the 1998 Act. The Act did not transmute international law obligations into domestic ones. It created new domestic human rights. The simple question is whether as a matter of construction, those rights applied to deaths which occurred before the Act came into force.

d [69] Your Lordships' House have decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by art 2 can have had no application to a person who died before the Act came into force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of s 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations. In *Wright's* case Jackson J was prepared to accept (at [65]) the possibility of investigations into breaches of art 2 'during the 50-year period between the UK's accession to the Convention and the coming into force of the [1998 Act]'. But that was because he regarded an international law right under the convention as a necessary (and sufficient) springboard for a domestic claim on the basis of a 'continuing breach'. In my opinion, however, the international law obligation is irrelevant. Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the convention should matter. It would in principle be necessary to investigate the deaths by state action of the Princes in the Tower.

g [70] I therefore agree with the opinion of Silber J in *R (on the application of Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin), [2003] All ER (D) 220 (Jun) that the duty to investigate under art 2 did not arise in domestic law in respect of deaths before 2 October 2002. In the Court of Appeal in that case ([2003] EWCA Civ 1129, [2003] 4 All ER 1239), Brooke LJ, giving the judgment of the court, disagreed. He said (at [82]): '... we do not believe the court at Strasbourg would look on this matter in this way.' I daresay it would not. But that is because the court would be concerned with the international obligations of the United Kingdom and not with the extent to which the 1998 Act was retrospective.

j [71] Mr Treacy QC, who appeared for the respondent, said that courts could deal with applications for investigations into past deaths in a pragmatic way. If an inquiry would no longer serve any purpose, they would refuse one. That was a question of remedy rather than the existence of the right. Likewise in *Khan's* case, Brooke LJ said (at [85]): 'If this decision causes practical difficulties in other cases, the solution to those difficulties will have to be worked out on a

case-by-case basis.’ I do not think it appropriate for human rights to be reduced to a matter of broad judicial discretion in this way. In my opinion Parliament intended s 6 of the 1998 Act to be enforced, but enforced only in respect of breaches occurring after it came into force. a

[72] Mr Treacy submitted in the alternative that, independently of the 1998 Act, the common law had created a right to an investigation which made it unlawful for the Secretary of State to refuse to order one. In my opinion this is an impossible contention. It is true that in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169 Lord Bingham of Cornhill said (at [30]): ‘A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under arts 1 and 2 of the convention’. It is perfectly true that the sanctity of life is a value which has directed the development of the common law and the enactment of many statutes which are intended to protect life, provide for the investigation of unnatural deaths and secure the detection and punishment of those who unlawfully kill. A number of statutes concerned with inquests into deaths in England and Wales are mentioned by Lord Bingham (at [16] and [17]) and there are similar statutes applicable to Northern Ireland. Some of the grounds upon which the Strasbourg court found that the investigative procedures in Mr McKerr’s case did not satisfy art 2 (for example, the rule by which a person suspected of causing the death was not a compellable witness and the limited nature of the verdicts which could be returned by the coroner’s jury) were deficiencies in these statutory provisions. But no successful challenge to the legality of the various investigative procedures (the criminal trial, the police inquiries, the inquest) was made at the time and it is far too late to make such a challenge now. Nor is any attempt being made to invoke domestic law procedures to quash the decision of the coroner to abandon the inquest or require another to be held. b
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[73] Instead, the respondent, in this part of the argument, asserts a broad common law principle equivalent to art 2 against which the whole of the complex set of rules which governed the earlier investigations can be tested and by which they can be found wanting and be ordered to be rerun under different rules. My Lords, in my opinion there is no such overarching principle and I venture to suggest that the very notion of such a principle, capable of overriding detailed statutory and common law rules, is alien to the traditions of the common law. The common law develops from case to case in harmony with statute. Its principles are generalisations from detailed rules, not abstract propositions from which those rules are deduced. Still less does it provide a solvent for any difficulties which may exist in the rules enacted by Parliament. It is in this respect quite different from the general statements which have now been enacted by the 1998 Act and to which the House gave effect in *Amin*’s case. f
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[74] I would allow the appeal and dismiss the application for judicial review.

LORD RODGER OF EARLSFERRY.

[75] My Lords, I too would allow the appeal, for the reasons given by my noble and learned friends, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Brown of Eaton-under-Heywood. I merely wish to add a short comment on the application of the Human Rights Act 1998 (the Act) in relation to the death of Gervaise McKerr. j

[76] Ever since the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Act) came into effect

a in international law, the United Kingdom has been bound by its terms. The position under international law did not change in any way on 2 October 2000: that was a significant day in terms of the domestic legal systems of the United Kingdom, but not in terms of international law. Both before and after that date, the obligation on the United Kingdom under art 1 of the convention was to secure to everyone within its jurisdiction the rights and freedoms defined in Pt I of the convention. Similarly, both before and after that date, the United Kingdom aimed to secure the enjoyment of those rights and freedoms by means of a raft of common law and statutory provisions in its domestic law. If the rights and remedies available in our domestic law proved to be insufficient for this purpose in any given case, then the European Court of Human Rights would find that the United Kingdom had failed to secure the right or freedom and so was in violation of its international law obligation under the convention. The only difference that the commencement of the Act made—and it was, of course, a significant difference—was to increase the range of provisions available in our domestic law to ensure that people within the jurisdiction enjoyed those rights and freedoms. On the international plane this meant that the United Kingdom should be better placed to fulfil its obligation under art 1 of the convention.

[77] Over the years, Parliament has passed many Acts, and public authorities have taken many steps, to secure that, under our domestic law, people should enjoy the rights and freedoms guaranteed by the convention. The legislation dealt with particular situations, whether or not brought to light by a ruling from Strasbourg. In 1998 Parliament adopted a more elegant and comprehensive solution. The Act reproduces as rights in our domestic law the rights that are to be found in certain specified articles in the convention and in two of the Protocols: see s 1(1)–(3). It then makes it unlawful for public authorities to act or to fail to act in a way which is incompatible with those rights: see s 6(1) and (6). Those affected by a breach can rely on these rights; courts and tribunals can grant the relief, remedy or order that they consider just and appropriate if a public authority is found to have acted unlawfully by violating one of them: see ss 7 and 8. In any given situation, therefore, a person may rely not only on all the pre-existing rights and remedies afforded by the common law and statute, but also on the relevant new domestic rights set out in Sch 1 to the Act. And, correspondingly, the courts can grant not only the remedies that would have been available to give effect to the pre-existing common law and statutory rights, but also the just and appropriate remedy to give effect to the relevant rights under the Act.

[78] In the present case the respondent relies on his rights under the domestic law of Northern Ireland. In particular, he says that, by reason of the convention right under art 2 as set out in Sch 1 to the Act (art 2 convention right), he has the right to a prompt and effective investigation of his father's death. By refusing to carry out such an investigation, he says, the Secretary of State has acted, and continues to act, incompatibly with that right and so unlawfully in terms of s 6(1).

[79] The respondent's father, Gervaise McKerr, was shot by a Royal Ulster Constabulary officer or officers in 1982. Your Lordships' House has established that, subject to s 22(4), which does not apply in the present case, the Act does not have retroactive effect. So none of its provisions applies to the position in 1982. This means that, in the domestic law of Northern Ireland, the legal rights and duties of the people involved in the events of 1982 are not altered by the Act. In particular, Gervaise McKerr did not enjoy, and is not now to be regarded as having enjoyed, any art 2 convention right to life under the Act. It follows that

his killing, however it may have come about, is not to be regarded as having been incompatible with that convention right or as unlawful by reason of s 6(1). a

[80] The respondent accepts this, but he fastens on another aspect of art 2. Where the article applies, it is interpreted as requiring the relevant public authority to carry out an effective official investigation of any death which may have resulted from the use of force by agents of the state: see *McCann v UK* (1996) 21 EHRR 97 at 163 (para 161). This obligation is variously described as b procedural or adjectival, but its purpose is to ensure that the lawfulness of the use of force by state agents resulting in death is reviewed. Without such a procedure the guarantee in art 2 would be ineffective. The Secretary of State does not dispute that interpretation of the art 2 convention right. It follows, of course, that c deaths will have to be investigated even though, as it turns out, the killing was lawful and not in breach of that right. To that extent the right to an investigation can properly be regarded as free-standing.

[81] What the respondent claims, however, is an art 2 convention right under the Act to have his father's death investigated even though, as he accepts, the killing did not violate, and is not to be regarded as having violated, any art 2 d convention right under the Act. Such a claim is fatally flawed and must be rejected.

[82] Like Lord Brown I am doubtful whether, even in international law terms, there was by October 2000 any continuing breach of the relatives' right to an effective investigation of Gervaise McKerr's death under art 2 of the convention. But, even supposing that there was, that continuing breach of an international e obligation was not turned into a continuing breach of an art 2 convention right in domestic law when the Act came into force. Any breach that there was remained a breach in international law and nothing more. The respondent relies on the Act as part of the domestic law of Northern Ireland. Under the Act the right to an investigation, deriving from an art 2 convention right, presupposes that the killing could have been in violation of that selfsame convention right. So, when f the respondent's father was killed in 1982, his relatives had no right to an investigation under the Act. Moreover, since the Act is not retroactive, they are not now to be regarded as having had such a right in 1982 or at any time after that. Conversely, the Secretary of State is not to be regarded as having been in breach, or continuing breach, of such a right either in 1982 or at any time after that. g

[83] What the respondent is really saying, therefore, is that, when the Act came into force, it conferred on him a right under art 2 to have his father's death investigated even though his killing was not, and is not to be regarded as having been, in breach of any art 2 convention right under the Act. Therefore, the respondent is not asking the courts to apply the Act according to its terms, but to h amend them so as to fit this case. That cannot be done. If Parliament had intended the rights under art 2 to be split up, with the Act applying differently to the different aspects, then it would have provided for this expressly. The potential objections are obvious. It would be curious to give a right, under the Act, to an investigation of a killing to which the Act did not apply. If there were to be such a right to an investigation, how far back would it go? Speculation is j fruitless: what matters is that Parliament could have made, but did not make, any such transitional provision. The obvious conclusion is that the right to an investigation under the Act is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act. The respondent seeks to contradict the policy of Parliament.

LORD BROWN OF EATON-UNDER-HEYWOOD.

- a** [84] My Lords, the respondent's father was one of three men shot dead in Armagh by Royal Ulster Constabulary police officers from a special mobile support unit on 11 November 1982. Within a month three other men had been killed in two similar incidents. The police, it came to be alleged, were operating a shoot-to-kill policy.
- b** [85] Try as they might, those like the respondent concerned by these deaths have never managed to secure a fully satisfactory investigation into them.
- [86] The investigations in fact undertaken and the respondent's efforts to improve upon them have already been charted in the speech of my noble and learned friend Lord Nicholls of Birkenhead. He has summarised too the judgment of the European Court of Human Rights (ECHR) (which became final on 4 August 2001) upon the application made by the respondent's mother on 7 March 1993 and continued by him after her death. Put shortly, the ECHR found that the various investigations carried out, culminating in the final abandonment of the inquest on 8 September 1994, failed in a number of respects to comply with the procedural obligation implied by art 2 of the convention.
- d** Awarding the respondent damages of £10,000, the court said ((2002) 34 EHRR 553 at 617 (para 181)):
- ‘... the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention.’
- e**
- [87] The central question before your Lordships is whether following that judgment the Secretary of State for Northern Ireland (the appellant) is now under an obligation enforceable in domestic law to undertake a further investigation into this killing. By letter dated 5 September 2001 the respondent's solicitors contended that such further investigation is now required ‘to comply with [the ECHR's] ruling’. The appellant disputes this.
- f**
- [88] Campbell LJ at first instance concluded that the obligation to conduct an art 2 compliant investigation ‘remained unfulfilled until such an investigation was carried out or a competent court vindicated the right in some other way’, but that, the respondent having received a declaration and an order for just satisfaction from the ECHR, the obligation then came to an end. The Court of Appeal allowed the respondent's appeal. They agreed with Campbell LJ that ‘there is a continuing breach of art 2’ but, unlike him, concluded that it had not come to an end and that the respondent would remain a victim so long as ‘no domestic remedy has been afforded to [him]’.
- g**
- h** [89] It was not suggested to either court below that, whatever continuing obligation there might be on the international plane to conduct some further investigation, no such duty could arise under domestic law because the Human Rights Act 1998 is not retrospective. That now is the principal argument advanced by the Attorney General on behalf of the appellant.
- j** [90] The argument essentially comes to this. Under domestic law it only became unlawful for a public authority to act incompatibly with a convention right on 2 October 2000. Whatever the circumstances of Mr McKerr's death, therefore, art 2 of the convention was not engaged by it. On the domestic plane the appellant could not be said to have breached the substantive obligations

arising under art 2. Nor, moreover, could he be said to have breached the procedural obligation to hold a sufficient inquiry into the death—an obligation which the ECHR first found to be implicit in art 2 in *McCann v UK* (1996) 21 EHRR 97 (the ‘Death on the Rock’ case) and has developed in subsequent case law to the point now reached in this very case, *McKerr v UK* (2002) 34 EHRR 553 (and the other three Northern Ireland cases determined in parallel with it). Plainly no art 2 obligation to investigate McKerr’s death could arise under domestic law prior to 2 October 2000. But no more could it arise after that date. It is a procedural obligation properly to be regarded as secondary or ancillary or adjectival to the substantive obligation to protect life, an obligation arising directly out of the loss of a life. True it is that in *McCann*’s case, where this procedural duty was first articulated, the European Commission said (at 140 (para 193)) that ‘where a victim dies in circumstances which are unclear ... the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention’, and true it is too that in the subsequent Strasbourg jurisprudence it has been described as a ‘freestanding’ obligation. That, however, means no more than that the procedural duty arises independently of any demonstrable breach of the substantive obligations arising under art 2. As stated in *McKerr*’s case itself (at 599 (para 111)):

‘The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.’

[91] The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when art 2 rights were enforceable under domestic law, i.e. on and after 2 October 2000.

[92] Such is the argument and to my mind it is irresistible. To say, as Mr Treacy QC for the respondent does, that the procedural obligation, once engaged, is a continuing one, regarded by the ECHR here as still continuing at the date of their decision in 2001, is nothing to the point. Even were it so (and, as I shall shortly come to explain, for my part I doubt it is), that would be the position only on the international plane. It would say nothing as to whether, on the true interpretation and application of the 1998 Act, a pre-2 October 2000 death could give rise to a procedural obligation to hold an art 2 compliant investigation enforceable under domestic law on and after 2 October 2000.

[93] As for Mr Treacy’s alternative contention that, irrespective of whether a right to an art 2 compliant investigation now arises under s 6 of the 1998 Act, a duty to hold such an investigation in any event arises at common law, and indeed has remained unfulfilled ever since Mr McKerr’s death, this in my opinion fails both on authority and principle. By the same token that this House in *R v Lyons* [2002] UKHL 44, [2002] 4 All ER 1028, [2003] 1 AC 976, declined, by reference to a subsequent ECHR ruling, to hold a pre-1998 Act trial, conducted in accordance with the domestic laws and standards then applicable, unsafe, so too here it would be wrong for your Lordships to condemn as contrary to the common law a series of procedures long since properly concluded in accordance with well-established domestic laws and never challenged save by reference to a substantially later convention decision. Nor would it be right to impute to the common law a requirement for the same form of investigation of fatalities as the ECHR has now found implicit in art 2. Such a fiction would be unwarranted however profound

a one's desire to interpret domestic law down the years consistently with our international obligations.

b [94] I return, as promised, to indicate why for my part I would question Mr Treacy's assertion that the ECHR's judgment should be understood as a finding that the United Kingdom remains under an international law obligation to hold a further investigation into Mr McKerr's death. Immaterial though, for reasons already explained, the correctness of this assertion is to the determination of the appeal, it would be unfortunate if the impression were gained that it was necessarily accepted by your Lordships. The following points should be made. First, that the ECHR, by reference to a number of identified shortcomings in the various investigative processes long since concluded in this case, found (at 613 (para 161)) 'that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision'. There is nothing in the judgment to suggest that this violation is to be regarded as a continuing one.

d [95] Secondly, it is plain that, 20 years on from Mr McKerr's death, no fresh inquiry could possibly comply fully with the now established requirements of an art 2 investigation. Perhaps most obviously, the opportunity for a prompt independent investigation has been irretrievably lost; this element of a compliant inquiry would necessarily be missing.

e [96] Thirdly, it has now been left by the court to the Committee of Ministers to supervise the execution of its judgment pursuant to art 46(2) of the convention. That Committee may or may not sanction the United Kingdom's present proposal, which is to hold no further inquiry into Mr McKerr's death. But even if it does not, such further inquiry as may be stipulated could only be by way of partial redress or remedy for past failures. Merely because the Committee of Ministers may judge some further inquiry 'effective' does not mean that it would be compliant.

f [97] In short, the most that is achievable now on the international plane is further redress for past non-compliance. It accordingly follows that, even were the domestic court, despite the non-retrospectivity of the 1998 Act, able to entertain art 2 complaints in respect of pre-October 2000 deaths, the respondent would in any event be unable to establish that an art 2 procedural obligation in respect of Mr McKerr's death arose after October 2000. The complaint would not be of a proposed post-October 2000 unlawful act (the refusal to comply with the implied procedural obligation to investigate) but rather of a pre-October 2000 breach and manifestly the respondent could have no right in domestic law to complain about that.

g [98] This conclusion, however, as I have already acknowledged, is not essential to the disposal of the present appeal. It is for the reasons earlier given, which accord with those given in the speech of my noble and learned friend Lord Hoffmann, that I too would allow the appeal and dismiss the respondent's application for judicial review.

Appeal allowed.

Dilys Tausz Barrister.

McAuley Catholic High School v C and others

[2003] EWHC 3045 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

SILBER J

1, 11 DECEMBER 2003

Education – Special educational needs – Educational provision – Disability discrimination – Allegation school discriminating against pupil by reason of his disability – Whether proper comparator to be used to determine whether disabled pupil treated less favourably than others person who was not disabled who behaved properly – Disability Discrimination Act 1995, ss 28A, 28B(1).

IC attended the appellant school. He suffered from autistic spectrum disorder which was a disability for the purposes of the Disability Discrimination Act 1995, as amended by the Special Educational Needs and Disability Act 2001. As a result of the way in which IC was treated by the school, which culminated in his temporary exclusion, his parents who were the first and second respondents, made a claim of disability discrimination against the school to the third respondent, the Special Educational Needs and Disability Tribunal. The parents alleged that by virtue of s 28B(1)^a of the 1995 Act the school had discriminated against IC, namely that for a reason which related to his disability, it treated him less favourably than it treated or would treat others to whom that reason did not and would not apply, and that it could not show that the treatment in question was justified, contrary to s 28A of the Act. The tribunal considered the Code of Practice for Schools, which was issued by the Disability Discrimination Commission, as it was required to do by virtue of s 53A(1)(a) of the Act. They determined that the proper comparator to be used was someone who was not disabled and who behaved properly. They then allowed the claim to the extent that IC was not given the necessary personal guidance and support within the context of the school of the school pastoral system as required. The school appealed, contending that the tribunal had failed to use the proper comparator and should have decided whether or not there had been unlawful discrimination against IC by establishing whether a child without any disability but manifesting the same behaviour would have been excluded permanently from the outset. The tribunal supported its view of the proper comparator by relying on an example in the Code where it was said that in the case of a pupil with Tourette's disease, who was banned from a school trip because of her abusive language, the comparison had to be made with others who did not use abusive language.

Held – Having established that there had been less favourable treatment by reason of the pupil's disability, which was a question of fact for the tribunal, the comparator to be used was the school population as a whole who were not disabled and who had not misbehaved. By introducing provisions for discrimination which were identical to those which had been in force in the discrimination in employment provision, Parliament had to have intended that both sets of

^a Section 28, so far as material, is set in Appendix para 2, below

- a provisions should be construed in the same way. Moreover, there was nothing in the 1995 Act, as amended, to suggest that that intention should be displaced. Therefore, the comparator should be selected in education discrimination claims in the same way as the courts had established they should be chosen for employment discrimination claims. In the instant case, the tribunal had used the correct comparator. Accordingly, the appeal would be dismissed (see [45], [46], [70], below).

- b *London Corp v Cusack-Smith* [1955] 1 All ER 302 and *Clark v TDG Ltd (t/a Novocold)* [1999] 2 All ER 977 applied.

Notes

- c For discrimination against disabled pupils, see Supp to 13 *Halsbury's Laws* (reissue) para 513A.

For the Disability Discrimination Act 1995, ss 28A and 28B, see 7 *Halsbury's Statutes* (2002 reissue) 327, 328.

Cases referred to in judgment

- d *Clark v TDG Ltd (t/a Novocold)* [1999] 2 All ER 977, CA.
London Corp v Cusack-Smith [1955] 1 All ER 302, [1955] AC 337, HL.
Rowden v Dutton Gregory (a firm) [2002] ICR 971, EAT.

Appeal

- e McAuley Catholic High School appealed from the decision of the third respondent, the Special Educational Needs and Disability Tribunal of 14 July 2003, by a written decision dated 22 July 2003, allowing claims of disability discrimination brought against the school by CC and PC, the first and second respondents, on behalf of their son IC, a child suffering from autistic spectrum disorder, who was a pupil at the school. The facts are set out in the judgment.

- f *John Friel* (instructed by *Taylor & Emmet*, Sheffield) for the School.
Sarah-Jane Davies (instructed by the *Treasury Solicitor*) for the tribunal.
The first and second respondents did not appear.

Cur adv vult

- g 11 December 2003. The following judgment was delivered.

SILBER J.

- h I. INTRODUCTION

- j [1] IC, who was born on 14 May 1990, attended McAuley Catholic High School in Doncaster (the School). Unfortunately, he suffers from autistic spectrum disorder. IC's parents, CC and PC, made a claim of disability discrimination against the School pursuant to the provisions of the Disability Discrimination Act 1995 and this was heard by the Special Educational Needs and Disability Tribunal (the tribunal). On 14 July 2003 by a written decision dated 22 July 2003 (the decision), the parents' claim against the School was allowed solely on the issue of lack of pastoral support with the result that the School was ordered to produce an action plan to deal with the specific needs of children on the autistic spectrum or who had communication difficulties and that a mentoring system be also established.

[2] The School has appealed against that decision and it, in common with the tribunal, had been represented at the hearing of the appeal. The parents of IC, who are the first and second respondents to the appeal, have submitted helpful written representations supporting the decision but they have not been present or represented at the hearing. At the outset of the hearing, the School applied to amend their grounds of appeal. In the absence of opposition from the tribunal, this application was granted. a
b

II. STATUTORY FRAMEWORK

[3] The relevant statutory provisions are set out in the appendix to this judgment and so I will briefly summarise the framework but I will refer to the relevant statutory provision in greater detail when I consider the issues raised on the appeal. The 1995 Act makes it unlawful to discriminate against a person who has a disability which for the purposes of the Act means that 'he has a physical or mental impairment which has a substantial long-term adverse effect on his ability to carry out normal day-to-day activities' (see s 1(1)). It is common ground that IC has a disability for the purpose of the Act. By the Special Educational Needs and Disability Act 2001, the 1995 Act was amended so as to cover education and s 28A of the 1995 Act makes it unlawful to discriminate against disabled pupils. By s 28C, provision is made that disabled pupils are not to be substantially disadvantaged in comparison with pupils who are not disabled. By s 28L of the Act, there are provisions relating to the permanent exclusion from a school of a disabled pupil. Section 28I of the Act gives the tribunal jurisdiction to hear complaints of discrimination. c
d
e

III. THE BACKGROUND TO THE APPLICATION TO THE TRIBUNAL

[4] In order to understand the grounds of appeal, I must now describe the background to the application which I take from the undisputed factual findings of the tribunal. IC had had a statement of special educational needs since March 2000 and he had been assessed as having problems in the area of social use of language, communication skills and imagination. Assessment by a speech and language therapist revealed an uneven profile of IC's language skills and very poor pragmatic language skills. Although his psychometric assessment indicated a level of functioning below the average level, his academic abilities were not a cause for concern and his teachers were said not to report any significant difficulties for him. IC was described to the tribunal as a— f
g

'well behaved child who can be quiet and hesitant [but] he was observed to have only a limited group of friends and interaction with a wider peer group is difficult for him.'

[5] The statement of special educational needs for IC referred to the need for his school to have access on an ad hoc basis to an educational psychologist and a teacher for pupils with communication difficulties who would provide information and advice on meeting IC's needs. IC became a pupil at the School in September 2001 and his transition 'seems to have taken place without undue difficulties' as there was no evidence of any particular problems for him during the Autumn term. Thereafter, IC's behaviour at the School started to deteriorate and the School arranged for IC to be seen by an educational psychologist, Ms Rachel Kershaw, who duly considered the matter. h
j

[6] In her written report to the School dated 13 March 2002, Ms Kershaw noted the concerns from the staff about the effect of IC's behaviour on the rest of the

a class and his tendency to be alone at lunch and at break times. She made a number of recommendations to tackle these difficulties and these included the use of a buddy system to address socialisation difficulties and to promote 'peer relationships', the use of direct questioning techniques in lessons, the production of subject-specific word banks and the repetition of instructions in lessons to help his understanding.

b [7] IC's mother was very supportive of these measures and, in particular, of the buddy system, which worked well for IC in year 7. IC continued to struggle in science lessons and IC's mother was not sure that IC had received the extra help suggested by Ms Kershaw in the form of subject-specific word banks or more individual support in science lessons. Subsequently, on 22 March 2002, the local education authority (LEA) amended IC's statement to provide for five hours support per week from a learning support assistant (LSA) at the School, as well as ongoing monitoring, advice and support from a teacher for pupils with communication disorders.

c [8] At a meeting which took place on 5 July 2002, IC's mother requested that IC should receive ten hours support per week from a LSA. Mr Toothill the leader of the communication difficulties team (CDT) at the LEA said at the meeting that he felt that IC's support were best coming from two or three LSAs if possible. Following this meeting, IC's statement was further amended on 18 July 2002 so as to provide for ten hours LSA support per week for IC.

e [9] IC started year 8 at the school in September 2002. A meeting took place on 4 September 2002 when consideration was given to IC's timetable to the groups that he would be in and to the lessons in which he would receive support. It was confirmed at that meeting that Mr Toothill would be replaced by Ms Melanie Whitney, as the representative of the CDT responsible for IC. IC's mother explained that she was unhappy about certain aspects of Mr Toothill's support for IC. The new head teacher at the School, Mrs Mary Lawrence explained during f the meeting that IC's mother was informed about a quiet room, known as room 30, which was provided at the School for children who needed more support and a safer space during lunch and break times. The School believed that IC knew of this facility but that he had only used it once. IC's mother said that she had only become aware of room 30 in November 2001 and she was not sure that IC had known that he could use it. It was also decided at that meeting that g a multi-agency meeting would take place and that the date that was arranged for it was 23 October 2002, but it did not take place as IC's parents declined to attend for reasons that will become apparent in [18], below, when I record the events, which occurred just before that hearing.

h [10] Mrs Lawrence told the tribunal that the transition from year 7 into year 8 is quite a challenge for many pupils as they move from mixed ability groups into sets for each subject. The children were also set in their forms which meant that IC was in groups of lower ability children, which had the advantage for them of being small in size. A disadvantage of the setting system was that it became impossible to replicate the buddy system that had worked so effectively for IC in j year 7 as there were no children of the right calibre in IC's sets in year 8 to carry out such a sensitive task. The three children who had previously performed that role had all moved into different classes from IC in year 8. In addition, IC's groups did not always consist of the same children and there were accordingly additional changes of fellow pupils for him to adapt to and cope with.

[11] By all accounts, IC's behaviour began to deteriorate during the Autumn term 2002. Mrs Horton, the special educational needs co-ordinator at the School

gave an account to the tribunal that IC's behaviour in terms could often be highly disruptive despite the presence of a LSA. Mrs Lawrence, who had previous experience working with autistic children, told the tribunal that she had been called out twice to the classroom to deal with IC when he had become difficult and her previous experience enabled her to calm and stabilise the situation with IC. a

[12] IC had particular difficulties with science. The method of teaching at the School required the children to work in groups; IC found it hard to cope with this method as he had a tendency to wander around the room and to touch the equipment and chemicals on the teacher's desk while the teacher was trying to help the other pupils. For those reasons, he had been removed from science lessons on two occasions as it was felt that he was presenting health and safety risks. He was then taught by the head of science on his own but this regime was perceived as a punishment by IC and by his parents. b

[13] The tribunal recorded that IC was 'capable of concentrating and producing good work in lessons on some days [but that] there did not appear to be any particular pattern to his behaviour'. He had LSA support for the equivalent of 16 out of the 25 hours of lessons that he received each week and he was usually taught in small groups with 'work being differentiated for him'. The School arranged for a number of LSAs to support IC as it was considered important that he did not develop a dependency on any one particular individual. c

[14] In spite of these efforts by the School to support IC in lessons, his parents were becoming increasingly concerned for his safety and welfare as he was reporting more bullying incidents, which were causing him a great deal of distress and anxiety. On 18 September 2002, IC had been found by a member of the staff in the playground during the lunch break curled up in a ball and he refused to move until his elder sister, who was a pupil at the School, came to assist. IC claimed that he had been attacked and kicked by another pupil. He said he was tired of being kicked and his mother described him as 'very upset after this incident'. d

[15] Another incident occurred on 2 October 2002 when IC claimed that he had been attacked by other boys in the toilets who pushed his head down a lavatory. In consequence, he ran out of the School to a local park and he eventually made his way home at 6.00 pm. The School only informed IC's parents of his disappearance at 3.30 pm. The School carried out an investigation into this episode but were unable to reach any conclusion as to who was responsible for the incident. e

[16] A consequence of this episode was that IC's parents asked the School to provide support for IC during breaks and lunch times. By a letter dated 18 October 2002, Mrs Lawrence informed IC's parents that the School's resources were not sufficient so as to enable it to provide that degree of support. Mrs Lawrence also referred in that letter to the arrangements in place for the monitoring of IC over the course of a School day by one of the LSAs. Mrs Lawrence told the tribunal that she had recognised that there was a need for extra support for IC at lunch and break times and that she had started instigating a process of requesting additional funds from the local education authority to provide this. This request was due to be considered at the annual review due in February 2003. f

[17] Mrs Robinson carried out observations on IC on 8 October 2002. In her detailed report, she pointed out the difficulties that IC was having in conforming to the requirements of acceptable behaviour in the classroom as he was g

a humming, making clicking noises, being distracting and annoying to other pupils, as well as often being unable to join in group work. Significantly, IC was also observed to be solitary and to be unable to interact with other children in physical education classes, at lunch time and at break times. She considered that IC was unable to initiate communication in a positive manner. In the corridor between classes, he was observed roaming up and down, searching and latching onto familiar faces and then barging others into corridor walls whilst laughing inappropriately. Mrs Robinson's report suggested that IC's behaviour might be moderated if he was moved into a teaching group pairing with other children, who might set him a better example and if there was 'positive reinforcement of any successes'.

c [18] The position therefore in early October 2002 was that IC's behaviour continued to present difficulties but IC's mother felt that his behaviour was caused by increasing anxiety on his part as a result of bullying and difficulties in lessons. A meeting was then held at the School on 14 October 2002 at which IC's mother explained that she was concerned about IC being given detentions after School and without proper notice. The tribunal noted that from the correspondence and the evidence that 'there was clearly a growing tension between the School and the parents over the best way to manage [IC]'s difficult behaviour'. For that reason, IC's parents felt that another meeting with staff would not lead to any changes and so they decided not to attend the meeting that had been arranged for 23 October 2002, to which I referred in [9], above. Instead, they resolved to seek help through a mediation scheme.

e [19] A further bullying incident occurred on 12 November 2002 when a girl in year 9 at the School was seen kicking and being verbally abusive to IC. The School wrote a letter to IC's parents explaining the events and it confirmed that the girl in question had been punished. She had admitted her misconduct but she said that she had been annoyed by IC. On 19 November 2002, Mrs Horton saw f IC jumping on the back of another boy which he repeated two or three times before responding to her call, but the other boy had ignored IC's actions and he had remained calm. Later during the same break, IC's nose had been cut after he was hit accidentally by another child who had been copying IC's hand-wafting but it seems that IC, who received treatment, did not appear to have been upset by this incident.

g [20] The next and most serious incident occurred on 26 November 2002 when IC was involved in a dispute with a year 9 boy while they were having lunch in the dining hall. There was a dispute about who instigated the argument but during the course of the dispute, the two boys threw yoghurt and blows at each other. The other boy was swearing and was abusive to IC and the accounts given h by other pupils indicated that IC came off worse physically. By the time teaching staff arrived, IC was curled up in a ball on the floor and attempts were made to comfort and reassure him. Other children were asked to move away and IC was given time and space to recover.

j [21] Mr Nelson, who was at teacher at the School, stayed with IC and he said that IC suddenly got up stating that he was going to find the other boy to hit him. IC then walked around the School looking for the other boy. Mr Nelson followed IC to ensure there would be no further incident. IC suggested at one point that this other boy might be in the inclusion unit and Mr Nelson agreed that they should go there. He hoped that this would provide an opportunity to reassure IC and to calm him down in a quiet place. The tribunal explained that Mrs Lawrence ended up taking the lead role in trying to calm and pacify IC but his behaviour

became more and more agitated as he was refused permission to leave the inclusion unit. During the period of 45 minutes whilst the School awaited the arrival of IC's parents, he became physically and verbally aggressive. He threw objects at Mrs Lawrence, overturned furniture and he tried to break a window. IC also grabbed Mr Bowstead's tie and jerked his neck as well as taking Mr Bowstead's pen and throwing it in his face. Mrs Lawrence described her efforts to calm IC and she asked other people to leave the unit room, but in spite of her experience, Mrs Lawrence found it impossible to persuade IC to modify his behaviour. At that time, IC was also complaining about his treatment at home alleging that his father beat him up and that his parents had confiscated his mobile phone on the previous evening. a

[22] On her arrival at the School, IC's mother, who was accompanied by her sister, was angry and upset because she felt that nobody at the School had taken proper notice of her concerns about the bullying suffered at the School by IC. She took IC away from School but he managed to evade her. He returned to the School shortly afterwards following which he wandered around the premises being both disruptive and violent. IC's mother was contacted again and she returned to the School where she had a heated exchange with one of the teachers during which she was quite abusive. IC's mother then left without IC. A decision was then made to exclude IC from the School for five days and a letter explaining this decision was delivered to the home of IC's parents during that afternoon. Eventually, IC was picked up by his father at 6.05 pm after several attempts had been made by the School to make arrangements for this to happen. b

[23] The parents of IC contend that IC's behaviour was a response to the effects of persistent bullying suffered by IC at school as he had never displayed such an aggressive outburst before at School. They considered that the failure of the School to provide a proper level of support for IC and to manage his difficulties was a key factor causing his behaviour. They pointed to IC's escalating levels of anxiety, the feelings of pressure experienced by him and his inability to manage his feelings, all of which were consequences of his autism, which they considered were matters that the School had failed to address or anticipate. The parents of IC also contended that the School had failed to make the necessary reasonable adjustments that were required if IC was to manage successfully the social and academic demands of School. After IC's exclusion on 26 November 2002, the School then extended the exclusion period to its maximum by 40 days in a letter of 3 December 2002. c

[24] In the meantime and partly because a tribunal hearing was imminent in respect of IC's statement, the School asked for a further psychological assessment by Ms Kershaw, who duly saw IC on 12 December 2002. In addition, reports were obtained from IC's paediatrician and from a clinical pathologist. These reports were apparently prepared in the expectation that IC would rejoin the School at some stage. d

[25] On 13 February 2003, a letter was sent to IC's parents by Ms Jane Finn, the LEA's special educational needs officer stating that whilst the fixed-term exclusion was at an end and IC was still on the School register, he could not be admitted back at that stage as he was still making threats against the other boy and that it was felt that it would not be safe to readmit him. e

[26] Arrangements were then made for IC to attend Rossington Hall, a special school with an autistic unit attached. IC has been excluded from that school after a similar outburst to the one in November 2002 during which he was pinned down by three teachers. f

a [27] On 26 February 2003, IC through his parents made a claim of disability discrimination to the tribunal which led to the decision under appeal. By the time of the tribunal hearing, agreement had been reached that IC should be placed in the Robert Ogden School, which is an independent School run by the National Autistic Society and his statement was amended accordingly.

b [28] The tribunal noted that they had been informed that this placement had broken down and that he had been excluded for a few days. IC was then refusing to return there but he was receiving home tuition. IC's parents wanted him eventually to return to a mainstream school.

IV. THE DECISION OF THE TRIBUNAL

c [29] It will be more appropriate to comment on the reasoning of the tribunal when I turn to consider the challenges to their decision, but their decision was that they rejected all the complaints except that—

d 'there was discrimination against [IC] to the extent that he was not given the necessary personal guidance and support within the context of the School pastoral system as he required.'

[30] The relief that was given was stated by the tribunal as being:

e 'The School is ordered to produce an Action Plan by half-term of the autumn term to deal with the specific needs of children on the autistic spectrum or who have communication difficulties to ensure that they are adequately supported on their transfer and admission to the School and on their transition into the next year group, with particular reference to the transition into year 8. Also that there is a mentoring scheme established and, wherever possible, that a buddy system is arranged for children who are socially isolated.'

f V. THE GROUNDS OF CHALLENGE

g [31] Mr John Friel, counsel for the appellant, raises a substantial number of issues, which can conveniently be summarised as follows: (a) whether the tribunal had jurisdiction to determine the complaint of the parents of IC ('Issue A—the jurisdiction issue'); (b) the characteristics of the comparator against whom IC had to be compared ('Issue B—the comparator issue'); (c) whether the decision of the tribunal is flawed because of the comments made by it on the exclusion issue in para 3 of its reasons ('Issue C—the para 3 exclusion issue'); (d) whether the tribunal was entitled to reach its decision that there was discrimination against IC because of the lack of personal guidance and support within the School's pastoral support system ('Issue D—the pastoral support issue'); (e) whether it was open to the tribunal to find that IC's behaviour was related to his disability ('Issue E—the disability issue'); (f) whether the tribunal acted unfairly in failing to raise the issue of the lack of pastoral support with Mrs Lawrence at the hearing ('Issue F—the fairness issue').

j VI. ISSUE A—THE JURISDICTION ISSUE

[32] Mr Friel contends that the tribunal did not have jurisdiction to hear the parents' complaint because s 28I(2) of the 1995 Act excludes the tribunal from hearing claims to which, among other provisions, s 28L of the Act applies.

[33] In so far as is relevant to the issue under consideration, s 28L of the 1995 Act applies to a claim in relation to an exclusion decision where there has been discrimination in a way which would be unlawful under the education discrimination

provision in the Act but where arrangements have been made under a specific statutory provision enabling an appeal to be made against that decision by the parents of the pupil concerned. The relevant specific statutory provision to which I have just referred provides, in so far as is material to the present issue and with my italicised emphasis added, that:

‘A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body ... not to reinstate a pupil who has been *permanently excluded* from a school maintained by the authority.’

[34] This provision is to be found in s 67(1) of the School Standards and Frameworks Act 1998 which has been repealed in s 52 of the Education Act 2002, which has been enacted in its place, deals with the exclusion of pupils and provides for regulations relating to exclusion. The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002, SI 2002/3178, were made pursuant to s 52 of the 2002 Act and they set out procedures for dealing with exclusion. Rule 6(1) of the 2002 regulations contains a provision identical in all relevant aspects to that set out in the last paragraph and found in s 67(1) of the 1998 Act.

[35] Counsel were unable to produce the statutory instruments which would determine which of those two provisions applies, but it is common ground first that it does not matter because both of the provisions are the same and second that the only question raised on this issue is whether IC was ‘permanently excluded’ from the School. Mr Friel contends that IC was ‘permanently excluded’ and therefore the tribunal did not have jurisdiction while Ms Sarah-Jane Davies for the tribunal contends that he was not ‘permanently excluded’ with the result that the tribunal did have jurisdiction.

[36] I have come to the clear conclusion that the correspondence establishes that IC was never ‘permanently excluded’. On 26 November 2002, the School wrote to the parents saying that IC had been excluded ‘for a fixed period of 5 days’. By a further letter to the parents of 3 December 2002, the School stated that they had decided to extend IC’s exclusion from School with effect from 4 December 2002 ‘for a fixed period of 40 days’. The parents duly appealed against that decision and the appeal was heard at a meeting held on 7 January 2003. The Governing Bodies Discipline Committee of the School upheld the exclusion and it explained that the exclusion period ‘will give time for support and advice on [IC’s] reintegration into [the School] at a future date’.

[37] On 28 February 2003, the local education authority wrote to the parents, pointing out that IC was ‘no longer excluded from the [School] as his fixed term exclusion has come to an end’. The letter pointed out that IC’s name was still on the School’s roll and it stated that the Department of Education and Skills had advised that ‘it is not in the interests of IC or the School for IC to return to the School at the time, but a permanent exclusion would not be appropriate’. It was quite clear from this correspondence that IC was not permanently excluded from the School and therefore Mr Friel cannot rely on the exclusion from the tribunal’s jurisdiction set out in s 28L of the 1995 Act. Thus, the tribunal had jurisdiction to hear the claim.

VII. ISSUE B—THE COMPARATOR ISSUE

[38] Mr Friel contends that the tribunal erred on the comparator point when it said:

a '1) The first matter to be considered in determining whether or not there has been unlawful discrimination against IC is to establish whether the less favourable treatment complained of is for a reason relating to the child's disability. This was denied by the School which put forward its case on the basis that firstly, there had been no less favourable treatment as a child without any disability but manifesting the same behaviour would have been excluded permanently from the outset ...

b 2) In light of the Code of Practice we do not consider this to be correct approach to the questions that have to be asked. The question of less favourable treatment has to be answered in comparison with the school population as a whole who have not misbehaved.'

c [39] The basis of the discrimination allegation is that the School discriminated against IC because:

d '(a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat *others to whom that reason does not or would not apply*; and (b) it cannot show that the treatment in question is justified.' (See s 28B(1) of the 1995 Act with italicised emphasis added.)

e The issue that has to be considered is what are the characteristics of the 'others to whom that reason does not or would not apply'. Mr Friel contends that the comparator has to be a person who is not disabled but who behaves badly while Ms Davies says that the proper comparator is somebody who is not disabled and who behaves properly. This was the approach of the tribunal.

f [40] The thrust of Ms Davies' contentions is that s 28B(1) is materially in the same terms as the corresponding provisions of the Act dealing with employment discrimination and which are set out in s 5(1)(a) of the Act. She submits that the case law relating to s 5(1)(a) on employment discrimination is applicable by analogy to the education discrimination provision in the same Act, with which this appeal is concerned.

g [41] Ms Davies says that applying that logic, s 5(1)(a) and therefore s 28B(1)(a) of the 1995 Act gives rise to two questions of which the first is whether the applicant was (for example) dismissed (or excluded) for a reason which relates to his disability. The second is if the answer to the first question is in the affirmative, whether the employers (or the School) treated the applicant less favourably than they would treat others to whom that reason does not or would not apply.

h [42] It is settled law that in the employment context, the first of these questions is a question of fact (see *Clark v TDG Ltd (t/a Novocold)* [1999] 2 All ER 977 at 986). Ms Davies points out that in answering the first question of fact, it should be noted that the expression 'for a reason which relates to the disabled person's disability' in ss 5(1)(a) and 28B(1)(a) has broadened the descriptions of the causative links from the links used in other discrimination Acts. It therefore includes causative links wider than those which would have fallen within the expressions of 'on the ground of' or 'by reason of' the disability (see *Rowden v Dutton Gregory (a firm)* [2002] ICR 971 at 973-974).

j [43] The second question that has to be answered requires a comparison between the treatment of the applicant and of others 'to whom that reason [for the treatment in question] does not or would not apply'. Ms Davies points out that those others are not required to be in the same circumstances as the disabled person. By way of example, she points out that where the reason for dismissing

an employee is his inability to perform the main functions of his job, the proper comparator is not another employee who is unable to perform the main functions of his job but for a reason not connected to disability. The proper comparator, she submits, is an employee who is able to perform the main functions of his job. The comparators in the employment provisions are in Mummery LJ's words 'persons who would be capable of carrying out the main functions of the job' (see *Clark's case* [1999] 2 All ER 977 at 986, 987, 989, 991–992).

[44] This, Ms Davies says, leads to the conclusion that the proper comparator for IC is a pupil who is neither disabled nor badly behaved. Mr Friel accepts that Ms Davies has accurately summarised the position in respect of discrimination in employment but he says that the position is different in respect of education. He contends that guidance can be obtained by the provisions in s 28L, which refer to exclusion decisions. He also seeks to obtain some assistance from the Department for Education and Employment circular 10/1999 (social inclusion: pupil support).

[45] I consider that when the legislature introduced, as is common ground, provisions for discrimination in education which are identical to those which had been in force in the discrimination in employment provision in the same Act, they intended that both sets of provisions should be construed in the same way. After I had reached that conclusion, I came across Lord Reid's relevant comment:

'Where Parliament has continued to use words of which the meaning is settled by decisions of the court, it is to be presumed that Parliament intends the words to continue to have that meaning.' (See *London Corp v Cusack-Smith* [1955] 1 All ER 302 at 314, [1955] AC 337 at 361.)

Thus, the comparator should be selected in education discrimination claims in the same way as the courts had established that they should be chosen for employment discrimination. I could not find anything in the provisions relied on by Mr Friel to suggest that this intention should be displaced.

[46] There is an additional reason why I consider that Ms Davies is right and that the tribunal adopted the correct approach. The 1995 Act also provides for a code of practice on disability discrimination to be issued by the Disability Discrimination Commission and a Code of Practice for Schools (the Code) was duly issued. By virtue of s 53(6) of the 1995 Act, where a provision of such a code appears to be relevant to a court, tribunal or other body hearing any proceedings concerned with disability discrimination, it must take that provision into account. In example 5.10C in the Code, it is said that in the case of a pupil with Tourette's disease, who was banned from a school trip because of her abusive language, 'the comparison has to be made with others who did not use abusive language'.

VIII. ISSUE C—THE PARA 3 EXCLUSION ISSUE

[47] At the forefront of Mr Friel's submission were complaints about para 3 of the tribunal's reasons in which it stated:

'As a matter of comment, it also seems rather disingenuous of the School to argue that they treated IC more favourably than a pupil without a disability as he was not excluded permanently, when in fact he was excluded for the maximum of 45 days and then not allowed to return to the School. We considered the duration of other fixed term exclusions from the School during 2002/2003 and noted that the next longest was for 14 days for aggressive behaviour. Most were for less than five days and there were no permanent exclusions. IC would therefore appear to have treated less

a favourably therefore than other children whose behaviour has led to a fixed-term exclusion.'

[48] Mr Friel points out that there are a number of serious errors in this paragraph. First, he says it was wrong to accuse the School of being disingenuous for arguing that it treated IC more favourably than pupils without a disability as he, unlike those other pupils, was not excluded permanently. The true position was, as I have explained, that he was excluded for a period of 45 days and then with the concurrence of his parents, he was not allowed to return to School. Second, the tribunal compared IC's exclusion for 45 days with the next longest exclusion which was 14 days for aggressive behaviour. Mr Friel points out that no other child had been violent to staff and this was an extreme incident, that his was not a fair comparison and was irrational.

[49] Ms Davies does not seek to justify the comments made in para 3 but she submits that any errors in this paragraph do not effect the validity of the decision. She points out correctly that the tribunal started this paragraph with the words 'As a matter of comment'. In my view, what followed in that paragraph did not form any part of the tribunal's reasoning because it did not relate to the issue of discrimination in the lack of pastoral care, which was the only complaint of IC's parents, which succeeded and the only finding under challenge on the appeal.

[50] The finding of the tribunal on the pastoral point issue was that a number of complaints against the School were made by the parents of IC. The only finding against the School was that 'there was discrimination against [IC] to the extent that [IC] was not given the necessary personal guidance and support within the context of the School pastoral system as he required'. That conclusion is totally independent and discrete from any discussion in para 3 about the exclusion decision. It is noteworthy that the tribunal did not find that the School had discriminated against IC in respect of the exclusion referred to in para 3 per se. Thus, even if the statements in para 3 are incorrect, that error was irrelevant to the finding on which the School lost and those statements in that paragraph do not provide any ground for impugning the decision which was based on different evidence and made for different reasons from the matters covered in para 3.

g IX. ISSUE D—THE PASTORAL SUPPORT ISSUE

[51] Mr Friel contends that the tribunal erred in the way it reached its decision that there was discrimination against IC on the basis that he was not given the necessary personal guidance and support within the context of the School pastoral system. He criticises the finding of the tribunal that there was no evidence that there were any specific arrangements to ensure IC was assisted during the transfer from year 7 to year 8. Mr Friel points out that Mrs Lawrence had given evidence first that there were reasons why the buddy system could not continue in year 8 and second that there was in place in year 8 specific pastoral arrangements to support IC. He explained that Mrs Lawrence had a meeting with the parents on 5 July and 4 September 2002 and that she had called a further meeting on 23 October 2002 for the purpose of reviewing the progress of IC and to have the learning support hours on the statement of special educational needs reviewed by the local authority. This meeting did not, as I have already explained in [18], above, take place because the parents refused to attend it for the reasons that I have already outlined.

[52] Mrs Lawrence also pointed out that Mrs Horton was very supportive of IC and that the School has made substantial arrangements for helping him. In

particular, she said that the School had made arrangements for monitoring IC at break and lunch times. Mr Friel complains that the tribunal failed to make findings on the parents' failure to attend the meeting on 23 October 2002.

[53] Ms Davies points out that the tribunal did not fail to have regard to the case for the School. The tribunal commented in para 11 of its decision that the failure to replicate the buddy system was 'regrettable'. In any event, the decision of the tribunal did not depend upon the provision of a buddy. The tribunal was, however, influenced by the effect on IC of specific changes that took place in the transition from year 7 to year 8; these entailed the changes in class composition, the effect of setting the pupils as well as the difficulty that autistic children commonly have in adapting to change. The tribunal accepted that the School clearly provided much support during lesson time with a substantial number of LSAs involved, but the tribunal was concerned with the problems that arose in unstructured times.

[54] The tribunal drew attention to the report of Mrs Robinson who, as I have explained, had observed IC in October 2002. She noted that he tended to hover at break times on the fringes of the groups as he travelled around the yard and that he did not appear to latch on to anyone in particular, spending some of the time on solitary pursuits, such as spinning around and jumping around. Mrs Robinson thought that IC appeared to be responding to an 'inner' set of instructions. Similar behaviour by IC was observed by her at lunchtime. She also noted strange behaviour by IC in the corridor before lessons with him roaming up and down the corridor and then barging familiar faces into the corridor walls. The tribunal concluded that they felt that IC's 'experience in the playground was a source of difficulty for him'. The tribunal considered that IC needed support during those unstructured times. Although the tribunal considered that the School provided adequate support for IC 'during lessons', it was troubled that—

'there was no evidence that any specific arrangements were made to ensure that IC was assisted during the transition from Year 7 to Year 8, which was difficult for all children but autistic children had the additional difficulty of commonly finding it hard to adapt to change.'

[55] The tribunal pointed to a number of factors, such as that IC was entitled to make use of room 30, the School's quiet room, although it was left up to him to decide whether to do so which he did on one occasion. Another point of importance to the tribunal was that there seems to have been 'no one person to act as a mentor for him or in whom he could confide'. This contention was disputed by the School who pointed out that Mrs Horton was an experienced special needs co-ordinator, who is 'excellently placed to take responsibility for [IC's] education and to support his special needs'. The tribunal was entitled to conclude, as it must have done, that Mrs Horton was not a person to whom IC could turn and who would help him in unstructured times.

[56] Contrary to Mr Friel's submissions, the tribunal did note and consider as 'clearly regrettable' that IC's mother did not attend the meeting on 23 October 2002 as that 'might have been an opportunity to take stock'.

[57] The tribunal also considered but rejected the School's contention that the problems with IC flowed from the refusal of his parents to attend the meeting on 23 October 2002 on the grounds that the problems had been apparent for some time and that the School 'underestimated and perhaps overlooked the extent of [IC's] growing difficulties' (para 11). I agree with Ms Davies that this was tantamount to a finding that the co-operation of IC's parents was not material.

a [58] In its decision, the tribunal did not specifically refer to the statutory regime, but its decision was totally consistent with it when it is read in a common sense way and as a whole. Section 28C(1) of the 1995 Act requires a school to—

b ‘take such steps as it is reasonable for it to have to take to ensure that ... (b) in relation to education and associated services provided for, or offered to, the pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison to pupils who are not disabled.’

c The tribunal considered this point in para 6 of its reasons. It considered possible adjustments consisting with the provision of support for IC during unstructured times (paras 9 and 10 of its reasons) and the making of arrangements to assist IC in the transition from year 7 to year 8, which included provision of a mentor and active pre-planned management of his behaviour (para 10 of the reasons). The tribunal concluded that the School had failed to take reasonable steps as were required by s 28C(1)(b) by failing to give IC the necessary personal guidance and support within the context of the School pastoral system.

d [59] In reaching that conclusion, the tribunal did not overlook, but in fact rejected, the School’s contention that the problem for the School in providing additional pastoral support for IC was an issue of resourcing, but instead held that it was one of ‘planning and organisation’. The tribunal considered that there had been sufficient information for the School to have made the necessary adjustments and thus it rejected the question of resources as not a substantial reason for the failure.

e [60] In my view, there was ample evidence on which the tribunal was entitled to conclude as it did that first, ‘more active pre-planned management of [IC] would in our view have helped and made a difference’, second, that IC ‘was not given the necessary personal guidance and support within the context of the School pastoral system as he required’ and third that ‘the problem [for the School] was not so much one of resources but of planning and organisation’.

f [61] I am quite satisfied that these conclusions were open to the tribunal on the facts and I am unable to accept Mr Friel’s criticism. Indeed, it must not be forgotten that two members of the tribunal have special qualifications and experience which would have enabled them to reach their conclusions based on the evidence adduced.

g X. ISSUE E—THE DISABILITY EVIDENCE ISSUE

h [62] Mr Friel complains that the tribunal erred when it said in para 2 of its reasons that ‘we neither heard nor received any expert evidence to suggest otherwise [namely that IC’s aggressive and impulsive behaviour were not all part of his disability]’. He contends that Mrs Lawrence, the head teacher at the School, was formerly a head teacher of a mainstream school with a special unit for autistic children. She had told the tribunal that in her experience, violence of the nature of IC was not typical of an autistic child. Mr Friel says that her evidence constitutes expert evidence as does a record of the views of Dr Ward at a meeting held on 22 January 2003 in which she explained that the ‘challenging’ secondary school environment was a nightmare for IC.

j [63] Ms Davies contends that neither Mrs Lawrence nor Dr Ward gave expert evidence that IC’s behaviour on 26 November 2002 or at any other time was unconnected with his disability. Mrs Lawrence recalled in a witness statement made after the hearing in front of the tribunal that her evidence at the tribunal was that autistic children are not normally violent but I consider that general

statement by Mrs Lawrence does not amount to evidence that IC's violent behaviour was unrelated to his disability. Mrs Lawrence also contends that her evidence and that of Dr Ward to the tribunal indicated that it was not just IC's autistic condition but that it was the fact that he could not cope with his environment that was largely responsible for the decline in his behaviour. Ms Davies points out that this contention is consistent with the tribunal's finding that IC's behaviour was related to his disability on the basis that his inability to cope with his environment was itself related to his disability. In any event, the view now expressed by Mrs Lawrence that IC's behaviour was unrelated to his autism does not appear to be consistent with the School's considered view expressed in his written response to the complaint of the parents to the tribunal, in which it wrote that '[IC's] behaviour is due to his autism'.

[64] On the basis of all that material, I conclude that Mrs Lawrence's evidence does not suggest that IC's behaviour was not part of or related to his disability. In addition, although Mrs Lawrence had a great deal of experience of dealing with autistic children, I also have some doubts as to whether the head teacher of a school can be regarded as being sufficiently independent in a claim against her school so as to be regarded as an 'expert' in that dispute, but that is not a matter in respect of which I need to come to a conclusion.

[65] Turning to Dr Ward, the School appeared to be referring to the views recorded in the notes of the meeting of 22 January 2003, but Ms Davies contends that there is nothing in those notes which shows that Dr Ward expressed the view that IC's behaviour on 26 November 2002 was unrelated to his autism. Dr Ward stated at the meeting that it was not the School's fault that the transfer of IC to that School and the large 'challenging secondary environment was a nightmare'. I agree with Ms Davies that it was open to the tribunal to find that IC's behaviour was related to his disability on the basis of his inability to cope with his environment, which was itself related to his disability. If I had been in any doubt, I would have reached the same conclusion because, as I have explained in [42], above, a broad approach has to be taken to whether a reason is 'related to' the disability.

XI. ISSUE F—THE FAIRNESS ISSUE

[66] Mr Friel contends that Mrs Lawrence could herself have given additional evidence about the pastoral support that was given to IC but the tribunal failed to raise this issue with her at the hearing but that instead it used its own expertise to reach its own decision. He stresses that Mrs Lawrence could have drawn attention to other actions taken by Mrs Horton, the special educational needs co-ordinator to show the pastoral support that was given to IC.

[67] I am unable to accept that complaint because it is clear from the parents' notice of claim to the tribunal that they were complaining, among other things, that IC's disruptive and difficult behaviour was caused by his disability and about the 'School's failure to manage him at School'. This raised the issue of support for IC, including pastoral support.

[68] Indeed, the School in its statement of case to the tribunal answered that point by setting out all the steps taken by it to manage IC's disability. Mrs Lawrence's witness statement shows that the School put forward detailed evidence of all the steps that it had taken to assist and to support IC. It is also noteworthy that in her witness statement commenting on the tribunal's decision, Mrs Lawrence explains that pastoral support that was in place for IC and she refers specifically to Mrs Horton's responsibility. Mrs Lawrence stated that

a indeed the tribunal asked IC's parents whether there were efforts made by the pastoral system at the School to support IC.

[69] In my view, the School was plainly aware and on notice that the nature and extent of the pastoral support and guidance provided for IC was an important issue. They had every opportunity to address this in their evidence to the tribunal and they actually adduced some evidence on this. I believe that with the benefit of hindsight, Mrs Lawrence now realises that she could perhaps have put further material before the tribunal, but that, I suspect, is the view that many witnesses have after they have given evidence. The stark fact is the issue of pastoral support was undoubtedly an issue which the School must have appreciated the parents had raised in their complaint to the tribunal and that the tribunal would have to consider. Thus, I reject the complaint on this point.

CONCLUSION

d [70] It is clear that Mrs Lawrence and others at the School are disappointed with the decision of the tribunal, even though the School succeeded on many issues. As I explained to Mr Friel, this court does not act as an appeal on questions of fact from the tribunal, but it only looks for errors of law. Notwithstanding Mr Friel's far-reaching submissions, my conclusion is that there are no such errors so that the decision of the tribunal cannot be impugned and that this appeal must be dismissed.

e *Appeal dismissed.*

Dilys Tausz Barrister.

f *Appendix*

1. The tribunal has jurisdiction to consider complaints of disability discrimination by virtue of the Disability Discrimination Act 1995^b, which provides, so far as material, as follows:

g '28A. *Discrimination against disabled pupils and prospective pupils.*—(1) It is unlawful for the body responsible for a school to discriminate against a disabled person—(a) in the arrangements it makes for determining admission to the school as a pupil; (b) in the terms on which it offers to admit him to the school as a pupil; or (c) by refusing or deliberately omitting to accept an application for his admission to the school as a pupil.

h (2) It is unlawful for the body responsible for a school to discriminate against a disabled pupil in the education or associated services provided for, or offered to, pupils at the school by that body.

j (3) The Secretary of State may by regulations prescribe services which are, or services which are not, to be regarded for the purposes of subsection (2) as being—(a) education; or (b) an associated service.

(4) It is unlawful for the body responsible for a school to discriminate against a disabled pupil by excluding him from the school, whether permanently or temporarily.

b As amended by the Special Educational Needs and Disability Act 2001 and the Education Act 2002.

(5) The body responsible for a school is to be determined in accordance with Schedule 4A, and in the remaining provisions of this Chapter is referred to as the "responsible body".^c a

2. The 1995 Act also provides a definition of discrimination.

'28B. Meaning of "discrimination".—(1) For the purposes of section 28A, a responsible body discriminates against a disabled person if—(a) for a reason which relates to his disability, it treats him less favourably than it treats or would treat others to whom that reason does not or would not apply; and (b) it cannot show that the treatment in question is justified. b

(2) For the purposes of section 28A, a responsible body also discriminates against a disabled person if—(a) it fails, to his detriment, to comply with section 28C; and (b) it cannot show that its failure to comply is justified ... c

(5) Subsections (6) to (8) apply in determining whether, for the purposes of this section—(a) less favourable treatment of a person, or (b) failure to comply with section 28C, is justified.

(6) Less favourable treatment of a person is justified if it is the result of a permitted form of selection. d

(7) Otherwise, less favourable treatment, or a failure to comply with section 28C, is justified only if the reason for it is both material to the circumstances of the particular case and substantial.

(8) If, in a case falling within subsection (1)—(a) the responsible body is under a duty imposed by section 28C in relation to the disabled person, but (b) it fails without justification to comply with that duty, its treatment of that person cannot be justified under subsection (7) unless that treatment would have been justified even if it had complied with that duty. e

3. The duties of a school are explained: f

'28C. Disabled pupils not to be substantially disadvantaged.—(1) The responsible body for a school must take such steps as it is reasonable for it to have to take to ensure that—(a) in relation to the arrangements it makes for determining the admission of pupils to the school, disabled persons are not placed at a substantial disadvantage in comparison with persons who are not disabled; and (b) in relation to education and associated services provided for, or offered to, pupils at the school by it, disabled pupils are not placed at a substantial disadvantage in comparison with pupils who are not disabled. g

(2) That does not require the responsible body to—(a) remove or alter a physical feature (for example, one arising from the design or construction of the school premises or the location of resources); or (b) provide auxiliary aids or services ... h

(4) In considering whether it is reasonable for it to have to take a particular step in order to comply with its duty under subsection (1), a responsible body must have regard to any relevant provisions of a code of practice issued under section 53A. j

^c By virtue of Sch 4A to the 1995 Act, the responsible body for a maintained school is either the local education authority or governing body, according to which has the function in question. In the present case, the responsible body is the governing body.

4. The jurisdiction of the tribunal is specific:

‘28H. Tribunals.—(1) The Special Educational Needs Tribunal—(a) is to continue to exist; but (b) after the commencement date is to be known as the Special Educational Needs and Disability Tribunal.

(2) In this Chapter—“the Tribunal” means the Special Educational Needs and Disability Tribunal, and “the Welsh Tribunal” means the Special Educational Needs Tribunal for Wales ...

28I. Jurisdiction and powers of the Tribunal.—(1) A claim that a responsible body—(a) has discriminated against a person (“A”) in a way which is made unlawful under this Chapter, or (b) is by virtue of section 58 to be treated as having discriminated against a person (“A”) in such a way, may be made to the appropriate tribunal by A’s parent.

(2) But this section does not apply to a claim to which section 28K or 28L applies.

(3) If the appropriate tribunal considers that a claim under subsection (1) is well founded—(a) it may declare that A has been unlawfully discriminated against; and (b) if it does so, it may make such order as it considers reasonable in all the circumstances of the case.

(4) The power conferred by subsection (3)(b)—(a) may, in particular, be exercised with a view to obviating or reducing the adverse effect on the person concerned of any matter to which the claim relates; but (b) does not include power to order the payment of any sum by way of compensation.

(5) Subject to regulations under section 28J(8), the appropriate tribunal—(a) for a claim against the responsible body for a school in England, is the Tribunal ...

28L. Exclusions.—(1) If the condition mentioned in subsection (2) is satisfied, this section applies to a claim in relation to an exclusion decision that a responsible body—(a) has discriminated against a person (“A”) in a way which is made unlawful under this Chapter; or ...

(2) The condition is that arrangements (“appeal arrangements”) have been made—(a) under section 52(3)(c) of the Education Act 2002, or ... enabling an appeal to be made against the decision by A or by his parent.

(3) The claim must be made under the appeal arrangements.

(4) The body hearing the claim has the powers which it has in relation to an appeal under the appeal arrangements.

(5) “Exclusion decision” means—(a) a decision of a kind mentioned in section 52(3)(c) of the Education Act 2002 ...

(6) “Responsible body”, in relation to a maintained school, includes the discipline committee of the governing body if that committee is required to be established as a result of regulations made under section 19 of the Education Act 2002.

(7) “Maintained school” has the meaning given in section 28Q(5).’

5. Section 52 of the Education Act 2002, which deals with exclusion of pupils, provides so far as material as follows:

‘52. Exclusion of pupils.—(1) The head teacher of a maintained school may exclude a pupil from the school for a fixed period or permanently.

(2) The teacher in charge of a pupil referral unit may exclude a pupil from the unit for a fixed period or permanently.

(3) Regulations shall make provision—(a) requiring prescribed persons to be given prescribed information relating to any exclusion under subsection (1) or (2), (b) requiring the responsible body, in prescribed cases, to consider whether the pupil should be reinstated, (c) requiring the local education authority to make arrangements for enabling a prescribed person to appeal, in any prescribed case, to a panel constituted in accordance with the regulations against any decision of the responsible body not to reinstate a pupil, and (d) as to the procedure on appeals ...

(5) In subsection (3), “the responsible body” means—(a) in relation to exclusion from a maintained school, the governing body of the school, and ...

(10) In this section “exclude”, in relation to the exclusion of a child from a school or pupil referral unit, means exclude on disciplinary grounds (and “exclusion” shall be construed accordingly).’

6. The Education (Pupil Exclusions and Appeals) (Maintained Schools) (England) Regulations 2002, SI 2002/3178, made pursuant to s 52 of the 2002 Act, prescribe cases in which the local education authority is required to make arrangements for enabling a prescribed person to appeal for the purposes of s 52(3)(c). They provide, so far as material, as follows:

‘Appeals against permanent exclusion of pupils.

6.—(1) A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body under regulation 5 not to reinstate a pupil who has been permanently excluded from a school maintained by the authority.’

a **Phillipps v Associated Newspapers Ltd**
[2004] EWHC 190 (QB)

QUEEN'S BENCH DIVISION

EADY J

b 2, 10 FEBRUARY 2004

Libel and slander – Statement in open court – Money paid into court – Whether defendant who had made payment into court normally liable for incidental costs incurred by claimant in making unilateral statement in open court – CPR Pt 36.

c The parties to libel proceedings reached a settlement when the claimant accepted an offer made by the defendant under CPR Pt 36. Prior to acceptance, the defendant made clear that it was not prepared to participate in the making of a joint statement. Nevertheless, it was clear to all concerned that it was open to the claimant to apply for permission to make a statement unilaterally. The claimant
d duly made such an application. The defendant originally objected to a unilateral statement, but at the hearing did not press any objections to the statement being read. The judge granted the application, and the claimant applied for the costs of the hearing, those already incurred in the preparation of the statement and those
e still to be incurred in respect of the ultimate reading in open court. On that application, the court was required to determine whether the implementation of the CPR had altered or modified the long-established practice that a defendant who had made a payment into court might well have to bear the incidental costs of a claimant who made a unilateral statement.

f **Held** – There had not been any significant change of practice governing statements in open court following the implementation of the CPR. Thus if a defendant made a payment into court under Pt 36, it would generally be the case that the costs of any formal application for permission to make a unilateral statement, and those of making the statement itself, would fall to be paid by the defendant as an integral part of the costs of the action. The claimant's application
g for costs would be dealt with accordingly (see [12], [15], below).

Notes

For statements in open court, see 28 *Halsbury's Laws* (4th edn reissue) paras 204–205.

h **Cases referred to in judgment**

Church of Scientology of California v North News (1973) 117 Sol Jo 566, CA.
Barnet v Crozier [1987] 1 All ER 1041, [1987] 1 WLR 272.

Cases referred to in skeleton argument

j *Charlton v EMAP plc* (1993) Times, 11 June.
Cleese v Clark [2003] EWHC 137 (QB), [2003] All ER (D) 63 (Feb).

Application

The claimant, Karen Phillips, applied for: (i) permission to make a statement in open court following the settlement of her proceedings for libel against the defendant, Associated Newspapers Ltd, and (ii) the costs of the hearing of that

application, those incurred in preparing the statement and those to be incurred in respect of the reading of the statement in open court. The facts are set out in the judgment. a

Matthew Nicklin (instructed by *Davenport Lyons*) for the claimant.

David Sherborne (instructed by *Reynolds Porter Chamberlain*) for the defendant. b

2 February 2004. The judge granted the claimant permission to make a statement in open court. He also made a costs order in the claimant's favour, with reasons for the costs order to be given later.

10 February 2004. The following judgment was delivered. c

EADY J.

[1] A short hearing took place on 2 February 2004 at which I granted permission in these libel proceedings for a statement in open court to be read, on a suitable occasion, in the terms of the draft then placed before me. The parties had reached agreed settlement terms in December of last year, when a CPR Pt 36 offer had been accepted on the claimant's behalf. It was made clear prior to acceptance that the defendants, Associated Newspapers Ltd, were not prepared to participate in the making of a joint statement (although shortly afterwards an apology was published in the newspaper). Nevertheless, it would have been clear to all concerned, in the light of practice both before and after the coming into effect of the CPR in April 1999, that it would be open to the claimant to apply for permission to make a statement unilaterally. d

[2] In the course of correspondence between the parties, and indeed in letters sent directly to the court, the defendants raised objections to some of the wording in the draft originally proposed. More importantly, however, it was also made clear that their legal advisers did not believe that the court would grant permission for a unilateral statement to be made at all, in the light of the sum of money taken out of court, and that they wished to object on the defendants' behalf to any such statement being made. There was thus objection in principle as well as to some of the detailed wording. e

[3] By the time the matter came before me Mr Nicklin, on the claimant's behalf, was seeking permission in respect of a revised draft statement, in the light of the fact that some relatively minor suggestions as to wording made on the defendants' behalf had been accommodated. On this occasion, Mr Sherborne attended to make submissions on the defendants' behalf, but made it clear that he did not wish to press any objections to the statement being read and wished to confine his submissions to the matter of costs. Mr Nicklin was applying for the costs of the hearing, as well as those already incurred in the preparation of the statement, and those yet to be incurred in respect of the ultimate reading in open court. There was nothing surprising about this, since it was generally recognised, at least under the old procedure, that a defendant who made a payment into court might well have to bear those incidental costs if the claimant wished, and was granted permission, to make a unilateral statement. The question now raised is whether, and to what extent, that long-established practice has been altered or modified by the terms of the CPR. f

[4] I have not previously heard it suggested that the CPR entailed any change in the established practice, and there is certainly nothing in the wording to make it clear that any such change was contemplated. My attention was drawn to two g

a separate provisions of the CPR which, Mr Sherborne suggested, gave rise to a certain tension and required reconciliation.

[5] On the one hand, there is provision for the consequences of acceptance by a defendant of a Pt 36 offer or payment at CPR 36.13. Not surprisingly, perhaps, it is in general terms and makes no specific reference to the particular features of a defamation claim. It is provided in r 36.13(1) that—

b ‘Where a Part 36 offer or a Part 36 payment is accepted without needing the permission of the court the claimant will be entitled to his costs of the proceedings up to the date of serving notice of acceptance.’

[6] It was accepted by both counsel that this provision is relevant to the present situation. Although it has no direct relevance to these circumstances, it is to be noted that r 36.13(2), which governs the situation where a Pt 36 offer or payment ‘relates to part only of the claim’ and the claimant abandons the balance of the claim, provides that he will be entitled to his costs up to the date of serving notice of acceptance *unless the court orders otherwise*. There is no such qualifying phrase in sub-para (1). It seems tolerably clear, however, that the wording of sub-para (2) is intended to draw attention to the court’s power to deprive a claimant of some part of his costs in respect of a partial offer where the balance of the claim is abandoned.

[7] One of Mr Sherborne’s submissions was that the ‘costs clock’ stopped ticking, in circumstances such as the present, where a Pt 36 offer cannot be described as relating to ‘part only of the claim’, once notice of acceptance has been served. In other words, he argued that a claimant who wishes to make a unilateral statement following the taking of the money out of court must do so at his own expense.

[8] The other provision which needed to be considered is to be found in CPR PD 53, para 6:

f ‘6.1 This paragraph only applies where a party wishes to accept a Part 36 offer, Part 36 payment or other offer of settlement in relation to a claim for—(1) libel; (2) slander.

6.2 A party may apply for permission to make a statement in open court before or after he accepts the Part 36 offer or the Part 36 payment in accordance with rule 36.8(5) or other offer to settle the claim.

g 6.3 The statement that the applicant wishes to make must be submitted for the approval of the court and must accompany the notice of application.

6.4 The court may postpone the time for making the statement if other claims relating to the subject matter of the statement are still proceeding.

(Applications must be made in accordance with Part 23).’

[9] It is reasonably clear that para 6.2 is contemplating an application for permission being made *before* accepting a Pt 36 offer or payment for the purpose of enabling a claimant to know whether he will obtain that extra element of vindication. It is possible, I suppose, that a claimant might decide to reject a payment or offer if he had not obtained permission for a unilateral statement in open court. It does not seem to me, however, logically to follow that unless the application is made prior to acceptance the claimant should be deprived of the costs which claimants have always hitherto expected to recover. Mr Nicklin argues that it is implicit that in making a Pt 36 offer or payment a defendant is recognising that he may have to bear the incidental costs of that offer being accepted, which would include in defamation proceedings those incurred in the making of a statement in open court. At the time of making the payment or offer, a defendant will not necessarily know whether the claimant would wish to avail

himself of the opportunity or, if he does, whether the application for the court's permission will be made before or after acceptance. a

[10] Mr Nicklin made the point that, if I were to uphold Mr Sherborne's submission that the 'clock' stopped ticking at the moment a Pt 36 offer or payment was accepted, then defendants would be free to make obstructive objections to a claimant's statement without fear of any sanction by way of costs. That would clearly be unsatisfactory. b

[11] Mr Sherborne accepts that the court will have a discretion as to costs when entertaining the Pt 23 application contemplated in CPR PD 53, para 6.2. It is likely that the costs will be correspondingly greater in so far as a defendant chooses to oppose the making of a unilateral statement or to make submissions in relation to the terms proposed. If a Pt 23 hearing becomes necessary by reason of a defendant's objections, and they are not upheld, there is no reason why he should not normally be expected to bear those costs. What Mr Sherborne does not accept, as I understand it, is that a defendant should also be expected to carry the cost of a unilateral statement where he makes little or no objection. c

[12] I cannot accept that there has been any significant change of practice governing statements in open court following the implementation of the CPR. If a defendant makes a payment into court under Pt 36, it would generally be the case that the costs of any formal application under Pt 23 for permission to make a unilateral statement, and those of making the statement itself, will fall to be paid by the defendant as an integral part of the costs of the action. d

[13] I saw no reason to refuse this claimant permission to make a unilateral statement, as to which she would have had a reasonable expectation, and the sum of money taken out of court was certainly well above any level which could be characterised as nominal. There is one briefly reported case where a plaintiff was refused permission to make a statement, and counsel were unable to cite any other example. In *Church of Scientology of California v North News* (1973) 117 Sol Jo 566, leave was refused on the taking out of £50 which seemed to the court relatively trivial as compared to the libel itself. In the light of experience, it would appear to be quite exceptional for the court to refuse permission for the making of a reasonable and proportionate statement in open court: see eg *Barnet v Crozier* [1987] 1 All ER 1041 at 1047, [1987] 1 WLR 272 at 280 per Ralph Gibson LJ. e

[14] Generally, the Pt 23 application would nowadays come before the senior master, where there is no significant opposition, and indeed Mr Nicklin suggested that it might very well be dealt with on paper. The cost should normally therefore be relatively modest. If there is opposition from the defendants, however, it is made clear in the White Book (*Civil Procedure*) (May 2003 edn) vol I, pp 1335–1336 (53 PD 15.2) that the application should be referred or made directly to the judge in charge of the jury list. f

[15] In this case I was invited to make a detailed assessment of the costs incurred over the correspondence and the Pt 23 application before me. I made some reduction to take account of proportionality, but I declined to rule that the claimant's costs should in any way be reduced to take account of the moderate concessions made by her legal advisers in the wording of the statement for the purpose of taking into account the defendant's suggestions. There was no major concession of principle and the objections seemed to me to be footling. g

Order accordingly.

a Practice Direction (Family Proceedings: Representation of Children)

FAMILY DIVISION

b BUTLER-SLOSS P

5 APRIL 2004

Practice – Family proceedings – Making a child party to proceedings – Guidance.

BUTLER-SLOSS P gave the following direction at the sitting of the court.

c [1] The proper conduct and disposal of proceedings concerning a child which are not specified proceedings within the meaning of s 41 of the Children Act 1989 may require the child to be made a party. Rule 9.5 of the Family Proceedings Rules 1991, SI 1991/1247 provides for the appointment of a guardian ad litem (a guardian) for a child party unless the child is of sufficient understanding and can participate as a party in the proceedings without a guardian, as permitted by r 9.2A of the 1991 rules.

e [2] Making the child a party to the proceedings is a step that will be taken only in cases which involve an issue of significant difficulty and consequently will occur in only a minority of cases. Before taking the decision to make the child a party, consideration should be given to whether an alternative route might be preferable, such as asking an officer of the Children and Family Court Advisory and Support Service (CAFCASS) to carry out further work or by making a referral to social services or possibly, by obtaining expert evidence.

f [3] The decision to make the child a party will always be exclusively that of the judge, made in the light of the facts and circumstances of the particular case. The following are offered, solely by way of guidance, as circumstances which may justify the making of an order: (1) Where a CAFCASS officer has notified the court that in his opinion the child should be made a party (see r 4.11B(6) of the 1991 rules). (2) Where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties. (3) Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute. (4) Where the views and wishes of the child cannot be adequately met by a report to the court. (5) Where an older child is opposing a proposed course of action. (6) Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child. (7) Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court. (8) Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer. **j** (9) Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position. (10) Where there is a contested issue about blood testing.

[4] It must be recognised that separate representation of the child may result in a delay in the resolution of the proceedings. When deciding whether to direct that a child be made a party, the court will take into account the risk of delay or other

facts adverse to the welfare of the child. The court's primary consideration will be the best interests of the child.

[5] When a child is made a party and a guardian is to be appointed: (1) Consideration should first be given to appointing an officer of CAFCASS as guardian. Before appointing an officer, the court will cause preliminary inquiries to be made of CAFCASS. For the procedure, reference should be made to the practice note issued by CAFCASS, contemporaneously with this direction. (2) If CAFCASS is unable to provide a guardian without delay, or if for some other reason the appointment of a CAFCASS officer is not appropriate, r 9.5(1) makes further provision for the appointment of a guardian.

[6] In cases proceeding in a county court, the court may, at the same time as deciding whether to join a child as a party, consider whether the nature of the case or the complexity or importance of the issues require transfer of the case to the High Court.

[7] Issued with the concurrence and approval of the Lord Chancellor.

Pamela Hardisty Barrister (NZ).

Practice Note (CAFCASS)

INTRODUCTION

[1] This practice note is issued in conjunction with the President's Practice Direction dated April 2004 relating to the Representation of Children in Family Proceedings and with the President's approval. It supersedes the CAFCASS practice note dated March 2001 ([2001] 2 FCR 562).

APPOINTMENT OF CAFCASS OFFICERS IN PRIVATE LAW PROCEEDINGS PURSUANT TO RULE 9.5 OF THE FAMILY PROCEEDINGS RULES 1991

[2] Where the court has decided to appoint an officer of CAFCASS as guardian the preferred order should simply state that—

'[name of the child] is made party to the proceedings and pursuant to rule 9.5 Family Proceedings Rules 1991 an officer of CAFCASS be appointed as his/her guardian ...'

It is also helpful for CAFCASS to know whether the court considers there is any reason why any CAFCASS officer who has dealt with the matter so far should not continue to deal with it in the role of guardian.

[3] The decision about which particular officer of CAFCASS to allocate as guardian is a matter for CAFCASS.

[4] In cases proceeding in the High Court, a copy of the court file, including the order making the r 9.5 appointment and any information about the court's reasons, should be sent for the attention of The Manager, CAFCASS Legal, 1st Floor, Newspaper House, 8–16 Great New Street, London, EC4A 3BN or by document exchange to DX 144 London Chancery Lane. If the appointment of a CAFCASS officer as guardian is urgent then the judge or a member of the court service is encouraged, if possible, to telephone on 020 7904 0867 to discuss the matter before an order is made; alternatively, the order and any information about the court's reasons can be faxed to CAFCASS Legal on 020 7904 0868.

[5] In cases proceeding in the county court, the order making the r 9.5 appointment should be faxed to the local CAFCASS office responsible for private

a law cases unless the case falls within any of the categories identified in [10], below, when it should be referred to CAFCASS Legal following the procedure in [4], above.

b [6] In either case CAFCASS will make a decision within five working days of receipt of the papers from the court about whether it will provide an officer of the service locally (as will be the case in most county court cases) or from CAFCASS Legal (as will be the case in most High Court cases) to act as guardian. It is the responsibility of the local CAFCASS service manager and CAFCASS Legal to liaise whenever necessary to ensure that the most appropriate CAFCASS officer is appointed as guardian.

c [7] The CAFCASS office that is to be responsible for the matter will notify the court of the name and professional address and telephone number of the particular officer who will act as guardian. If for whatever reason there is likely to be any significant delay in an officer of the service being made available CAFCASS will notify the court accordingly to enable the court to consider whether some other proper person should instead be appointed as guardian.

d [8] If the CAFCASS officer to be appointed as guardian is based at CAFCASS Legal there will normally be no need for a solicitor for the child also to be appointed as the litigation will usually be conducted in-house pursuant to s 15 of the Criminal Justice and Court Services Act 2000.

e [9] If the CAFCASS officer to be appointed as guardian is based at a local CAFCASS office then legal representation will be provided either through CAFCASS Legal or by the appointment of a local solicitor to act for the child. It is normally the guardian's responsibility to appoint a solicitor pursuant to the combined effect of rr 9.5(6) and 4.11A(1) of the 1991 rules. A local solicitor can apply for legal aid for the child in the ordinary way enabling the guardian (funded by CAFCASS) and the child's solicitor (funded by the Legal Services Commission) to work together in the same way as they routinely do in specified proceedings.

f CASES THAT SHOULD BE REFERRED TO CAFCASS LEGAL WHETHER OR NOT INVOLVING AN APPOINTMENT PURSUANT TO RULE 9.5 OF THE 1991 RULES AND WHETHER PROCEEDING IN THE HIGH COURT OR THE COUNTY COURT

g [10] Whilst the great majority of cases are likely to continue to be referred by courts to local CAFCASS offices the following categories of case should be referred to CAFCASS Legal: (1) cases in which the Children's Divisions of the Official Solicitor or CAFCASS Legal previously acted for the child; (2) exceptionally complex international cases where legal or other substantial inquiries abroad will be necessary or where there is a dispute as to which country's courts should have jurisdiction over the child's affairs (for example, a case in which two children previously the subject of adoption and then care proceedings in two other countries were brought to England illegally and made the subject of further care proceedings here); (3) exceptionally complex adoption cases (for example, where there is a need to investigate a suspected illegal payment or placement; adoption proceedings following a mistake during fertility treatment involving the use of unauthorised sperm; and the circumstances arising in *Flintshire CC v K* [2001] 2 FCR 724); (4) all medical treatment cases where the child is old enough to have views which need to be taken into account, or where there are particularly difficult ethical issues such as the withdrawal of treatment, unless the issue arises in existing proceedings already being handled locally when the preferred arrangement will usually be for the matter to continue to be dealt with locally but with additional advice provided by CAFCASS Legal; (5) any free-standing human rights applications pursuant to s 7(1)(a) of the Human Rights Act 1998 in which it is thought that it may be possible

and appropriate for any part to be played by CAFCASS or its officers; (6) any additional categories of case for referral to CAFCASS Legal that may from time-to-time be added to this list. a

[11] In such cases the referral to CAFCASS Legal should follow a similar procedure to that set out in [4], above.

OTHER CASES THAT MAY BE REFERRED TO CAFCASS LEGAL

[12] Other family proceedings in which the welfare of children is or may be in question may be referred to CAFCASS Legal where they are exceptionally difficult, unusual or sensitive (for example, a care case in which death threats were made against the child and other professionals necessitating special security measures including false identities for some of those under threat; and an adoption case in which there had been serious misconduct by the local CAFCASS officer originally appointed). b
c

CAFCASS LEGAL ACTING AS ADVOCATE TO THE COURT

[13] CAFCASS Legal may be invited to act or instruct counsel to appear as advocate to the court in family proceedings in which the welfare of children is or may be in question (for example in a recent case an issue arose about the extent of the court's powers in Hague Convention proceedings (Hague Convention on the Civil Aspects of International Child Abduction (The Hague, 25 October 1980; TS 66 (1986); Cm 33) to give directions designed to prevent further abduction pending trial, which led to CAFCASS Legal briefing counsel as advocate to the court). d

[14] Sometimes it will be more appropriate for the Attorney General or the Official Solicitor to fulfil this role. Reference should be made to the Memorandum on Requests for the appointment of an Advocate to the Court issued by the Attorney General and the Lord Chief Justice on 19 December 2001. e

LIAISON BETWEEN CAFCASS LEGAL AND THE OFFICIAL SOLICITOR

[15] In cases in which there is any doubt as to whether CAFCASS or the Official Solicitor should provide representation, staff of CAFCASS Legal will liaise with staff of the Official Solicitor's office to ensure that the most suitable arrangements are made. f

PROVISION OF GENERAL ASSISTANCE BY CAFCASS LEGAL

[16] CAFCASS Legal is available to provide legal advice to officers of CAFCASS, whether employed or self-employed, in connection with their professional responsibilities. g

[17] CAFCASS Legal is also available to offer informal advice to judges and other professionals engaged in family proceedings in which the welfare of children is or may be in question without necessarily being appointed as a guardian or advocate to the court (for instance in relation to passport applications for accommodated children). h

[18] Lawyers at CAFCASS Legal take it in turn to carry a mobile telephone through which they can be contacted any day of the year by the High Court out-of-hours duty judge if their help is needed, for instance in relation to a medical treatment emergency. j

Charles Prest
Director of Legal Services, CAFCASS

Practice Direction (Child: Custody: Conciliation)

FAMILY DIVISION

12 MARCH 2004

Divorce – Practice – Children – Custody – Applications for custody and access – Residence, contact and other orders – Contested applications – Conciliation – Conciliation before district judge and Children and Family Court Advisory and Support Service officer – Attendance of parties – Applications for adjournment – Directions where conciliation unsuccessful – Urgent applications – Matrimonial Causes Act 1972, s 41 – Children Act 1989, ss 8, 13 – Family Proceedings Rules 1991, r 2.39(3)(c).

Minor – Practice – Wardship and guardianship proceedings – Custody and access – Residence, contact and other orders – Contested applications – Conciliation – Conciliation before district judge and Children and Family Court Advisory and Support Service officer – Attendance of parties – Applications for adjournment – Directions where conciliation unsuccessful – Urgent applications – Children Act 1989, ss 8, 13.

[1] The conciliation scheme which is in operation in the Principal Registry of the Family Division is to be extended as from 22 March 2004. As from that date the scheme will be as follows:

[2] (1) All applications for orders under s 8 of the Children Act 1989 (residence, contact, specific issue or prohibited steps orders) or to vary or discharge such orders will, upon issue, be listed in the conciliation list. (2) All applications for an order under s 13 of the 1989 Act (leave to cause a child to be known by a new surname or to remove the child from the United Kingdom) or to vary or discharge such an order will, upon issue, be listed in the conciliation list. (3) When the district judge gives a direction under r 2.39(3)(c) of the Family Proceedings Rules 1991, SI 1991/1247 (compliance with s 41 of the Matrimonial Causes Act 1973), the case will, unless otherwise directed, be listed in the conciliation list. (4) The district judge may refer a summons for wardship to an appointment in the conciliation list, where orders under s 8 of the 1989 Act are sought. This would normally be done at the first appointment.

[3] Cases may be excluded or removed from the conciliation list and listed otherwise if a district judge so directs. Applications for such a direction will usually be made to the district judge of the day but opposed applications will be listed in the normal way.

[4] (1) Subject to operational requirements, there will be five conciliation lists each week, two on Monday and Tuesday and one on Wednesday. The district judge will be attended by an officer of the Children and Family Court Advisory and Support Service (CAFCASS). (2) It is essential that both parties and any legal advisers having conduct of the case attend the appointment. The nature of the application and matters in dispute will be outlined to the district judge and the CAFCASS officer. The conciliation appointment will be conducted with a view to the parties reaching an agreement and, if appropriate, discussion away from the courtroom will be facilitated. Conciliation is a legally-privileged occasion. All the discussions will be privileged and will not be disclosed on any subsequent hearing (other than at a further conciliation appointment) or upon any later

application. (3) The party who has living with him or her any child aged nine or over to whom the conciliation appointment relates, must (unless excused by the direction of a district judge) bring that child to the appointment to be seen by the CAFCASS officer. When a child of nine or over attends, any younger child to whom the application relates may also attend. (4) Any application to adjourn a conciliation appointment must be made to a district judge. (5) If agreement is reached the district judge will make such orders, if any, as may be appropriate but if no agreement can be reached disposing of the application, then the district judge will give directions (including timetabling) with a view to the early hearing and disposal of the application. (6) The district judge and the CAFCASS officer will not be further involved in any further application or proceedings between the parties, other than further conciliation appointments or similar privileged hearings. (7) Where there has been a referral as described in [2](3), above, and the conciliation appointment has been concluded, the district judge will give an appropriate direction in relation to s 41 of the 1973 Act.

[5] Urgent applications: Urgent applications made without notice will continue to be heard by the district judge of the day. The district judge of the day will determine whether the application or any subsequent hearing requires to be listed in the conciliation list.

[6] The Practice Direction of 18 October 1991 (Practice Direction (Child: Custody: Conciliation) [1992] 1 All ER 421) shall cease to apply as from 22 March 2004 save in respect of proceedings pending on that day.

[7] Issued with the approval of the President.

Philip Waller
Senior District Judge

a R (on the application of Middleton) v West Somerset Coroner
[2004] UKHL 10

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOPE OF CRAIGHEAD, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD CARSWELL

2–4 FEBRUARY, 11 MARCH 2004

c *Coroner – Inquest – Right to life – Whether regime for holding inquests in England and Wales providing effective public investigation – Coroners Act 1988, s 11(5)(b)(ii) – Human Rights Act 1998, Sch 1, Pt I, art 2 – Coroners Rules 1984, rr 36, 42, 43.*

d M, a prisoner in custody, took his life by hanging himself in his cell. At the inquest into his death the coroner told the jury that if they wished to do so, they could give him a note regarding any specific areas of the evidence about which they were concerned and he would consider the note, which would not be published, when considering the exercise of his power under r 43^a of the Coroners Rules 1984, which allowed a coroner who believed that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest was being held to make an appropriate report. Section 11(5)(b)(ii)^b of the **e** Coroners Act 1988 required that a coroner's inquisition, signed by the jury, should set out how, when and where the deceased came by his death and r 36(1)^c of the 1984 rules provided that the proceedings and evidence at an inquest were to be directed solely to ascertaining certain matters, including how, when and where the deceased came by his death. Under r 36(2) neither the coroner nor the **f** jury might express any opinion on any other matters. Rule 42^d provided that no verdict might be framed in such a way as to appear to determine any question of criminal liability on the part of a named person or civil liability. The jury at M's inquest found the cause of his death to be hanging and returned a verdict that he had taken his own life when the balance of his mind had been disturbed. The jury also gave the coroner a note, communicating its opinion that the Prison Service **g** had failed in its duty of care for M. M's family asked that the note be appended to the inquisition but the coroner declined to do so. The claimant, M's mother applied for judicial review, seeking an order that the jury's findings as set out in their note be publicly recorded, and that there should thus be a formal public determination of the responsibility of the Prison Service for M's death. The issue **h** was thus raised whether the current regime under the 1988 Act and the 1984 rules for holding inquests in England and Wales met the requirements of a properly conducted official investigation into a death required by art 2^e of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which imposed on the **j** state substantive obligations not to take life without justification and also to

a Rule 43, so far as material, is set out at [26], below

b Section 11, so far as material, is set out at [24], below

c Rule 36, so far as material, is set out at [26], below

d Rule 42, so far as material, is set out at [26], below

e Article 2, so far as material, provides: 'Everyone's right to life shall be protected by law ...'

establish a framework of laws, precautions, procedures and means of enforcement which would, to the greatest extent reasonably practicable, protect life. The judge made a declaration that the inquest into M's death had been inadequate to meet the procedural obligation in art 2 of the convention. The Secretary of State for the Home Department appealed to the Court of Appeal which set aside the judge's declaration. The claimant appealed. The issues considered by the House of Lords were; (i) what, if anything, the convention required (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving or possibly involving, a violation of art 2; (ii) whether the regime for holding inquests established by the 1988 Act and the 1984 rules, as hitherto understood and followed in England and Wales, met those requirements of the convention; and (iii) if not, whether the current regime governing the conduct of inquests should be revised, and if so, how.

Held – (1) An inquest, being the means by which the state ordinarily discharged its procedural obligation to investigate under art 2 of the convention, ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case (see [16]–[20] below); *Jordan v UK* (2001) 11 BHRC 1 and *Keenan v UK* (2001) 10 BHRC 319 considered.

(2) Cases in which, under the regime for conducting inquests established by the 1988 Act and the 1984 rules as hitherto understood and followed in England and Wales, the inquest verdict did not express the jury's factual conclusion on the events leading up to the death, did not meet the requirements of the convention (see [30]–[32], below); *R v North Humberside and Scunthorpe Coroner, ex p Jamieson* [1994] 3 All ER 972, [1995] QB 1, [1994] 3 WLR 82 considered.

(3) The only change needed to the current regime was to interpret the word 'how' in s 11(5)(b)(ii) of the 1988 Act and r 36(1)(b) of the 1984 rules ('how ... the deceased came by his death') as meaning not simply 'by what means' but 'by what means and in what circumstances'. That change would not require a change of approach in some cases, where a traditional short form verdict would be quite satisfactory, but where it did call for a change of approach it was for the coroner, in the exercise of his discretion, to decide how best to elicit the jury's conclusion on the central issue or issues. That could be done by inviting an expanded form of verdict, by inviting a narrative form of verdict in which the jury's factual conclusions were briefly summarised, or by inviting the jury's answers to factual questions put by the coroner. If the coroner invited a narrative verdict or answers to questions, he might find it helpful to direct the jury with reference to some of the following matters; where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors relevant to the circumstances of the death. The prohibition in r 36(2) of the 1984 rules, read with reference to the broader interpretation of 'how' in s 11(5)(b)(ii) and r 36(1), did not preclude conclusions of fact as opposed to expressions of opinion. But however the jury's factual conclusion was conveyed, r 42 of the 1984 rules should not be infringed. Compliance with the convention did not require that the power reserved to the coroner under r 43 of the 1984 rules to make an appropriate report should be exercisable by the jury. But the procedural obligation under art 2 of the convention would be most effectively discharged if the coroner announced

- a publicly not only his intention to report any matter, but also, neutrally expressed, the substance of that report (see [35]–[38], below).

(4) In the instant case, the jury's verdict had not expressed its conclusion on the crucial facts of whether M should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. It followed that the judge's declaration had been correctly made.

- b The appeal would be allowed in part (see [45], [48], [49], below).

Decision of the Court of Appeal [2002] 4 All ER 336 reversed in part.

Notes

For the right to life, and for the purpose and scope of inquests, see, respectively, 8(2) *Halsbury's Laws* (4th edn reissue) para 123 and 9(2) *Halsbury's Laws* (4th edn reissue) paras 887, 923.

- c For the Coroners Act 1988, s 11, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 667.

For the Coroners Rules 1984, rr 36, 42, 43, see 5 *Halsbury's Statutory Instruments* (2002 Issue) 456–548.

- d **Cases referred to in the report**

Calvelli v Italy [2002] ECHR 32967/96, ECt HR.

Edwards v UK (2002) 12 BHRC 190, ECt HR.

Jordan v UK (2001) 11 BHRC 1, ECt HR.

Keenan v UK (2001) 10 BHRC 319, ECt HR.

- e *LCB v UK* (1998) 4 BHRC 447, ECt HR.

Mastromatteo v Italy App No 37703/97 (24 October 2002, unreported), ECt HR.

McCann v UK (1995) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR.

McKerr, Re [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807.

Öneryildiz v Turkey App No 48939/99 (18 June 2002, unreported), ECt HR.

- f *Osman v UK* (1998) 5 BHRC 293, ECt HR.

Powell v UK App No 45305/99 (4 May 2000, unreported), ECt HR.

R (on the application of Amin) v Secretary of State for the Home Dept [2002] EWCA Civ 390, [2002] 4 All ER 336, [2003] QB 581, [2002] 3 WLR 505; *rvsd* [2003] UKHL 51, [2003] 4 All ER 1264, [2003] QB 581, [2003] 3 WLR 1169.

- g *R (on the application of Davies) v HM Deputy Coroner for Birmingham* [2003] EWCA Civ 1739, (2003) 147 Sol Jo 1426.

R v HM Coroner for Birmingham, ex p Secretary of State for the Home Dept (1990) 155 JP 107, DC.

R v North Humberside and Scunthorpe Coroner, ex p Jamieson [1994] 3 All ER 972, [1995] QB 1, [1994] 3 WLR 82, CA.

- h *R v HM Coroner for Western District of East Sussex, ex p Homberg* (1994) 19 BMLR 11, DC.

R v Walthamstow Coroner, ex p Rubenstein [1982] Crim LR 509.

Salman v Turkey (2002) 34 EHRR 425, [2000] ECHR 21986/93, ECt HR.

Sieminska v Poland App No 37602/97 (29 March 2001, unreported), ECt HR.

- j *Taylor v UK* (1994) 79 DR 127, E Com HR.

Cases referred to in list of authorities

Andronicou v Cyprus (1998) 25 EHRR 491, [1997] ECHR 25052/94, ECt HR.

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

- Dallison v Caffery* [1964] 2 All ER 610, [1965] 1 QB 348, [1964] 3 WLR 385, CA. a
- Devine v A-G for Northern Ireland, Breslin v A-G for Northern Ireland* [1992] 1 All ER 609, [1992] 1 WLR 262, HL.
- Deweert v Belgium* (1980) 2 EHRR 439, [1980] ECHR 6903/75, ECt HR.
- Doody v Secretary of State for the Home Dept* [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL. b
- Duguid, Re* (8 July 2003, unreported), Sh Ct.
- Erikson v Italy* (1999) 29 EHRR CD 152, E Com HR.
- Farrell v Secretary of State for Defence* [1980] 1 All ER 166, [1980] 1 WLR 172, HL.
- Fayed v UK* (1994) 18 EHRR 393, [1994] ECHR 17101/90, ECt HR.
- General Cleaning Contractors Ltd v Christmas* [1952] 2 All ER 1110, [1953] AC 180, [1953] 2 WLR 6, HL. c
- Jordan's Application for Judicial Review, Re* (29 January 2002, unreported), NI HC.
- Jordan's Application for Judicial Review, Re* (8 March 2002, unreported), NI HC.
- Kelly, Re* (1997) 161 JP 417, DC.
- Lazzarini v Italy* App No 53749/00 (7 November 2002, unreported), ECt HR.
- Lister v National Coal Board* [1969] 3 All ER 1077, [1970] 1 QB 228, [1969] 3 WLR 439, CA. d
- Lothian Regional Council, Re* 1993 SLT 1132n, Ct of Sess.
- Masson v Netherlands* (1996) 22 EHRR 491, [1995] ECHR 15346/89, ECt HR.
- Matthews v Ministry of Defence* [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
- Menson v UK* [2003] ECHR 47916/99, ECt HR. e
- Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
- R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.
- R v DPP, ex p Manning* [2001] QB 330, [2000] 3 WLR 463, DC.
- R v East Berkshire Coroner, ex p Buckley* (1992) 157 JP 425, DC.
- R v Hammersmith Coroner, ex p Peach* [1980] 2 All ER 7, [1980] QB 211, [1980] 2 WLR 496, CA. f
- R v Harding* [1908] 25 TLR 139, CCA.
- R v HM Coroner for Birmingham and Solihull, ex p Cotton* (1995) 160 JP 123, DC.
- R v HM Coroner for Birmingham, ex p Secretary of State for the Home Dept* (1990) 155 JP 107, DC. g
- R v HM Coroner for Coventry, ex p Chief Constable of Staffordshire Police* (2000) 164 JP 665.
- R v HM Coroner for Coventry, ex p O'Reilly* (1997) 35 BMLR 48, DC.
- R v HM Coroner for Inner South London, ex p Epsom Health Care Trust* (1994) 158 JP 973, DC. h
- R v HM Coroner for Swansea and Gower, ex p Chief Constable of Wales* (1999) 164 JP 191.
- R v HM Coroner for Wiltshire, ex p Clegg* (1997) 161 JP 521, DC.
- R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344, CA.
- R v Inner South London Coroner, ex p Kendall* [1989] 1 All ER 72, [1988] 1 WLR 1186, DC. j
- R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860, [2000] 1 WLR 1855, CA.
- R v Portsmouth Coroner, ex p Anderson* [1988] 2 All ER 604, [1987] 1 WLR 1640, DC.
- R v South London Coroner, ex p Thompson* (1982) 126 Sol Jo 625, DC.

- a* *R v Southwark Coroner, ex p Hicks* [1987] 2 All ER 140, [1987] 1 WLR 1624, DC.
R v Surrey Coroner, ex p Campbell [1982] 2 All ER 545, [1982] QB 661, [1982] 2 WLR 626, DC.
R v Surrey Coroner, ex p Wright [1997] 1 All ER 823, [1997] QB 786, [1997] 2 WLR 16; *affd* (1996) 35 BMLR 57, CA.
R v West London Coroner, ex p Gray [1987] 2 All ER 129, [1988] QB 467, [1987] 2 WLR 1020, DC.
- b* *R (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry)* [2001] EWCA Civ 2048, [2002] 1 WLR 1249.
R (on the application of Anufrijeva) v Secretary of State for the Home Dept [2003] UKHL 36, [2003] 3 All ER 827, [2003] 3 WLR 252.
R (on the application of Bentley) v HM Coroner for the District of Avon [2001] EWHC Admin 170, (2001) 74 BMLR 1.
- c* *R (on the application of Dawson) v HM Coroner for East Riding and Kingston upon Hull City Council* [2001] EWHC 352 (Admin), [2001] ACD 68.
R (on the application of Hurst) v HM Coroner for the Northern District of London [2003] EWHC 1721 (QB), [2003] ACD 361, DC.
- d* *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129, [2003] 4 All ER 1239.
R (on the application of Lambourne) v Deputy Coroner for Avon, Lambourne v Coroner for the District of Avon [2001] EWHC Admin 1877 [2002] All ER (D) 443 (Jul), DC.
- e* *R (on the application of Metropolitan Police Comr) v Southern District of London Coroner* [2003] EWHC 1829 (Admin), [2003] All ER (D) 385 (Jun).
R (on the application of Mumford) v HM Coroner for Reading [2002] EWHC 2184 (Admin), [2002] All ER (D) 420 (Oct).
R (on the application of N) (a child) v Coroner for the Liverpool City [2001] EWHC Admin 922 [2001] All ER (D) 125 (Nov), DC.
- f* *R (on the application of S) v Inner West London Coroner* [2001] EWHC Admin 105, (2001) 61 BMLR 222.
R (on the application of Stanley) v Inner North London Coroner [2003] EWHC 1180 (Admin), [2003] All ER (D) 351 (Apr).
R (on the application of Touche) v Inner London North Coroner [2001] EWCA Civ 383, [2001] 2 All ER 752, [2001] QB 1206, [2001] 3 WLR 148.
- g* *R (on the application of Wright) v Secretary of State for the Home Dept* [2001] EWHC Admin 520, (2001) 62 BMLR 16.
Rapier (decd), Re [1986] 3 All ER 726, [1988] QB 26, [1986] 3 WLR 830, DC.
Reeves v Comr of Police of the Metropolis [1999] 3 All ER 897, [2000] 1 AC 360, [1999] 3 WLR 363, HL.
- h* *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, [1971] ECHR 2614/65, ECt HR.
S (children: care plan), Re, Re W (children: care plan) [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
Sacker v West Yorkshire Coroner [2003] EWCA Civ 217, [2003] 2 All ER 278.
Slimani v France App No 57671/00 (8 April 2003, unreported), ECt HR.
- j* *Timurtas v Turkey* (2001) 33 EHRR 121, [2000] ECHR 23531/94, ECt HR.
Weir, Re (23 January 2003, unreported), Ct of Sess.

Appeal

The claimant, Jean Middleton, appealed from the decision of the Court of Appeal (Lord Woolf CJ, Laws and Dyson LJ) on 27 March 2002 ([2002] EWCA

Civ 390, [2002] 4 All ER 336) allowing in part the appeal of the Secretary of State for the Home Department, as interested party, from the order of Stanley Burnton J on 14 December 2001 ([2001] EWHC Admin 1043, [2002] Lloyd's Rep Med 107) granting the claimant a declaration that the inquest into the death of her son, Colin Campbell Middleton, was inadequate to meet the procedural requirements of art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, by reason of the direction of the Coroner for West Somerset. The facts are set out in the report of the Appellate Committee.

Ben Emmerson QC, Peter Weatherby and Danny Friedman (instructed by Howells, Sheffield) for Mrs Middleton.

Hugh Mercer (instructed by *Clarke Willmott*, Taunton) and *Richard Eaton* of that firm for the coroner.

Rabinder Singh QC and Jonathan Crow (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

11 March 2004. The following report of the Appellate Committee was delivered.

LORD BINGHAM OF CORNHILL.

[1] This is the considered opinion of the Committee.

[2] The European Court of Human Rights (the European Court) has repeatedly interpreted art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969) (now set out in Sch 1 to the Human Rights Act 1998) as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. See, for example, *LCB v UK* (1998) 4 BHRC 447 at 456 (para 36); *Osman v UK* (1998) 5 BHRC 293; *Powell v UK* App No 45305/99 (4 May 2000, unreported); *Keenan v UK* (2001) 10 BHRC 319 at 348–349 (paras 88–90); *Edwards v UK* (2002) 12 BHRC 190 at 206 (para 54); *Calvelli v Italy* [2002] ECHR 32 967/96; *Öneryildiz v Turkey* App No 48939/99 (18 June 2002, unreported).

[3] The European Court has also interpreted art 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated. See, for example, *Taylor v UK* (1994) 79 DR 127 at 137; *McCann v UK* (1995) 21 EHRR 97 at 163 (para 161); *Powell v UK*; *Salman v Turkey* (2002) 34 EHRR 425 at 483 (para 104); *Sieminska v Poland* App No 37602/97 (29 March 2001, unreported); *Jordan v UK* (2001) 11 BHRC 1 at 30 (para 105); *Edwards' case* (2002) 12 BHRC 190 at 210 (para 69); *Öneryildiz's case*; *Mastromatteo v Italy* App No 37703/97 (24 October 2002, unreported).

[4] The scope of the state's substantive obligations has been the subject of previous decisions such as *Osman's case* and *Keenan's case* but is not in issue in this appeal. Nor does any issue arise about participation in the official investigation by

a the family or next of kin of the deceased, as recently considered by the House in *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51, [2003] 4 All ER 1264, [2003] QB 581. The issue here concerns not the conduct of the investigation itself but its culmination. It is, or may be, necessary to consider three questions. (1) What, if anything, does the convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of art 2?

b (2) Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984, SI 1984/552, as hitherto understood and followed in England and Wales, meet those requirements of the convention? (3) If not, can the current regime governing the conduct of inquests in England and Wales be revised so as to do so, and if so how?

c [5] Before turning to consider these questions it should be observed that they are very important questions. Compliance with the substantive obligations referred to above must rank among the highest priorities of a modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness. In the context of this

d appeal the questions have a particular importance also. For, as the facts summarised in [39]–[43], below make clear, the appeal concerns an inquest into the suicide, in prison, of a serving prisoner. Unhappily, this is not a rare event. The statistics given in recent publications, (notably *Suicide is Everyone's Concern: A Thematic Review by HM Chief Inspector of Prisons for England and Wales* (May 1999), the annual report of HM Chief Inspector of Prisons for England and

e Wales 2002–2003, and evidence given to the House of Lords and House of Commons Joint Committee on Human Rights (HL Paper 12, HC 134) (January 2004) make grim reading. While the suicide rate among the population as a whole is falling, the rate among prisoners is rising. In the 14 years 1990–2003

f there were 947 self-inflicted deaths in prison, 177 of which were of detainees aged 21 or under. Currently, almost two people kill themselves in prison each week. Over a third have been convicted of no offence. One in five is a woman (a proportion far in excess of the female prison population). One in five deaths occurs in a prison hospital or segregation unit. 40% of self-inflicted deaths occur within the first month of custody. It must of course be remembered that

g many of those in prison are vulnerable, inadequate or mentally disturbed; many have drug problems; and imprisonment is inevitably, for some, a very traumatic experience. These statistics, grim though they are, do not of themselves point towards any dereliction of duty on the part of the authorities (which have given much attention to the problem) or any individual official. But they do highlight the need for an investigative regime which will not only

h expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern. This appeal is concerned with

j the death of a long-term convicted prisoner but the same principles must apply to the death of any person in the custody of the prison service or the police.

[6] Question (1). What, if anything, does the convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of art 2?

[7] The European Court has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by art 2 of the convention, should be. This is because the court applies principles and does not lay down rules, because the court pays close attention to the facts of the case before it and because it recognises that different member states seek to discharge their convention obligations through differing institutions and procedures. In this appeal the Committee heard oral submissions on behalf of the Secretary of State, HM Coroner for the Western District of Somerset and Mrs Jean Middleton, and received written submissions on behalf of the Coroners' Society of England and Wales, the Northern Ireland Human Rights Commission and Inquest. It was not suggested that the express terms of the convention or any ruling of the European Court provide a clear answer to this first question before the House.

[8] The European Court has recognised (in *McCann's* case (1995) 21 EHRR 97 at 160 (para 146) that its approach to the interpretation of art 2—

'must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.'

Thus if an official investigation is to meet the state's procedural obligation under art 2 the prescribed procedure must work in practice and must fulfil the purpose for which the investigation is established.

[9] What is the purpose for which the official investigation is established? The decided cases assist in answering that question. In *Keenan's* case (2001) 10 BHRC 319, which concerned a prisoner who had committed suicide, the art 2 argument was directed to the state's performance of its substantive, not its procedural, obligation. The court did, however, note the limited scope of an inquest in England and Wales (at 344–346 (paras 75–78)), which was relevant to the applicant's complaint under art 13 that national law afforded her no effective remedy. In the context of that complaint the government agreed (at 355 (para 121))—

'that the inquest, which did not permit the determination of issues of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities or obtaining damages.'

The court, still with reference to this complaint, ruled (at 356 (para 122)):

'Given the fundamental importance of the right to the protection of life, art 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life ...'

On the facts, the court held (at 357 (para 131)) that a civil action in damages would not have afforded the applicant an effective remedy which would have established where responsibility lay for the death of the deceased.

[10] *Jordan's* case (2001) 11 BHRC 1 arose from the fatal shooting of a young man by a police officer in Northern Ireland. The European Court found a violation of art 2 in respect of failings in the investigative procedures concerning the death. The court held (at 30, 31):

‘105 The obligation to protect the right to life under art 2 of the convention, read in conjunction with the state’s general duty under art 1 of the convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force ... The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...

107 The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances ... and to the identification and punishment of those responsible ... This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death ... Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.’

There was argument whether the inquest, which had been opened but not concluded, would satisfy the state’s investigative obligation, but the European Court (at 35–36) concluded that, on the facts of this case, it would not:

‘128 It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of art 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.

129 None the less, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death ... In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including "unlawful death". As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the coroner may send a written report to the DPP if he considers that a criminal offence may have been committed ... It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.

130 Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of art 2.'

The court held (at 39 (para 142)) that the Northern Irish inquest procedure fell short of what art 2 required because (among other shortcomings) it—

'did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed ...'

[11] The killing in *Edwards v UK* (2002) 12 BHRC 190 was of a prisoner by another prisoner with whom he shared a cell. The killer was charged with murder but his plea of guilty to manslaughter by reason of diminished responsibility was accepted, and there was accordingly no investigation in the criminal trial of how the two men came to be sharing a cell. This, not surprisingly, was a feature of the case which greatly concerned the family of the deceased. In its judgment, the European Court described (at 210 (para 69)) the purpose of the investigation required by art 2 in exactly the same terms as it had used in its judgment in *Jordan's* case (2001) 11 BHRC 1 at 30 (para 105), quoted above. A violation was found.

[12] In *Mastromatteo v Italy* App No 37703/97 (24 October 2002, unreported) the deceased had been killed by a group of criminals, some of whom were on leave of absence from prison and one of whom had absconded from prison. A complaint that the state had violated its substantive obligation under art 2 was rejected. So too was a complaint that the state's procedural obligation had been violated. This complaint was primarily directed to the possibility of obtaining compensation, but the European Court, while finding that there was a procedural obligation to determine the circumstances of the death, found the obligation to be met by the trial and conviction of two of the murderers and the making of a compensation order.

[13] Basing themselves primarily on *Keenan v UK* (2001) 10 BHRC 319, *Jordan's* case (2001) 11 BHRC 1 and *Edwards' case* (2002) 12 BHRC 190, the

a parties made competing submissions on what the procedural investigative obligation under art 2 requires. For the Secretary of State, it was argued that what is required, where the obligation arises, is a full, thorough, independent and public investigation of the facts surrounding and leading to the death but not necessarily culminating in any decision on whether the state or any individual is responsible. The duty is to investigate, no more. If the investigation yields evidence of delinquency on the part of the state or its agents, then the victim must have a remedy. But that is a requirement of art 13, not of the procedural obligation under art 2. Counsel for Mrs Middleton challenged this approach. If an investigation is to ensure the accountability of state agents or bodies for deaths occurring under their responsibility (*Jordan's* case (at 30 (para 105))) and be capable of leading to a determination of whether the force used had been justified (*Jordan's* case (at 31 (para 107))) and to establish the cause of death or the person or persons responsible (*Jordan's* case at 31 (para 107))), then it must culminate in a finding which, while it need not convict any person of crime nor constitute an enforceable civil judgment against any party, must express the fact-finding body's judgment on the cardinal issues concerning the death.

[14] In choosing between these submissions assistance is gained by comparing the court's decisions in *McCann's* case and *Jordan's* case. *McCann's* case arose from the fatal shooting by soldiers of three people, believed to be terrorists, in Gibraltar. A lengthy and detailed inquest was held, also in Gibraltar, when much evidence was heard. It was clear from the outset when and where the deceased had died, and that they had been shot by the soldiers. The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the coroner directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them ((1995) 21 EHRR 97 at 127–128 (para 120)): these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. Although criticism was made of the adequacy of the inquest proceedings as an investigative mechanism, the European Court concluded (at 164 (para 163)) that the alleged shortcomings in the proceedings had not substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings. The inquest could not, of course, have culminated in an award of compensation.

[15] In *Jordan's* case (2001) 11 BHRC 1, to which reference is made in [10], above, the central issue was very much the same but a different result was reached. One of the reasons for this was that the jury were only permitted in their verdict to give the identity of the deceased and the date, place and cause of death and not, as in England, Wales and Gibraltar, to return any one of several verdicts including 'unlawful death'. A verdict in the permitted form would not, the court held, operate to trigger criminal prosecution. In a situation where the Director of Public Prosecutions of Northern Ireland had decided not to prosecute, with no reasons given, and with no effective means of requiring reasons to be given (at 34 (para 122)), the court regarded the

inquest as inadequate to investigate the possible breach of the state's substantive obligation under art 2. a

[16] It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required. b

[17] Does that requirement apply only to the very limited category of cases just defined, or does it apply to other cases as well? The decision in *Keenan's* case (2001) 10 BHRC 319 shows that it does apply to a broader category of cases, since although in that case no breach of the state's investigative obligation was alleged or found, the European Court based its conclusion that art 13 had been violated in part on its opinion (at 355 (para 121)) that the inquest, which did not permit any determination of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities nor did it (at 355–356 (para 122)) constitute an investigation capable of leading to the identification and punishment of those responsible for the deprivation of life. A statement of the inquest jury's conclusions on the main facts leading to the suicide of Mark Keenan would have precluded that comment. c
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[18] Two considerations fortify confidence in the correctness of this conclusion. First, a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next of kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (*Jordan's* case (2001) 11 BHRC 1 at 31 (para 109)), which is why they must be accorded an appropriate level of participation (see also *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] 4 All ER 1264). An uninformative jury verdict will be unlikely to meet what the House in *Amin's* case (at [31]) held to be one of the purposes of an art 2 investigation. f
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‘... that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.’ h

[19] The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systemic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex: see *Amin's* case (at [21], [41], [50] and [62]). It would not promote the objects of the convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life. j

[20] The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to

a investigate under art 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public inquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of art 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case.

b [21] Question (2). Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984, SI 1984/552 as hitherto understood and followed in England and Wales, meet the requirements of the convention?

c [22] The historical and statutory background to the 1988 Act and the 1984 rules was accurately summarised by the Court of Appeal in *R v North Humberside and Scunthorpe Coroner, ex p Jamieson* [1994] 3 All ER 972, [1995] QB 1. There has been little significant legislative change in England and Wales since then, and that account need not be repeated. It is enough to identify the main features of the regime so far as relevant to this appeal.

d [23] By s 8(1) of the 1988 Act an inquest must be held where there is reasonable cause to suspect that a deceased person—

‘(a) has died a violent or an unnatural death; (b) has died a sudden death of which the cause is unknown; or (c) has died in prison or in such a place or in such circumstances as to require an inquest under any other Act ...’

e If there is reason to suspect that the death occurred in prison or in police custody or resulted from an injury caused by a police officer in the purported execution of his duty, the inquest must be held with a jury (s 8(3)), and the independence of jurors dealing with prison deaths is specifically protected (s 8(6)). The requirement to summon a jury in such cases recognises the substantive and procedural obligations of the state which are now derived from art 2 as well as from domestic law. If a coroner fails to hold an inquest when he should, he may be ordered to do so, and if a coroner misconducts an inquest, another inquest may be ordered (s 13).

g [24] The task of the jury is to ‘inquire as jurors into the death of the deceased’ (s 8(2)(a)) and they are sworn ‘diligently to inquire into the death of the deceased and to give a true verdict according to the evidence’ (s 8(2)(b)). The coroner is to ‘examine on oath concerning the death all persons who tender evidence as to the facts of the death and all persons having knowledge of those facts whom he considers it expedient to examine’ (s 11(2)). Thus the character of the proceedings is quite different from that of an ordinary trial, civil or criminal. The jury, where there is one, must hear the evidence and give their verdict (s 11(3)(a)). Section 11(5) requires that the inquisition, to be signed by the jury or a majority of them, must set out in writing, so far as such particulars have been proved, and in such form as the Lord Chancellor may by rule prescribe, ‘(i) who the deceased was; and (ii) how, when and where the deceased came by his death’.

j [25] The 1988 Act recognises that a death which is the subject of an inquest may also be the subject of criminal proceedings, and also recognises the general undesirability of investigating publicly at an inquest evidence pertinent to a forthcoming criminal trial. In a departure from previous practice, s 11(6) of the Act provides:

'At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition shall in no case charge a person with any of those offences.'

Thus the inquest jury may no longer perform its former role as a grand jury. Section 16 of the Act (and rr 27 and 28 of the 1984 rules) make provision for the adjourning of an inquest when criminal proceedings are or may be pending on certain specified charges or in certain specified circumstances (but not solely because any criminal proceedings arising out of the death of the deceased have been instituted: see r 32 of the rules). After the conclusion of criminal proceedings the coroner may resume the adjourned inquest 'if in his opinion there is sufficient cause to do so' (s 16(3)). Section 17A makes provision for the adjourning of an inquest when a public inquiry into a death is to be conducted or chaired by a judge. A coroner may only resume an inquest so adjourned 'if in his opinion there is exceptional reason for doing so', and then subject to conditions (s 17A(4)).

[26] The 1984 rules have effect as if made under s 32 of the 1988 Act, which gives the Lord Chancellor, with the concurrence of the Secretary of State, a wide power to make rules for regulating the practice and procedure at inquests and to prescribe forms for use in connection with inquests. The 1984 rules prescribe a hybrid procedure, not purely inquisitorial or purely adversarial. On the one hand, notice of the inquest must be given to the next of kin of the deceased and a widely defined group of other interested parties (r 19), who are entitled to examine witnesses either in person or by an authorised advocate (r 20); witnesses are privileged against self-incrimination; notice must be given to, and attendance facilitated of, persons whose conduct is likely to be called into question (rr 24 and 25). On the other hand, the coroner calls and first examines all witnesses, the representative of a witness questioning him last (r 21); no person is allowed to address the coroner or the jury as to the facts (r 40); and there is no particularised charge or complaint as in criminal or civil proceedings. In addition to examining the witnesses the coroner (r 41) sums up the evidence to the jury and directs them as to the law, drawing their attention to rr 36(2) and 42. Rule 43 provides:

'A coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly.'

Attention should be drawn to two important rules. The first of these, r 36, provides:

'(1) The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely—(a) who the deceased was; (b) how, when and where the deceased came by his death; (c) the particulars for the time being required by the Registration Acts to be registered concerning the death.'

(2) Neither the coroner nor the jury shall express any opinion on any other matters.'

a The second, r 42, provides:

‘No verdict shall be framed in such a way as to appear to determine any question of—(a) criminal liability on the part of a named person, or (b) civil liability.’

b [27] Rule 60 provides that the forms set out in Sch 4 may be used for the purposes for which they are expressed to be applicable, with such modifications as circumstances may require. Schedule 4 includes, as Form 22, a model form of inquisition. This suggests that, when recording the conclusion of the jury as to the death, one or other of certain forms should be adopted. The form provides that a finding that ‘the cause of death was aggravated by lack of care/self-neglect’ should be added only where the finding is of a death caused c by natural causes, industrial disease, dependence on or abuse of drugs, or want of attention at birth. In the case of murder, manslaughter or infanticide the suggested form of conclusion is that the deceased was ‘killed unlawfully’.

d [28] Remarkably, as it now seems, the Court of Appeal made no reference to the convention in *Ex p Jamieson*, and the report does not suggest that counsel referred to it either. Counsel for Mrs Middleton criticised the reasoning of that decision, but it appears to the committee to have been an orthodox analysis of the Act and the rules and an accurate, if uncritical, compilation of judicial authority as it then stood. Thus emphasis was laid on the function of an inquest as a fact-finding inquiry ([1994] 3 All ER 972 at 989, [1995] QB 1 at 23, e conclusion (1)). Following *R v Walthamstow Coroner, ex p Rubenstein* [1982] Crim LR 509, *R v HM Coroner for Birmingham, ex p Secretary of State for the Home Dept* (1990) 155 JP 107 and *R v HM Coroner for Western District of East Sussex, ex p Homberg* (1994) 19 BMLR 11, the Court of Appeal interpreted ‘how’ in s 11(5)(b)(ii) of the Act and r 36(1)(b) of the rules narrowly as meaning ‘by what f means’ and not ‘in what broad circumstances’ ([1994] 3 All ER 972 at 989, [1995] QB 1 at 24, conclusion (2)). It was not the function of a coroner or an inquest jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame ([1994] 3 All ER 972 at 989–990, [1995] QB 1 at 24, conclusion (3)). Attention was drawn to the potential g unfairness if questions of criminal or civil liability were to be determined in proceedings lacking important procedural protections ([1994] 3 All ER 972 at 990, [1995] QB 1 at 24, conclusion (4)). A verdict could properly incorporate a brief, neutral, factual statement, but should express no judgment or opinion, and it was not for the jury to prepare detailed factual statements ([1994] 3 All ER 972 at 990, [1995] QB 1 at 24, conclusion (6)). It was acceptable for a h jury to find, on appropriate facts, that self-neglect aggravated or contributed to the primary cause of death, but use of the expression ‘lack of care’ was discouraged and a traditional definition of ‘neglect’ was adopted ([1994] 3 All ER 972 at 990–991, [1995] QB 1 at 24–25, conclusions (7), (8) and (9)). Where it was found that the deceased had taken his own life, that was the appropriate verdict, and only in the most extreme circumstances (going well j beyond ordinary negligence) could neglect be properly found to have contributed to that cause of death ([1994] 3 All ER 972 at 991, [1995] QB 1 at 25–26, conclusion (11)). Reference to neglect or self-neglect should not be made in a verdict unless there was a clear and direct causal connection between the conduct so described and the cause of death ([1994] 3 All ER 972 at 991, [1995] QB 1 at 26, conclusion (12)). It was for the coroner alone to make reports

with a view to preventing the recurrence of a fatality ([1994] 3 All ER 972 at 991, [1995] QB 1 at 26, conclusion (13)). Emphasis was laid on the duty of the coroner to conduct a full, fair and fearless investigation, and on his authority as a judicial officer ([1994] 3 All ER 972 at 991, [1995] QB 1 at 26, conclusion (14)). a

[29] How far, then, does the current regime for conducting inquests in England and Wales match up to the investigative obligation imposed by art 2? b

[30] In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards v UK* (2002) 12 BHRC 190), or the issue at trial is the mental state of the defendant (as in *Amin's* case), because in such cases the wider issues will probably not be explored. c

[31] In some other cases, short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest. *McCann v UK* (1995) 21 EHRR 97 has already been given as an example: see [14], above. The same would be true if the central issue at the inquest were whether the deceased had taken his own life or been killed by another: by choosing between verdicts of suicide and unlawful killing, the jury would make clear its factual conclusion. But it is plain that in other cases a strict *Ex p Jamieson* approach will not meet what has been identified above as the convention requirement. In *Keenan v UK* (2001) 10 BHRC 319 the inquest verdict of death by misadventure and the certification of asphyxiation by hanging as the cause of death did not express the jury's conclusion on the events leading up to the death. Similarly, verdicts of unlawful killing in *Edwards'* case and *Amin's* case, although plainly justified, would not have enabled the jury to express any conclusion on what would undoubtedly have been the major issue at any inquest, the procedures which led in each case to the deceased and his killer sharing a cell. d

[32] The conclusion is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the convention. This is a conclusion rightly reached by the judge in this case (see [44], below) and by the Court of Appeal both in the present case (see [44], below) and in cases such as *R (on the application of Davies) v HM Deputy Coroner for Birmingham* [2003] EWCA Civ 1739 at [71], 147 Sol Jo 1426 at [71]. e

[33] Question (3). Can the current regime governing the conduct of inquests in England and Wales be revised so as to meet the requirements of the convention, and if so, how? f

[34] Counsel for the Secretary of State rightly suggested that the House should propose no greater revision of the existing regime than is necessary to secure compliance with the convention, even if it were (contrary to his main submission) to reach the conclusion just expressed. The warning is salutary. There has recently been published *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003* (June 2003) (Cm 5831). Decisions have yet to be made on whether, and how, to give effect to the recommendations. Those decisions, when made, will doubtless take account of policy, administrative and financial considerations which are not the concern of the House sitting judicially. It is correct that the scheme enacted by and under the authority of Parliament should be respected g

a save to the extent that a change of interpretation (authorised by s 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the convention.

b [35] Only one change is in our opinion needed: to interpret 'how' in s 11(5)(b)(ii) of the 1988 Act and r 36(1)(b) of the 1984 rules in the broader sense previously rejected, namely as meaning not simply 'by what means' but 'by what means and in what circumstances'.

c [36] This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others (see [30]–[31], above). In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in Form 22 of Sch 4 to the 1984 rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites d either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under s 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the e death. It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.

f [37] The prohibition in r 36(2) of the expression of opinion on matters not comprised within sub-r (1) must continue to be respected. But it must be read with reference to the broader interpretation of 'how' in s 11(5)(b)(ii) and r 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, r 42 should not be g infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular 'neglect' or 'carelessness' and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of h art. A verdict such as that suggested in [45], below ('The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so') embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any issue of criminal or civil liability. It does not therefore infringe either rr 36(2) or 42.

j [38] The power of juries to attach riders of censure or blame was abolished on the recommendation of the *Report of the Departmental Committee on Coroners* under the chairmanship of Lord Wright (1936) (Cmd 5070). It has not been reintroduced. Juries do not enjoy the power conferred on Scottish sheriffs by the 1976 Act to determine the reasonable precautions, if any, whereby the death might have been avoided (see s 6(1)(c)). Under the 1984 rules, the power

is reserved to the coroner to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. Compliance with the convention does not require that this power be exercisable by the jury, although a coroner's exercise of it may well be influenced by the factual conclusions of the jury. In England and Wales, as in Scotland, the making of recommendations is entrusted to an experienced professional, not a jury. In the ordinary way, the procedural obligation under art 2 will be most effectively discharged if the coroner announces publicly not only his intention to report any matter but also the substance of the report, neutrally expressed, which he intends to make.

THE PRESENT CASE

[39] Colin Campbell Middleton took his own life by hanging himself in his cell at HM Prison Horfield on 14 January 1999. He had been in custody since, aged 14, he was convicted in April 1982 of murdering his 18-month-old niece.

[40] His career in prison was uneven, periods of progress being interrupted by setbacks, some of his own making, some attributable to the hostility of fellow prisoners. After trial periods in open prisons in 1993, 1994 and 1996 he was transferred to Horfield where, in November 1998 he harmed himself seriously. A self-harm at risk form (F2052SH) was then opened, but closed a few days later. There was evidence that he was depressed, and he was receiving medication at the time of his death. On 11 January 1999 he wrote to the wing governor, unhappy about his status and referring to his mental illness. He spoke of suicide to another prisoner who may, or may not, have passed on this information to the authorities. Although he was aged only 30, he had spent more than half his life in custody.

[41] The verdict reached at a first inquest was quashed for want of sufficient inquiry, and a second inquest was held over three days in October 2000, when oral evidence was received from 11 witnesses and written evidence from a further seven. It is accepted by Mrs Middleton and the family of the deceased that at this inquest the issues surrounding the death were thoroughly, effectively and sensitively explored.

[42] At the end of the evidence the coroner ruled that the issue of 'neglect' should not be left to the jury. But he told the jury that if they wished to do so they could give him a note regarding any specific areas of the evidence about which they were concerned, and he would consider the note, which would not be published, when considering exercise of his power under r 43.

[43] The jury found the cause of death to be hanging and returned a verdict that the deceased had taken his own life when the balance of his mind was disturbed. The jury also gave the coroner a note which communicated the jury's opinion that the Prison Service had failed in its duty of care for the deceased. The family asked that the note should be appended to the inquisition, but the coroner declined to do so. The contents of the note remained private until, in the course of these proceedings, two points made by the jury were revealed. As the judge put it ([2001] EWHC Admin 1043 at [7], [2002] Lloyd's Rep Med 107 at [7]) the jury—

'(a) expressed concern that a form F2052SH had been closed by two officers who had no prior knowledge of Mr Middleton; and (b) expressed their belief that a letter of 11 January 1999 written by him "contained sufficient indication to warrant an F2052SH being opened".'

a In exercise of his power under r 43, the coroner wrote a full letter to the Chief Inspector of Prisons, drawing attention to the jury's point (a) and to the jury's noting of 'a failure in the prison's responsibilities towards Middleton and a total lack of communication between all grades of prison staff'. The coroner pointed out that on the day before his death the deceased had not left his cell, even for meals, and had placed a rug all day over the inspection port window into the cell.

b [44] In her judicial review application Mrs Middleton did not question the adequacy of the coroner's investigation nor seek an order that there be a further inquest. She sought an order that the jury's findings as set out in their note be publicly recorded, and that there should thus be a formal public determination of the responsibility of the Prison Service for the death of the deceased. The issue was thus raised whether the current regime for holding inquests in England and Wales meets the requirements of art 2 of the convention. In his reserved judgment given on 14 December 2001 ([2002] Lloyd's Rep Med 107 at [54]), Stanley Burnton J said:

d 'However, where there has been neglect on the part of the State, and that neglect was a substantial contributory cause of the death, my view is that a formal and public finding of neglect on the part of the State is in general necessary in order to satisfy those requirements [of art 2].'

He therefore concluded (at [56]) that an inquest would not necessarily satisfy the procedural requirements of art 2 in a case such as the present. But the judge declined to order that the jury's note be incorporated in the inquisition, for a series of reasons but most importantly because he considered that the coroner had acted unlawfully in suggesting production of the note. The judge recorded (at [60]) that in the view of the jury and the coroner there had been significant deficiencies in the Prison Service's care of the deceased. He considered that no declaration was needed but, at the request of the Secretary of State, declared that—

f 'by reason of the restrictions on the verdict at the inquest into the death of [the deceased] ... that inquest was inadequate to meet [the] procedural obligation in Article 2 of the European Convention ...'

g The Secretary of State appealed to the Court of Appeal which delivered its reserved judgment on 27 March 2002: [2002] EWCA Civ 390, [2002] 4 All ER 336, [2003] QB 581. It was found to be necessary, to comply with art 2, that a verdict of neglect be available, but the Court of Appeal distinguished between individual and systemic neglect:

h '[87] A verdict of neglect can perform different functions. In particular, in the present context, it can identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by inmates. Alternatively it may do no more than identify a failure of an individual prison officer to perform his duties properly. We offer two illustrations, which demonstrate the distinction we have in mind. On the one hand, the system adopted by a prison may be unsatisfactory in that it allows a prisoner who is a known suicide risk to occupy a cell by himself or does not require that prisoner to be kept under observation. On the other hand, the system may be perfectly satisfactory but the prison officer responsible for keeping observation may fall asleep on duty.'

[88] For the purpose of vindicating the right protected by art 2 it is more important to identify defects in the system than individual acts of negligence. The identification of defects in the system can result in it being changed so that suicides in the future are avoided. A finding of individual negligence is unlikely to lead to that result. If the facts have been investigated at the inquest the evidence given for this purpose should usually enable the relatives to initiate civil proceedings against those responsible without the verdict identifying individuals by name. The shortcomings of civil proceedings in meeting the requirements of art 2 do not in general prevent actions in the domestic courts for damages from providing an effective remedy in cases of alleged unlawful conduct or negligence by public authorities. a

[89] In contrast with the position where there is individual negligence, not to allow a jury to return a verdict of neglect in relation to a defect in the system could detract substantially from the salutary effect of the verdict. A finding of neglect can bring home to the relevant authority the need for action to be taken to change the system, and thus contribute to the avoidance of suicides in the future. The inability to bring in a verdict of neglect (without identifying any individual as being involved) in our judgment significantly detracts, in some cases, from the capacity of the investigation to meet the obligations arising under art 2. b

Later, the court continued:

[91] ... In a situation where a coroner knows that it is the inquest which is in practice the way the state is fulfilling the adjectival obligation under art 2, it is for the coroner to construe the rules in the manner required by s 6(2)(b) [of the Human Rights Act 1998]. Rule 42 can and should, contrary to *R v North Humberside and Scunthorpe Coroner, ex p Jamieson* [1994] 3 All ER 972, [1995] QB 1, when necessary be construed (in relation to both criminal and civil proceedings) only as preventing an individual being named, with the result that a finding of system neglect of the type we have indicated will not contravene that rule. If the coroner is acting in accordance with the rule for this purpose he will not be offending in this respect s 6(1). c

[92] For a coroner to take into account today the effect of the 1998 Act on the interpretation of the rules is not to overrule *Ex p Jamieson* by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate art 2 to give in effect a verdict of neglect, it is permissible to do so. The requirements are in fact specific to the particular inquest being conducted and will only apply where in the judgment of the coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest. Subject to the coroner, in the appropriate cases, directing the jury when they can return what would in effect be a rider identifying the nature of the neglect they have found, the rules will continue to apply as at present. The proceedings should not be allowed to become adversarial. We appreciate there is no provision for such a rider in the model inquisition but this technicality should not be allowed to interfere with the need to comply with s 6 of the 1998 Act. d

The Court of Appeal set aside the judge's declaration and instead declared:

a 'In a case where (a) a coroner knows that it is the inquest which is in practice the way the state is to fulfil the adjectival obligation under art 2 of the convention, and (b) a finding of neglect by the jury at the inquest could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into, r 42 of the 1984 rules can and should be construed as allowing such a finding, providing no individual is named therein.'

b [45] It follows from the reasoning earlier in this opinion that the judge's declaration was correctly made, although not for all the reasons he gave. There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether
c appropriate precautions should have been taken to prevent him taking his own life. The jury's verdict, although strictly in accordance with the guidance in *Ex p Jamieson*, did not express the jury's conclusion on these crucial facts. This might have been done by a short and simple verdict (eg 'The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so'). Or it could have been
d done by a narrative verdict or a verdict given in answer to the coroner's questions. By one means or another the jury should, to meet the procedural obligation in art 2, have been permitted to express their conclusion on the central facts explored before them.

e [46] Had this been done (and the coroner cannot of course be criticised for applying the law as it stood) it would not have been necessary to invite the jury to submit a note. Their assessment of the facts and probabilities would have been clear, and the coroner (having also heard the evidence) could have judged what report he should make under r 43. As it was, he was not constrained by the jury's note in what he reported. But the judge was right to view private communications between the jury and the coroner with disfavour, since such
f a practice must derogate from the public nature of the proceedings.

g [47] The declaration made by the Court of Appeal found no fault in argument before the House. In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under art 2. There is force in the criticism made by all parties of the distinction drawn
h between individual and systemic neglect, since the borderline between the two is indistinct and there will often be some overlap between the two: there are some kinds of individual failing which a sound system may be expected to detect and remedy before harm is done. There will, moreover, be individual failings which need to be identified even though an individual is not to be named. 'Self-neglect' and 'neglect' are terms of art in the law of inquests, and there is no reason to alter their meaning. The recommending of precautions to prevent repetition is for the coroner, not the jury.

j [48] There has been in this case a full and satisfactory investigation. Mrs Middleton does not seek another inquest. The conclusions of the jury, which Mrs Middleton sought to publicise, have been published to the world. No purpose is served by a declaration.

[49] The arguments of the Secretary of State and Mrs Middleton on the acceptability of the inquest regime to discharge the state's procedural investigative obligation under art 2 have, in each case, succeeded in part and failed in part. But the Secretary of State has succeeded in persuading the House

that the Court of Appeal's declaration should be set aside. To that extent his appeal succeeds. We make no order for the payment of costs by any party. a

[50] In this appeal no question was raised on the retrospective application of the 1998 Act and the convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in *Re McKerr* [2004] UKHL 12, [2004] 2 All ER 409, [2004] 1 WLR 807.

Appeal allowed in part.

Kate O'Hanlon Barrister.

a R (on the application of Sacker) v West Yorkshire Coroner

[2004] UKHL 11

b HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD HOPE OF CRAIGHEAD, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND AND LORD CARSWELL

2–4 FEBRUARY, 11 MARCH 2004

c *Coroner – Inquest – Right to life – Whether regime for holding inquests in England and Wales providing effective public investigation – Coroners Act 1988, s 11(5)(b)(ii) – Human Rights Act 1998, Sch 1, Pt I, art 2 – Coroners Rules 1984, r 36.*

The claimant's daughter died whilst being held on remand in prison. An inquest was conducted into her death by the defendant coroner. The inquisition recorded the conclusion of the jury that the deceased had killed herself. The claimant had submitted that the jury should be given an opportunity to add the words 'contributed to by neglect' to their verdict, but the coroner had declined to give them that opportunity. In so doing he applied the narrow meaning of 'by what means' to the word 'how' in s 11(5)(b)(ii) of the Coroners Act 1988 which required that a coroner's inquisition, signed by the jury, should set out 'how, when and where the deceased came by his death' and in r 36(1)^a of the Coroners Rules 1984 which provided that the proceedings and evidence at an inquest were to be directed solely to ascertaining certain matters, including 'how, when and where the deceased came by his death'. The claimant's application for permission to apply for judicial review was refused, but the Court of Appeal allowed her appeal, quashed the inquisition, and ordered a fresh inquest. The coroner appealed. The issues before the House of Lords related to the conduct of inquests and the verdicts that might result from them in view of the requirements of a properly conducted official investigation into a death required by art 2^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), which provided for the right to life.

Held – The scheme for the conduct of inquests under the 1988 Act and the 1984 rules was to be respected, save to the extent that a change of interpretation was required to honour the obligations of the United Kingdom under art 2 of the convention. The word 'how' in s 11(5)(b)(ii) of the 1988 Act and r 36(1)(b) of the 1984 rules should be interpreted as meaning 'by what means and in what circumstances', with the result that a coroner would now be able to exercise his discretion to decide how best, in the particular case, to elicit the jury's conclusion on the central factual issues. In the instant case, the coroner had not had an opportunity of inviting the jury to consider the disputed factual issues, which had deprived the inquest of its ability, when subjecting the events surrounding the

a Rule 36, so far as material, provides: '(1) The proceedings and evidence at an inquest shall be directed solely to ascertaining ... (b) how, when and where the deceased came by his death ...'
b Article 2, so far as material, provides: 'Everyone's right to life shall be protected by law ...'

deceased's death to public scrutiny, to address the positive obligation that art 2 placed on the state to take effective operational measures to safeguard life. The inquest had not been able to identify the cause or causes of the deceased's suicide, the steps (if any) that could have been taken and had not been taken to prevent it and the precautions (if any) that should be taken to avoid or reduce the risk to other prisoners. The most convenient and appropriate way to make good that deficiency was to order a new inquest. The appeal would therefore be dismissed (see [27]–[30], below).

R (on the application of Middleton) v West Somerset Coroner [2004] 2 All ER 465 applied.

Decision of the Court of Appeal [2003] 2 All ER 278 affirmed.

Notes

For the right to life, and for the purpose and scope of inquests, see, respectively, 8(2) *Halsbury's Laws* (4th edn reissue) para 123 and 9(2) *Halsbury's Laws* (4th edn reissue) paras 887, 923.

For the Coroners Act 1988, s 11, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 667.

For the Coroners Rules 1984, SI 1984/552, r 36, see 5 *Halsbury's Statutory Instruments* (2002 issue) 465–457.

Cases referred to in the report

Osman v UK (1998) 5 BHRC 293, ECt HR.

R (on the application of Amin) v Secretary of State for the Home Dept [2003] UKHL 51, [2003] 4 All ER 1264, [2003] 3 WLR 1169.

R (on the application of Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 All ER 465, [2004] 2 WLR 800.

R v North Humberside and Scunthorpe Coroner, ex p Jamieson [1994] 3 All ER 972, [1995] QB 1, [1994] 3 WLR 82, CA.

Cases referred to in list of authorities

Andronicou v Cyprus (1998) 25 EHRR 491, [1997] ECHR 25052/94, ECt HR.

Calvelli v Italy [2002] ECHR 32 967/96, ECt HR.

Dallison v Caffery [1964] 2 All ER 610, [1965] 1 QB 348, [1964] 3 WLR 385, CA.

Devine v A-G for Northern Ireland, Breslin v A-G for Northern Ireland [1992] 1 All ER 609, [1992] 1 WLR 262, HL.

Deweert v Belgium (1980) 2 EHRR 439, [1980] ECHR 6903/75, ECt HR.

Doody v Secretary of State for the Home Dept [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

Duguid, Re (8 July 2003, unreported), Sh Ct.

Edwards v UK (2002) 12 BHRC 190, ECt HR.

Erikson v Italy (1999) 29 EHRR CD 152, E Com HR.

Farrell v Secretary of State for Defence [1980] 1 All ER 166, [1980] 1 WLR 172, HL.

Fayed v UK (1994) 18 EHRR 393, [1994] ECHR 17101/90, ECt HR.

General Cleaning Contractors Ltd v Christmas [1952] 2 All ER 1110, [1953] AC 180, [1953] 2 WLR 6, HL.

Jordan v UK (2001) 11 BHRC 1, ECt HR.

Jordan's Application for Judicial Review, Re (29 January 2002, unreported), NI HC.

Jordan's Application for Judicial Review, Re (8 March 2002, unreported), NI HC.

Keenan v UK (2001) 10 BHRC 319, ECt HR.

- Kelly (decd)*, *Re* (1997) 161 JP 417, DC.
- a** *Lazzarini v Italy* App No 53749/00 (7 November 2002, unreported), ECt HR.
LCB v UK (1998) 4 BHRC 447, ECt HR.
Lister v National Coal Board [1969] 3 All ER 1077, [1970] 1 QB 228, [1969] 3 WLR 439, CA.
Lothian Regional Council, Re 1993 SLT 1132n, Ct of Sess.
- b** *Masson v Netherlands* (1996) 22 EHRR 491, [1995] ECHR 15346/89, ECt HR.
Mastromatteo v Italy App No 37703/97 (24 October 2002, unreported), ECt HR.
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
McCann v UK (1996) 21 EHRR 97, [1995] ECHR 18984/91, ECt HR.
- c** *Menson v UK* [2003] ECHR 47916/99, ECt HR.
Öneryildiz v Turkey App No 41939/99 (18 June 2002, unreported), ECt HR.
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
Powell v UK App No 45305/99 (4 May 2000, unreported), ECt HR.
R (A) v Lord Saville of Newdigate [2001] EWCA Civ 2048, [2002] 1 WLR 1249.
- d** *R v A* [2001] UKHL 25, [2001] 3 All ER 1, [2002] 1 AC 45, [2001] 2 WLR 1546.
R v DPP, ex p Manning [2001] QB 330, [2000] 3 WLR 463, DC.
R v East Berkshire Coroner, ex p Buckley (1992) 157 JP 425, DC.
R v Hammersmith Coroner, ex p Peach [1980] 2 All ER 7, [1980] QB 211, [1980] 2 WLR 496, CA.
- e** *R v Harding* [1908] 25 TLR 139.
R v HM Coroner for Birmingham and Solihull, ex p Cotton (1995) 160 JP 123, DC.
R v HM Coroner for Birmingham, ex p Secretary of State for the Home Dept (1990) 155 JP 107, DC.
R v HM Coroner for Coventry, ex p Chief Constable of Staffordshire Police (2000) 164 JP 665.
- f** *R v HM Coroner for Coventry, ex p O'Reilly* (1997) 35 BMLR 48, DC.
R v HM Coroner for Inner South London, ex p Epsom Health Care NHS Trust (1994) 158 JP 973, DC.
R v Surrey Coroner, ex p Wright [1997] 1 All ER 823, [1997] QB 786, [1997] 2 WLR 16; *affd* (1996) 35 BMLR 57, CA.
- g** *R v HM Coroner for Swansea and Gower, ex p Chief Constable of Wales* (1999) 164 JP 191.
R v HM Coroner for Wiltshire, ex p Clegg (1997) 161 JP 521, DC.
R v South London Coroner, ex p Thompson (1982) 126 Sol Jo 625, DC.
R v HM Coroner for Western District of East Sussex, ex p Homberg (1994) 19 BMLR 11, DC.
- h** *R v Inner South London Coroner, ex p Douglas-Williams* [1999] 1 All ER 344, CA.
R v Inner South London Coroner, ex p Kendall [1989] 1 All ER 72, [1988] 1 WLR 1186, DC.
R v Lord Saville of Newdigate, ex p A [1999] 4 All ER 860, [2000] 1 WLR 1855, CA.
- j** *R v Portsmouth Coroner, ex p Anderson* [1988] 2 All ER 604, [1987] 1 WLR 1640, DC.
R v Southwark Coroner, ex p Hicks [1987] 2 All ER 140, [1987] 1 WLR 1624, DC.
R v Surrey Coroner, ex p Campbell [1982] 2 All ER 545, [1982] QB 661, [1982] 2 WLR 626, DC.
R v West London Coroner, ex p Gray [1987] 2 All ER 129, [1988] QB 467, [1987] 2 WLR 1020, DC.

- R (on the application of Davies) v HM Deputy Coroner for Birmingham* [2003] EWCA Civ 1739, (2003) 147 Sol Jo 1426. a
- R (on the application of Dawson) v HM Coroner for East Riding and Kingston upon Hull* [2001] EWHC Admin 352, [2001] ACD 365.
- R (on the application of Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2003] 3 All ER 827, [2003] 3 WLR 252.
- R (on the application of Bentley) v HM Coroner District of Avon* [2001] EWHC Admin 170, (2001) 74 BMLR 1. b
- R (on the application of Hurst) v HM Coroner for Northern District of London* [2003] EWHC 1721 (QB), [2003] ACD 361, DC.
- R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129, [2003] 4 All ER 1239.
- R (on the application of Lambourne) v Deputy Coroner for Avon, Lambourne v Coroner for the District of Avon* [2001] EWHC Admin 1877, [2002] All ER (D) 443 (Jul), DC. c
- R (on the application of Metropolitan Police Comr) v Southern District of Greater London Coroner* [2003] EWHC 1829 (Admin), [2003] ACD 87.
- R (on the application of N (a child)) v Coroner for Liverpool City* [2001] EWHC Admin 922, [2002] ACD 13, DC. d
- R (on the application of S) v Inner West London Coroner* [2001] EWHC Admin 105, (2001) 61 BMLR 222.
- R (on the application of Stanley) v Inner North London Coroner* [2003] EWHC 1180 (Admin), [2003] All ER (D) 351 (Apr). e
- R (on the application of Touche) v Inner London North Coroner* [2001] EWCA Civ 383, [2001] 2 All ER 752, [2001] QB 1206, [2001] 3 WLR 148.
- R (on the application of Wright) v Secretary of State for the Home Dept* [2001] EWHC Admin 520, (2001) 62 BMLR 16.
- Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360, [1999] 3 WLR 363, HL. f
- Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, [1971] ECHR 2614/65, ECt HR.
- S (children: care plan), Re, Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
- Salman v Turkey* (2002) 34 EHRR 17, [2000] ECHR 21986/93, ECt HR.
- Sieminska v Poland* App No 37602/97 (29 March 2001, unreported), ECt HR. g
- Slimani v France* App No 57671/00 (8 April 2003, unreported), ECt HR.
- Taylor v UK* (1994) 79 DR 127, E Com HR.
- Timurtas v Turkey* (2001) 33 EHRR 121, [2000] ECHR 23531/94, ECt HR.
- Weir, Re* (23 January 2003, unreported), Sh Ct. h

Appeal

HM Coroner for the County of West Yorkshire appealed with permission of the Court of Appeal (Pill, Mummery and Latham LJ) from the court's decision on 27 February 2003 ([2003] EWCA Civ 217, [2003] 2 All ER 278) (i) allowing the appeal of the claimant, Helen Sacker, from the order of Sir Richard Tucker on 4 July 2002 ([2002] EWHC 1520 (Admin)) refusing her permission to apply for judicial review of a decision of the appellant in the inquest on 9–12 October 2001 held into the death of the claimant's daughter, Sheena Dawn Lisa Nicola Marie Creamer, and (ii) quashing the inquest of 9–12 October 2001 and directing a fresh inquest. The facts are set out in the report of the Appellate Committee. j

a Ian Burnett QC and James Findlay (instructed by Walker Morris, Leeds) for the appellant.
 Richard Gordon QC and Stephen Cragg (instructed by Howells, Sheffield) for the respondent.

b Their Lordships took time for consideration.

11 March 2004. The following report was delivered.

LORD HOPE OF CRAIGHEAD.

c [1] This is the considered opinion of the Committee.
 [2] The respondent Helen Sacker is the mother of Sheena Creamer, who died on 7 August 2000 while she was being held on remand at HM Prison New Hall, West Yorkshire. An inquest was conducted into her death by the appellant, HM Coroner for West Yorkshire (Eastern District), from 9 to 12 October 2001. The inquisition which was read by the appellant at the end of
 d the inquest recorded the conclusion of the jury, by a majority of nine to two, which was that Ms Creamer had killed herself. Counsel for the respondent had submitted that the jury should be given an opportunity to add the words 'contributed to by neglect' to their verdict. The appellant declined to do this, so the jury were not given that opportunity. On 4 July 2002 Sir Richard Tucker refused the respondent permission to apply for judicial review of the appellant's
 e decision ([2002] EWHC 1520 (Admin)). On 27 February 2003 the Court of Appeal (Pill, Mummery and Latham LJ) ([2003] EWCA Civ 217, [2003] 2 All ER 278) allowed the respondent's appeal against the decision of the judge, quashed the inquisition and ordered a fresh inquest.

[3] The question which is before your Lordships in this appeal is whether
 f the appellant should have directed the jury that they could add a rider to their verdict to indicate that systemic neglect had contributed to Ms Creamer's death. But the case raises a number of other issues of general public importance about the conduct of inquests and the verdicts that may result from them. This is because art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953);
 g Cmd 8969) which provides that '[e]veryone's right to life shall be protected by law', has now been incorporated into domestic law by the Human Rights Act 1998. These issues are of particular concern in cases such as this, where the death was caused by suicide while the deceased was in custody. In view of its importance the appeal was heard together with *R (on the application of*
 h *Middleton) v West Somerset Coroner* [2004] UKHL 10, [2004] 2 All ER 465, [2004] 2 WLR 800. The opinion which has been delivered in that case provides the background to the way in which the question in this case must be decided.

SUICIDE IN PRISONS

j [4] It is important, in order to set this case into its proper context, to appreciate the nature and scale of the problem of self-harming behaviour by prisoners who are held in prison establishments, especially those holding women. The Joint Committee on Human Rights which was appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom is at present engaged on an inquiry into

deaths in custody: see *Deaths in Custody: Interim Report* (26 January 2004) (HL Paper 12, HC 134). In response to its call for evidence the Committee received a memorandum from HM Prison Service for England and Wales dated 18 August 2003: Ev 26–32. In this memorandum the Director General of the Prison Service, Phil Wheatley, acknowledges that any death in custody is a terrible tragedy that brings its duty of care to people in custody into sharp focus. Reducing suicides and self-harm in prisons is said by him to be a key objective. He points out that a great deal of work has been and continues to be done in this area, but that there are, regrettably, no simple solutions and that the reasons for self-inflicted deaths are complex. a
b

[5] For many years the standard method of reducing the risk of prison suicides was to observe prisoners who were thought to be at risk at fixed intervals. The Tumin review on suicide, *Report of a Review by Her Majesty's Chief Inspector of Prisons for England and Wales of Suicide and Self-harm in Prison Service Establishments in England and Wales* (December 1990) (Cm 1383), drew attention to the dangers which were inherent in this practice and recommended that the period between observations should be designed to meet the perceived needs of the individual prisoners concerned. In December 1997 Ms Joyce Quin, the Minister for Prisons, asked the then Chief Inspector of Prisons, Sir David Ramsbotham, to carry out a thematic review of suicide and self-harm in prison service establishments in England and Wales to follow up that undertaken by Sir Stephen Tumin. This was in response to concern expressed by the Director General of the Prison Service about the increasing number of deaths in custody and as to whether everything possible was being done to prevent them. The Ramsbotham report, *Suicide is Everyone's Concern: A Thematic Review by HM Chief Inspector of Prisons for England and Wales* (May 1999) noted that, in contrast with the falling rate of suicide in the community, the rate in prison had increased dramatically. It had more than doubled between 1982 and 1998, and a marked increase had taken place among prisoners who were unsentenced. c
d
e
f

[6] In a section entitled 'Understanding Suicide' the Ramsbotham report noted the complexity of the characteristics that lead to the suicide state and the need to understand it at several levels. It was possible to identify a number of broad types of prisoners who were at risk of suicide. One of these was prisoners aged between 16 and 25 with a history of previous self-injury, whose distress was acute and who were particularly vulnerable to the impact of imprisonment. It was noted (para 2.11) that the role of staff must be to understand the complexity of this experience, to alleviate the pain of isolation and to help the individual to take steps that will bring about an end to their pain through means other than killing themselves. g

[7] In a section entitled 'The Effectiveness of Current Practice' the Ramsbotham report set out the main features of the suicide prevention strategy that had been adopted by the Prison Service in 1994 in the light of independent research which it had commissioned into the behaviour and characteristics of male prisoners who attempt suicide or harm themselves. These included greater responsibility for all prison staff in caring for the suicidal, a move away from reliance on health care staff and the introduction of a new form for managing those considered as being at risk (form F2052SH). It was found that there was an evident inconsistency in the effectiveness of different suicide awareness teams that had been set up and that, although suicide prevention policies were in place across the Prison Service, there was little differentiation h
j

a within them between different types of prisoner. The need for different strategies was emphasised having regard in particular to the vulnerable, uncertain and impulsive nature of young prisoners, especially those on remand. Attention was drawn to the proper use of the 'At Risk' form F2052SH, of which this was said (para 5.37):

b 'This form is opened when any member of staff considers a prisoner to be at risk. It was designed in considerable detail to manage the measures to be taken to support an individual at a time of a suicidal crisis to the point where risk was reduced and the form could be closed. The form is only intended however as a framework and following the stages of the form should not be the end in itself. Writing on the form is not what sees someone through a crisis. If the contents become clichéd and repetitive, the piece of paper becomes meaningless, and worse, staff quite wrongly feel they have done their job. This is not to argue against the role of the form, but to emphasize that it is not the most important feature of the strategy and it should not be relied on as the sole mechanism for intervention. The most important outcome of any process is that the prisoner concerned receives the help he/she needs to get through the crisis.'

The report concluded (para 5.58) that the Prison Service policy towards the prevention of suicide was fundamentally sound when applied in its entirety, but that the modern history of the Prison Service revealed that systems are only as effective as the competence and dedication of those who administer them.

[8] In ch 6 the Ramsbotham report put forward principles on which a revised strategy for suicide prevention in local prisons, such as HM Prison New Hall, should be built. The chief inspector drew attention to the importance of this exercise in his preface to the report, which included this paragraph:

f 'The particular significance of this review is that it affects every person every time they come into custody. Death and bereavement inevitably touch us all in some way, and, when a prisoner dies in prison, his or her family and friends are bereaved in the same way as anyone else. But there is an added dimension to a death in prison. Firstly family and friends do not just lose a loved one, they lose him or her in very painful circumstances, separated from them and in conditions that they do not fully appreciate. In addition staff and prisoners, living and working with the person, are also deeply affected, and have to come to terms with their bereavement as well as that of the family. Thus the impact of a death in custody is compounded by a number of additional factors and emotions, which must be acknowledged, but are difficult to understand objectively. One suicide is one too many, but, regrettably, there will always be deaths in prison, however professional and caring the prison staff, and however efficient a reduction strategy and systems for observing prisoners.'

j In the penultimate paragraph he said that central to his recommendations was the need for a ringing declaration from the Home Secretary, through the Director General, to everyone in the Prison Service, that suicide and self-harm can and will be reduced, and that accountability for delivering that reduction begins at the top and goes right down to the bottom.

[9] Despite all these efforts on the part of successive chief inspectors of prisons and the Prison Service, suicides in custody continue to occur. In her annual report for 2003, *Annual Report of HM Chief Inspector of Prisons for England and Wales 2002/2003* (20 January 2004) Anne Owers observed that in spite of the commendable efforts of the Safer Custody Group, and of some individual prisons and officers, the rise in the number of suicides in prison has continued to grow. In the year under review, almost two prisoners a week had killed themselves in prisons in England and Wales. This was, she said, closely linked to overcrowding and prisoner movements. But the statistics of those who commit suicide in prison were shocking: over a third were unconvicted, one in five were women (though they accounted for only 8% of the average daily prison population), one in five were in prison hospitals or segregation units, 61% were in male local prisons and 40% die within their first month in custody. She added this comment (p 12):

‘Those statistics sketch the profile of those who most commonly die in our prisons: they are likely to be newly in prison, often unconvicted, often so mentally ill or disturbed that they need segregation or treatment, and a disproportionate number are women, often young women. Many of them, at that stage in sentence, will be withdrawing from drugs.’

[10] In his memorandum to the Joint Committee on Human Rights dated 18 August 2003 the Director General of the Prison Service addressed the question what practical steps have already been taken, and what further steps are being considered, to prevent suicide and self-harm in prisons: Ev 30–31. A fresh strategy to develop policies and practices to reduce prisoner suicide and manage self-harm in prisons was announced in February 2001 by the then Home Secretary and has been implemented from April 2001. It is said to be holistic in approach, more overtly preventative, risk-based, to better facilitate inter-agency information exchange, and to develop safer prison design, including safer cells. New evidence-based healthcare reception screening arrangements are being implemented. They include measures designed to improve the detection of vulnerable prisoners. Improved processes for the identification and management of prisoners at risk of suicide and self-harm are being developed to replace the current F2052SH procedures. Changes in detoxification facilities and procedures are also being introduced. Staff awareness and training are recognised as being the key to the successful outcome of many of these initiatives, and training programmes are being developed alongside new procedures.

[11] It is hard to fault the attention that has been given to this problem by senior management in the Prison Service and by the Prison Inspectorate. There is a high level of awareness, and much effort has been devoted to improving the system for the prevention of suicides. But every time one occurs in a prison the effectiveness of the system is called into question. So all the facts surrounding every suicide must be thoroughly, impartially and carefully investigated. The purpose of the investigation is to open up the circumstances of the death to public scrutiny. This ensures that those who were at fault will be made accountable for their actions. But it also has a vital part to play in the correction of mistakes and the search for improvements. There must be a rigorous

a examination in public of the operation at every level of the systems and procedures which are designed to prevent self-harm and to save lives.

[12] The public investigation of deaths in prison has long been a requirement in domestic law: see *R (on the application of Amin) v Secretary of State for the Home Dept* [2003] UKHL 51 at [16], [2003] 4 All ER 1264 at [16], [2003] 3 WLR 1169 per Lord Bingham of Cornhill. Section 8(1)(c) of the Coroners Act
b 1988 requires a coroner to hold an inquest on being informed that a person has died in prison. Section 8(3)(a) provides that such an inquest must be conducted with a jury. The inquest must be held in public, and the family of the deceased may attend and be legally represented: see rr 17 and 20 of the Coroners Rules 1984, SI 1984/552. Not all the deaths that occur in prisons are due to suicide. But the majority are. Statistics that were provided by HM Prison Service to the
c Joint Committee on Human Rights show that in 2002 there were 94 self-inflicted deaths, as compared with 71 which were due to natural or other causes (HL Paper 12, HC 134) Ev 26. Added importance has been given to this procedure, and to its effectiveness as a means of protecting the right to life, by the 1998 Act and by the incorporation into domestic law of art 2 of the
d convention in particular.

THE FACTS OF THIS CASE

[13] The appellant has submitted that on the facts of this case there was no basis for concluding that Ms Creamer's death was caused by a systematic
e failure. If the appellant is right, there would be no purpose to be served in holding a fresh inquest. The respondent's case is that there was a relevant causal connection between the neglect which she alleges and the cause of Ms Creamer's death. The question where the truth lies on this issue is essentially one for decision at an inquest. The question for your Lordships is whether, if there were to be a fresh inquest, the jury would be entitled to hold
f that a relevant causal connection had been established. So the tragic events which led to Ms Creamer's death need to be set out in some detail. The facts set out in the following three paragraphs are based on the agreed statement of facts and issues.

[14] Ms Creamer was aged 22 at the time of her death. She was the single
g mother of two children. On 29 July 2000 she was remanded in custody at Sheffield Magistrates' Court for an alleged offence of dishonesty. She was taken to HM Prison New Hall. On 4 August 2000 at a further hearing in the magistrates' court she was again remanded in custody until 23 August 2000. While she was at court she became very upset. PCO Clayton of Group 4
h Custodial Services, who was the court custody officer, opened a 'Self Harm at Risk' form F2052SH at 13.00 hrs that day. Under the heading 'Why are you concerned?' she wrote:

j 'DP seems very depressed says if she goes back to prison today she will do herself in very tearful whilst in court, had to be forcibly removed from dock when remanded.'

Under the heading 'What does the prisoner say about his/her situation?' she wrote: 'Says she will lose her accommodation worried about her children says she has nothing left her life's a mess.'

[15] She was taken back from the magistrates' court to HM Prison New Hall. On her arrival she was sent to the health centre for observation. A member of the nursing staff recorded on the form F2052SH at 18.00 hrs, in the section where she was required to give her assessment of Ms Creamer on her initial referral, that she had stated that she was not suicidal at all. On the following day, 5 August 2000, she was taken to the care and supervision unit for an adjudication about her behaviour in court the previous day. A member of the nursing staff recorded in the daily supervision and support record at 10.00 hrs that Ms Creamer was a little bit upset during the adjudication. She was seen later in the health centre by Dr Leslie Spivack, who was a locum medical officer. Dr Spivack entered the following assessment on her F2052SH: 'Not suicidal or thinking of self harm. Was reacting to failure to get bail. Compos mentis. I feel she is manipulative.' Dr Spivack referred Ms Creamer back to the residential unit. But he did not complete the part of the F2052SH entitled 'Discharge Report'. This part of the form states that it must be completed in all cases where a prisoner is discharged or returned to the residential unit, and that if necessary a case review is to be held involving residential staff to decide a post-discharge support plan. He was not familiar with the form, and he was unaware of the procedure that had to be followed in cases where a form F2052SH had been opened.

[16] Ms Creamer was returned to the residential unit at 10.30 hrs on 6 August 2000. She was placed in a single cell with a modesty curtain around the toilet. During the afternoon she associated with other prisoners. During the evening when she was back in her cell she was observed every half hour, as her F2052SH had not been closed. When she was checked at 23.30 hrs she was found hanging by a ligature made from the modesty curtain which had been attached to the bars of her cell window. Steps were taken to try to resuscitate her. These steps continued while she was being taken by ambulance to hospital, but they were unsuccessful. Ms Creamer was pronounced dead in the hospital at 00.40 hrs on 7 August 2000.

[17] Mr Burnett QC's submission for the appellant, in the light of these facts, is that there is no basis for concluding that Ms Creamer's death was caused by a systematic failure. He accepted that the system was not correctly operated because Dr Spivack was not familiar with the F2052SH and the procedure that should be followed in connection with it. But he said that it was clear that if Dr Spivack had understood the procedure he would have closed Ms Creamer's F2052SH, because his view was that she posed no risk of self-harm. The consequence of his not having done so was that the form remained open. This had the result that Ms Creamer was subject to half-hourly observations during the night when she died. If he had completed the discharge section the form would have been closed and she would not have been observed at all. Mr Gordon QC for the respondent disputed this assessment. In support of his argument that there were grounds for concluding that a finding that the death had been contributed to by neglect could have been made in this case he referred to additional information which was to be found in a report which had been commissioned by Mr ND Clifford, the operational manager for women's prisons, in an attempt to find out why the death had occurred and what could be done to prevent such a tragic occurrence in the future. It was commissioned on 7 August 2000, commenced on 9 August 2000 and was concluded on

a 1 October 2000. The information in this report has to be read together with the evidence that was to be led later at the inquest.

b [18] The report reveals that Ms Creamer had numerous previous convictions for crimes of dishonesty, and that she had acquired a drug habit. When she was admitted to the prison on 29 July 2000 it was noted on her inmate medical record that she had admitted that she was a regular intravenous
c drug user. She admitted to using heroin and to consuming large quantities of alcohol. She was immediately placed on a detoxification opiate withdrawal programme. When she was remanded on 4 August 2000 for a further three weeks in custody she was still showing signs of withdrawal. She reacted aggressively to the refusal of bail and had to be removed forcibly from the dock. It was at this stage that PCO Clayton opened the F2052SH. She noted on the form that Ms Creamer should be assessed on arrival by the residential unit manager. The absence of any record that this was done indicates that no such assessment was carried out by the reception staff on her arrival. They appear not to have been alerted to the fact that she had been on a detoxification programme. She was placed in a five-bed ward in the health care centre.

d [19] Ms Creamer appeared before the governor the next day for an adjudication about her behaviour in court on 4 August 2000. The governor found her guilty of a disciplinary offence and ordered seven days stoppage of earnings and two days loss of association. The effect of the adjudication was that she was deprived of the opportunity of associating with other prisoners during the evening. The governor noted that she was upset, so she decided not
e to order loss of television in her room in the residential unit. But she was not aware when she made the order that Ms Creamer was subject to an F2052SH, as this fact had not been reported to her. Ms Creamer told prisoners in the health centre that she was going to take her own life, but this information was not passed on by them to the prison staff because it was not taken seriously.
f The cell into which she was placed on her return to the residential unit was a single cell. Contrary to the standard regime that ought to have been applied in her case, it did not have a television set. The prison officer who checked Ms Creamer's cell at 23.30 hrs and found her hanging by a ligature did not have a set of cell keys. She had to summon assistance to gain access to the cell. This hampered her response to the incident.

g [20] The report which was commissioned by Mr Clifford contains numerous criticisms of the systems that were in operation on the night of Ms Creamer's death and recommendations for their improvement. Many of the defects that were noted appear to have been due to poor communication between members of staff with each other and between members of staff and
h prisoners, and to an inadequate understanding of the appropriate procedures. It is reasonable to think that steps have been taken to improve procedures at the prison in the light of this report and the further initiatives mentioned in the memorandum to the Joint Committee by the Director General. But the report did not have the effect of exposing these procedures to public scrutiny. This
j was the task that was to be performed by the coroner's inquest.

THE INQUEST

[21] The inquest which the appellant conducted in this case was held in accordance with the statutory requirements. His decision to refuse the request that the jury be permitted to add the words 'contributed to by neglect' to their

verdict cannot be criticised. It was in accordance with the guidance that was given as to the conduct of inquests in *R v North Humberside and Scunthorpe Coroner, ex p Jamieson* [1994] 3 All ER 972, [1995] QB 1. In that case Bingham MR said ([1994] 3 All ER 972 at 989, [1995] QB 1 at 24), that the word 'how' in s 11(5)(b)(ii) of the 1988 Act and in r 36(1)(b) of the 1984 rules was to be understood as meaning 'by what means', and that the task was not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how ... the deceased came by his death' which was a more limited question directed to the means by which the deceased came by his death. He said ([1994] 3 All ER 972 at 991, [1995] QB 1 at 25–26) that it could possibly be correct for the jury to hold that neglect contributed to a verdict that the deceased took his own life, but that this finding would not be justified simply on the ground that the deceased was afforded an opportunity to take his own life even if it was careless to afford him that opportunity. He said that such a finding would only be appropriate in a case where gross neglect was directly connected with the deceased's suicide. It has not been suggested that that standard was achieved by the evidence in this case.

[22] The inquisition which the appellant read at the conclusion of the inquest recorded the fact that the following matters had been found by the jury by a majority of nine to two:

'That the name is that of Sheena Dawn Lisa Nicola Marie Creamer, the injury or disease causing death was 1(a) hanging by ligature and (b) the time place and circumstances is that the deceased was a remand prisoner at HM Prison New Hall. She was further remanded to prison by Sheffield Magistrates' Court on 4 August 2000 and was admitted to the medical centre, she was moved to the residential wing cell C215 on 6 August 2000 where she was discovered hanging by a ligature by a patrolling officer. An ambulance took her to Pinderfields General Hospital where she was declared dead on arrival at 00.40 hrs on 7 August 2000 and the jury's conclusion by majority is that Sheena killed herself ...'

[23] Rule 43 of the 1984 rules provides:

'A coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly.'

[24] Having read the inquisition, the appellant made the following statement before he closed the inquest:

'Just before I formally conclude this inquest I intend now making an announcement pursuant to r 43 of the 1984 rules that it is my intention to write to the prison department and inform them as to my grave concerns regarding the locum medical officer at HM Prison New Hall on this occasion not having a working knowledge of the form F2052SH procedures. I regard the form F2052SH as a vital tool in identifying those prisoners who are vulnerable and at risk of self-harm or suicide and I take an extremely dim view of the fact that somebody in such an important

a position as a medical officer albeit a locum on this occasion demonstrated such a scant understanding of what is such an important provision and therefore I shall write to the Head of the Prison Service pointing out my concerns pursuant to this rule.'

b [25] No criticism is made, nor could any criticism properly be made, of the appellant's decision to draw the gap in Dr Spivack's knowledge of the F2052SH procedures to the attention of the Prison Service. It was clearly open to him to do this in view of the terms of r 43, and it was a reasonable step for him to have taken in the light of Dr Spivack's evidence. But it would, I think, be a misconception to conclude from the fact that he chose to take this course that this was the only ground on which it could reasonably be said that Ms Creamer's death was due to a failure in the content or operation of the system that ought to have prevented her suicide.

c [26] It is plain that Ms Creamer, like so many other women in prisons, fell within the profile of those who most commonly die while they are in custody. She was a young woman, she was unconvicted and she was withdrawing from drugs. It is plain too that she was placed on her own in a cell without a television set where material was available for her to hang herself. The tragedy which occurred in her case is that these factors came together to create the dark, desperate sense of isolation and hopelessness that drives a person to contemplate, and then to commit, suicide. There are signs in the report commissioned by Mr Clifford that this tragedy might have been prevented if there had been better communication between members of staff with each other and between staff and prisoners. It may be too that it was a mistake to rely on the routine system of half-hourly inspections in her case as this left ample time for prisoners, aware of the system, to take measures while they were unobserved that could lead to self-harm and ultimately to suicide.

f CONCLUSION

g [27] As Lord Bingham of Cornhill, giving the opinion of the Appellate Committee, has explained in *R (on the application of Middleton) v West Somerset Coroner* [2004] 2 All ER 465 at [34]–[35], the scheme for the conduct of inquests which has been enacted by and under the authority of Parliament must be respected, save to the extent that a change of interpretation is required to honour the international obligations of the United Kingdom under the convention. The word 'how' in s 11(5)(b)(ii) of the 1988 Act and r 36(1)(b) of the 1984 rules is open to the interpretation that it means not simply 'by what means' but rather 'by what means and in what circumstances'. The provisions of s 3 of the 1998 Act indicate that it should now be given the broader meaning, with the result that a coroner will be able to exercise his discretion in the way Lord Bingham has indicated in the opinion in that case (at [36] and [37]).

h [28] The coroner in this case did not have an opportunity of inviting the jury to consider the issues in the way which Lord Bingham has now identified. This deprived the inquest of its ability, when subjecting the events surrounding j Ms Creamer's death to public scrutiny, to address the positive obligation that art 2 of the convention places on the state to take effective operational measures to safeguard life: see *Osman v UK* (1998) 5 BHRC 293 at 321–322 (paras 115, 116). The inquest was not able to identify the cause or causes of Ms Creamer's suicide, the steps (if any) that could have been taken and were not taken to prevent it and the precautions (if any) that ought to be taken to avoid or reduce the risk to

other prisoners. The most convenient and appropriate way to make good this deficiency is, as the Court of Appeal did, to order a new inquest. a

[29] It should be noted that, although the inquest took place after 2 October 2000 when the relevant provisions of the 1998 Act came into operation, the death occurred before that date. The respondent's contention in her claim for judicial review that this was a case of an ongoing breach of art 2 has not been challenged at any stage in these proceedings. But there has been no decision on the point, and nothing that has been said in this opinion should be taken as having had that effect. b

[30] The Committee is of the opinion that the appeal should be dismissed.

Appeal dismissed.

Kate O'Hanlon Barrister.

a **Dunnachie v Kingston-upon-Hull City Council**

[2004] EWCA Civ 84

b COURT OF APPEAL, CIVIL DIVISION

BROOKE, SEDLEY LJ AND EVANS-LOMBE J

25–27 NOVEMBER 2003, 11 FEBRUARY 2004

c *Unfair dismissal – Compensation – Amount which is just and equitable having regard to the loss sustained by employee – Whether compensation recoverable for non-economic loss brought about by manner of unfair dismissal – Employment Rights Act 1996, s 123.*

The appellant employee resigned from his post with the respondent employer. In subsequent proceedings, an employment tribunal concluded that the employee's resignation had been brought about by a prolonged campaign of harassment and undermining on the part of a colleague and sometime line manager—a campaign which management had refused to deal with, and which had reduced the employee to a state of overt despair. Accordingly, the tribunal found that the employee had been constructively and unfairly dismissed. Under s 123^a of the Employment Rights Act 1996, the compensatory award for unfair dismissal was to be 'such amount as the tribunal considers just and equitable in all the circumstances having regard to' the loss sustained by the complainant in consequence of the dismissal in so far as that loss was attributable to action taken by the employer. The tribunal's award to the employee included a sum of £10,000 for non-economic harm. The employer appealed to the Employment Appeal Tribunal (EAT) against, inter alia, the award for non-economic harm. The EAT allowed that appeal, holding that compensation under s 123 of the 1996 Act was confined to quantifiable pecuniary losses. The employee appealed to the Court of Appeal.

Held – (Brooke LJ dissenting) Compensation under s 123 of the 1996 Act embraced non-pecuniary losses caused (in the sense associated with the ordinary principles of remoteness) by an unfair dismissal. The governing phrase in the formula for compensation was 'such amount as the tribunal considers just and equitable in all the circumstances'. That being so, the natural implication of 'having regard to' was that the matters which followed had to be compensated for, but that compensation was to include whatever else justice and equity required. A conclusion to the contrary would leave the governing concept—compensation which was just and equitable—without a role. It followed that compensation for non-economic loss brought about by the manner of an unfair dismissal was recoverable in principle. Furthermore, the award of such compensation in the instant case was not excessive and had been adequately explained. Accordingly, the appeal would be allowed and the award restored (see [29], [30], [49], [52], [53], [56], [57], [71], [73], [74], [102], below).

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183 overruled.

Johnson v Unisys Ltd [2001] 2 All ER 801 considered.

a Section 123, so far as material, is set out at [10], below

Notes

For calculation of the compensatory award, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 530. a

For the Employment Rights Act 1996, s 123, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 727.

Cases referred to in judgments

Addis v Gramophone Co Ltd [1909] AC 488, [1908–10] All ER Rep 1, HL. b

B (a minor) v DPP [2000] 1 All ER 833, [2000] 2 AC 428, [2000] 2 WLR 452, HL.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Campbell v Dunoon and Cowal Housing Association Ltd [1993] IRLR 496, Ct of Sess.

Cassell & Co Ltd v Broome [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL. c

Devis (W) & Sons Ltd v Atkins [1977] 3 All ER 40, [1977] AC 931, [1977] 3 WLR 214, HL.

Edwards v Society of Graphical and Allied Trades [1970] 3 All ER 689, [1971] Ch 354, [1970] 3 WLR 713, CA. d

EWP Ltd v Moore [1992] 1 All ER 880, [1992] QB 460, [1992] 2 WLR 184, CA.

Fougère v Phoenix Motor Co Ltd [1977] 1 All ER 237, [1976] ICR 495, [1976] 1 WLR 1281, EAT.

Galloway v Galloway [1955] 3 All ER 429, [1956] AC 299, [1955] 3 WLR 723, HL.

HIH Casualty and General Insurance Ltd v Chase Manhattan Bank [2003] UKHL 6, [2003] 1 All ER (Comm) 349. e

ICTS (UK) Ltd v Tchoula [2000] IRLR 643, sub nom *Tchoula v ICTS (UK) Ltd* [2000] ICR 1191, EAT.

Jacobs v London CC [1950] 1 All ER 737, [1950] AC 361, HL.

Johnson v Unisys Ltd [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518, [2001] 2 WLR 1076; *affg* [1999] 1 All ER 854, [1999] ICR 809, CA. f

Mahmud v BCCI SA (in liq), Malik v BCCI SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

Malloch v Aberdeen Corp [1971] 2 All ER 1278, [1971] 1 WLR 1578, HL.

Normansell (Robert) (Birmingham) Ltd v Barfield (1973) 8 ITR 171, NIRC.

Norton Tool Co Ltd v Tewson [1973] 1 All ER 183, [1972] ICR 501, [1973] 1 WLR 45, NIRC. g

O'Donoghue v Redcar and Cleveland BC [2001] EWCA Civ 701, [2001] IRLR 615.

Polkey v AE Dayton Services Ltd [1987] 3 All ER 974, [1988] AC 344, [1987] 3 WLR 1153, HL.

Pretoria City Council v Levison 1949 (3) SALR 305, SA SC (App Div).

R v Chard [1983] 3 All ER 637, [1984] AC 279, [1983] 3 WLR 835, HL. h

Smith v Manchester Corp (1974) 17 KIR 1, CA.

Tidy v Battman [1934] 1 KB 319, [1933] All ER Rep 259, CA.

Vaughan v Weighpack Ltd [1974] IRLR 105, [1974] ICR 261, NIRC.

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318. j

Wainwright v Home Office [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137.

Wellman Alloys Ltd v Russell [1973] ICR 616, NIRC.

Cases referred to in skeleton arguments

Adams v Hackney London BC [2003] IRLR 402, EAT.

- a** *A-G's Reference (No 1 of 1988)* [1989] 2 All ER 1, [1989] AC 971, [1989] 2 WLR 729, HL.
- Alexander v Home Office* [1988] 2 All ER 118, [1988] ICR 685, [1988] 1 WLR 968, CA.
- Andrew v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452, Can SC.
- Boardman v Copeland BC* [2001] EWCA Civ 888, [2001] All ER (D) 99 (Jun).
- Brassington v Cauldon Wholesale Ltd* [1977] IRLR 479, [1978] ICR 405, EAT.
- b** *Clarkson International Tools Ltd v Short* [1973] IRLR 90, [1973] ICR 191, NIRC.
- Cleveland Ambulance NHS Trust v Blane* [1997] IRLR 332, [1997] ICR 851, EAT.
- Customs & Excise Comrs v Savoy Hotel Ltd* [1966] 2 All ER 299, [1966] 1 WLR 948.
- Day v Society of Graphical and Allied Trades* 1982 [1986] ICR 640, EAT.
- De Keyser Ltd v Wilson* [2001] IRLR 324, EAT.
- Devine v Designer Flowers Wholesale Florist Sundries Ltd* [1993] IRLR 517, EAT.
- c** *Digital Equipment Co Ltd v Clements* [1996] IRLR 513, [1996] ICR 829, EAT.
- Digital Equipment Co Ltd v Clements (No 2)* [1998] IRLR 134, [1998] ICR 258, CA.
- Dilworth v Comr of Stamps* [1899] AC 99, [1895–9] All ER Rep Ext 1576, PC.
- Eastwood v Magnox Electric plc* [2002] EWCA Civ 463, [2002] IRLR 447, [2003] ICR 520n.
- d** *Gogay v Hertfordshire CC* [2000] IRLR 703, CA.
- Haigh v Royal Mail Steam Packet Co Ltd* (1883) 52 LJQB 640, [1881–5] All ER Rep 177, CA.
- Hallett's Estate, Re, Knatchbull v Hallett, Cotterell v Hallett* (1880) 13 Ch D 696. [1874–80] All ER Rep 793, CA.
- Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613.
- HM Prison Service v Johnson* [1997] IRLR 162, [1997] ICR 275, EAT.
- HM Prison Service v Salmon* [2001] IRLR 425, EAT.
- Jiad v Byford* [2003] EWCA Civ 135, [2003] IRLR 232.
- John v MGN Ltd* [1996] 2 All ER 35, [1997] QB 586, [1996] 3 WLR 593, CA.
- f** *Lifeguard Assurance Ltd v Zadrozny* [1977] IRLR 56, EAT.
- Martins v Marks & Spencer plc* [1998] ICR 1005, [1998] IRLR 326, CA.
- McCabe v Cornwall CC* [2002] EWCA Civ 1887, [2003] IRLR 87, [2003] ICR 501.
- McConnell v Police Authority for Northern Ireland* [1997] IRLR 625, NI CA.
- Meek v City of Birmingham DC* [1987] IRLR 250, CA.
- Ministry of Defence v Cannock* [1995] 2 All ER 449, [1994] ICR 918, EAT.
- g** *North West Thames Regional Health Authority v Noone* [1988] IRLR 195, [1988] ICR 813, CA.
- Osbourne v Rowlett* (1880) 13 Ch D 774.
- Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.
- h** *Post Office v Foley, HSBC Bank plc (formerly Midland Bank plc) v Madden* [2001] 1 All ER 550, [2000] ICR 1283.
- R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.
- Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] All ER (D) 364 (Jul).
- j** *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, [1999] ICR 1170, CA.
- Slack v Leeds Industrial Co-operative Society Ltd* [1923] Ch 431; *rvsd* sub nom *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851, [1924] All ER Rep 259, HL.
- Townson v Northgate Group Ltd* [1981] IRLR 382, EAT.
- Wallace v United Grain Growers Ltd* (1997) 152 DLR (4th) 1, Can SC.

Wood Group Heavy Industrial Turbines Ltd v Crossan [1998] IRLR 680, EAT.

Appeal

Christopher Dunnachie appealed with permission of the Employment Appeal Tribunal (Burton J (President), D Bleiman and R Straker) from its decision on 22 May 2003 ([2003] IRLR 384, [2003] ICR 1294) allowing an appeal by the respondent, Kingston-upon-Hull City Council, from the decision of an employment tribunal sitting at Hull on 24 May 2002 awarding Mr Dunnachie compensation of £10,000 for non-economic harm arising from his unfair dismissal by the council. The facts are set out in the judgment of Sedley LJ.

Antony White QC and Thomas Linden (instructed by *UNISON Employment Rights Unit*) for Mr Dunnachie.

John Bowers QC and Joanna Heal (instructed by *Margaret J Taylor*, Kingston-upon-Hull) for the council.

Cur adv vult

11 February 2004. The following judgments were delivered.

SEDLEY LJ (giving the first judgment at the invitation of Brooke LJ).

THE ISSUE

[1] Ever since the introduction by the Industrial Relations Act 1971 of a right not to be unfairly dismissed, compensation for unfair dismissal has been required by law to be—

‘such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.’ (See now s 123(1) of the Employment Rights Act 1996.)

[2] In the early days of the new legislation the National Industrial Relations Court (NIRC), under its first (and only) president Sir John Donaldson, decided in *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 that this formula embraced only quantifiable pecuniary losses. This remained the almost unquestioned orthodoxy until in the speeches of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518 it was—putting it equivocally for the moment—indicated that, although at common law the House’s decision in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 continued to confine damages for breach of contract to pecuniary losses, the statutory formula was large enough to embrace damages for non-economic harm in unfair dismissal cases.

[3] The decision in *Johnson’s* case has attracted a good deal of academic comment, not all of it favourable, partly because of its uncovenanted impact on the law of constructive dismissal. But its apparent enlargement of the accepted ambit of compensation led one learned commentator, Professor Hugh Collins, to remark ((2001) 30 ILJ 305 at 309) that a phoenix of truly just and equitable compensation might now rise from the ashes of the hoped-for evolution of the common law of wrongful dismissal.

[4] This appeal is about the phoenix. If the Employment Appeal Tribunal (EAT) is right and the *Norton Tool* case remains good law, the phoenix was an

- a illusion. Whether this is the case depends on two things: first, whether the availability of full compensation was an integral part of their Lordships' reasoning; secondly, if it was not, whether this court should nevertheless now hold it to be the law.

THE FACTS

- b [5] It is not necessary to say a great deal about the history of the case. Mr Dunnachie, an environmental health officer (EHO), had begun work with Hull City Council at the age of 19 in 1986, had qualified two years later and by the time he was forced to resign was an acting principal EHO in the council's food section. His resignation on a month's notice in March 2001 was brought about, the employment tribunal found, by a prolonged campaign of harassment and
- c undermining on the part of his colleague and sometime line manager Gary Kitching. The tribunal summed it up like this:

- d 'In that connection, we found that Mr Kitching did, for whatever reason, have a low opinion of the applicant's capabilities. That opinion was misplaced. Nevertheless, he acted upon it by seeking to undermine the applicant whenever the opportunity presented itself. A particularly bad example was his irrational refusal to allow the prosecution of Skelton's Bakery to proceed. When the applicant challenged that decision by going to their manager, Mrs Cottis, we are satisfied that Mr Kitching retaliated by conducting an in-depth investigation into the management of the applicant's
- e files, without telling him that he was doing so. He then threatened the applicant with disciplinary proceedings and left the matter hanging in the air. Mr Kitching's conduct was compounded by that of Mrs Cottis, who failed to alleviate the applicant's anxieties about the prospect of being suspended. Both she and Mr Duxbury [her line manager] either failed or refused to recognise that the applicant had been a victim of bullying by Mr Kitching.
- f Mr Duxbury deliberately sought to deflect the applicant from making a formal complaint under the respondent's personal harassment policy. The respondent's treatment of the applicant by those officers caused his ill health. We are satisfied that there was the clearest evidence of a breach of the implied term of mutual trust and confidence.'

- g [6] It followed that Mr Dunnachie had been constructively and unfairly dismissed. Because he had a family to support, he had hung on until he found another job to go to and had only then given notice. The new job, with Doncaster City Council, was less well paid, of lower status and at a much greater
- h distance from his home.

- i [7] This was a bad case of workplace bullying, compounded by an equally serious refusal by management to deal with it. The blow to a conscientious employee's self-esteem which such treatment delivers may well be the unkindest cut of all, worse in many ways than the monetary loss. There was no professional
- j evidence that the distress and its effects had amounted to a recognised psychiatric condition, but Mr Dunnachie had been reduced by his treatment to a state of overt despair.

THE PROCEEDINGS

- [8] The tribunal gave their decision on 15 May 2002 and adjourned the question of remedies, failing agreement, to 24 May. On 11 June 2002 they handed

down extended reasons for their award. The total was £54,940, together with £2,752 costs. The breakdown was as follows: a

Basic award	£3,240·00
<u>Compensatory award:</u>	
Loss of earnings to date	£6,148·16
Loss of future earnings	£74,175·35
Additional cost of travel to work	£29,514·77
Loss of statutory industrial rights	£250·00
Compensation under <i>Johnson v Unisys</i>	£10,000·00

b

The total compensatory award, £123,328·28, had to be reduced to the amount of the statutory cap of £51,700. To the total produced by adding the basic award to the capped compensatory award, the tribunal added an award of costs because they considered that the respondent council had conducted the proceedings high-handedly, in particular by unreasonably threatening Mr Dunnachie with a costs order should he lose. c

[9] The council appealed to the EAT against the calculation of the compensatory award—on which they succeeded to the extent of having it remitted to a fresh employment tribunal—and separately against the *Johnson* award of £10,000. It is the latter to which the present very full and careful judgment of the EAT, delivered by Burton J (President), is directed ([2003] IRLR 384, [2003] ICR 1294). Its conclusions are, first, that the material part of the speech of Lord Hoffmann in *Johnson's* case is not integral to the House's reasoning, and secondly that the *Norton Tool* case was rightly decided and should continue to be followed. Recognising the importance of the issues, the EAT itself gave permission to appeal. d
e

THE LAW

[10] Although it will be necessary to refer to other provisions later in this judgment, the key provision is now found in Pt X, s 123 of the 1996 Act as amended: f

'(1) Subject to the provisions of this section and sections 124 ... 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. g

(2) The loss referred to in subsection (1) shall be taken to include—(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.' h

[11] The remainder of s 123 and the other provisions referred to in sub-ss (1) and (2) do not matter to the present argument. The provisions which I have quoted do not differ in any significant way from the formula originally enacted in s 116 of the 1971 Act and reproduced at intervals in amending or consolidating Acts. It will be relevant, however, that s 116 of the 1971 Act governed not only awards of compensation for unfair dismissal but all awards of compensation under the Act for unfair industrial practices. These included (under s 101) the inducement of victimisation by trade unions; (under s 102) failure by employers to implement agency shop agreements or provide information relevant to collective bargaining; (under ss 103, 107 and 108) unfair exclusion from trade j

- a unions and employers' associations; and (under s 106) victimisation by employers of trade union members (prohibited by s 5), as well as unfair dismissal.

WHAT DID JOHNSON'S CASE DECIDE?

- b [12] The issue before their Lordships' House in *Johnson's* case [2001] 2 All ER 801, [2003] 1 AC 518 was whether in an action at common law for wrongful dismissal an employee can recover damages for consequential psychiatric harm. Their Lordships held that he could not, the majority on the ground that a claim for compensation arising out of the manner of a dismissal (which was what was sought) did not lie within the doctrine of *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 and must now be made under the statutory unfair dismissal scheme or not at all. They consequently declined to enlarge the limit
- c placed by *Addis's* case on the ambit of damages for breach of contract.

[13] The holding, as reported in the Appeal Cases headnote ([2003] 1 AC 518) was:

- d 'that (per Lord Bingham of Cornhill, Lord Nicholls of Birkenhead, Lord Hoffmann and Lord Millett) under Part X of the Employment Rights Act 1996 Parliament had provided the employee with a limited remedy for the conduct of which he complained; that, although it was possible to conceive of an implied term which the common law could develop to allow an employee to recover damages for loss arising from the manner of his dismissal, it would be an improper exercise of the judicial function for the
- e House to take such a step in the light of the evident intention of Parliament that such claims should be heard by specialist tribunals and the remedy restricted in application and extent ...'

Lord Steyn concurred in the result, but on grounds of remoteness rather than of the non-existence of a cause of action.

- f [14] The reference in the headnote to the restricted statutory remedies reflects Lord Nicholls of Birkenhead's reliance (at [2]) on 'matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims'. None of these touch the present question, which is whether there is also a restriction on the kinds of consequence for which compensation may be awarded. As to this,
- g the critical passage comes in the speech of Lord Hoffmann:

- h '[54] My Lords, this statutory system for dealing with unfair dismissals was set up by Parliament to deal with the recognised deficiencies of the law as it stood at the time of *Malloch v Aberdeen Corp* [1971] 2 All ER 1278, [1971] 1 WLR 1578. The remedy adopted by Parliament was not to build upon the
- j common law by creating a statutory implied term that the power of dismissal should be exercised fairly or in good faith, leaving the courts to give a remedy on general principles of contractual damages. Instead, it set up an entirely new system outside the ordinary courts, with tribunals staffed by a majority of lay members, applying new statutory concepts and offering statutory remedies. Many of the new rules, such as the exclusion of certain classes of employees and the limit on the amount of the compensatory award, were not based upon any principle which it would have been open to the courts to apply. They were based upon policy and represented an attempt to balance fairness to employees against the general economic interests of the community. And I should imagine that Parliament also had in mind the practical difficulties I have mentioned about causation and

proportionality which would arise if the remedy was unlimited. So Parliament adopted the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount. a

[55] In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award. The only doubtful question is whether it would have been open to the tribunal to include a sum by way of compensation for his distress, damage to family life and similar matters. As the award, even reduced by 25%, exceeded the statutory maximum and had to be reduced to £11,000, the point would have been academic. But perhaps I may be allowed a comment all the same. I know that in the early days of the National Industrial Relations Court it was laid down that only financial loss could be compensated: see *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, ([1972] ICR 501); *Wellman Alloys Ltd v Russell* [1973] ICR 616. It was said that the word "loss" can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life. b c d

[56] Part X of the 1996 Act therefore gives a remedy for exactly the conduct of which Mr Johnson complains. But Parliament had restricted that remedy to a maximum of £11,000, whereas Mr Johnson wants to claim a good deal more. The question is whether the courts should develop the common law to give a parallel remedy which is not subject to any such limit. e

[15] Lord Bingham of Cornhill (at [1]) and Lord Millett (at [68]) both expressed their agreement with the speech of Lord Hoffmann. If the passage of Lord Hoffmann's speech which I have cited was integral to his reasoning, their assent will—for reasons I will come to—have given it the force of binding authority. Antony White QC for the appellant submits that this is the case; John Bowers QC for the respondent submits that it is not. The excellence of their respective arguments has made this and the other questions both easier to grasp and harder to resolve. f g

[16] I have put the paradigm of judicial authority as sharply as I have done in the preceding paragraph because, as we have correctly been reminded, it is not every remark in a judgment to which the author's fellow judges can be taken to be assenting when they express agreement with it. As Lord Reid said in *Cassell & Co Ltd v Broome* [1972] 1 All ER 801 at 837, [1972] AC 1027 at 1087: 'Concurrence with the speech of a colleague does not mean acceptance of every word which he has said. If it did there would be far fewer concurrences than there are.' The distinction which he made, and which I respectfully adopt, was between views which did and did not form 'an essential step in [the judge's] argument'. j

[17] This formulation is not as simple as it sounds. It is often possible to proceed to a conclusion X either by the progression A → B → X or by the progression A → B → C → X. Here step C is by definition not objectively essential; but the judge who takes it has elected to integrate it into his or her reasoning. Does an assenting judgment in such a case include assent to C or not?

a In *Jacobs v London CC* [1950] 1 All ER 737 at 741, [1950] AC 361 at 369, Lord Simonds said:

‘there is, in my opinion, no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also. If it were a proper test to ask whether the decision would have been the same apart from the proposition alleged to be *obiter*, then a case which *ex facie* decided two things would decide nothing.’

b (From the illustrations which he went on to cite it is clear that he had in mind decisions founded on two alternative grounds.) This makes clear sense.

c [18] I would conclude therefore that an additional reason which a judge gives for reaching his conclusion is for the purposes of establishing authority an integral part of his reasoning. Once that point is reached, I think the other questions raised by Mr Bowers, as to the reading of judicial minds and the imputation to them of others’ ideas, become mercifully immaterial. Giving full weight to Lord Reid’s cautionary remark, one still has to take expressed assents by other members of the court or committee as adopting at least as much of the leading judgment or speech as its author has chosen to make part of his or her reasons for reaching a particular conclusion. It is always possible, after all, for an assenting judgment to reserve or even to reject (reverting to my algebra) the correctness of proposition C without disturbing the result. So everything turns on whether the view expressed by Lord Hoffmann in the material part of his speech was of this character or was, as Mr Bowers submits it was, a personal reflection on a side issue, having manifest forensic weight but no judicial authority.

d [19] This inevitably depends to a very large extent on how the judge has chosen to express his or her particular view. If it is prefaced by words such as ‘This is enough to dispose of the appeal, but I would nevertheless observe that ...’ there will be little difficulty in segregating what follows from the judge’s essential reasoning. If it is prefaced by words such as ‘This in itself would not be sufficient; but ...’, the converse will equally probably follow. But the narrative form which in the eyes of other European judges makes United Kingdom judgments remarkable and, at least in our own eyes, makes them interesting, eschews such formulaic approaches; so that those who come after have sometimes to undertake what Bacon called divination (and what Lord Hoffmann in *HIH* *Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at [80], [2003] 1 All ER (Comm) 349 at [80], described as having ‘more in common with reading tea leaves than with legal reasoning’).

e [20] The EAT ([2003] IRLR 384 at 395, [2003] ICR 1294 at 1319 (para 38)) expressed itself ‘entirely satisfied’ that the passage in question was no more than—

‘the expression of opinion by a very experienced and influential Law Lord as to what employment tribunals ought, notwithstanding *Norton Tool*, to do in respect of recoverability of non-economic loss in unfair dismissal claims ...’

j Mr Bowers supports this conclusion essentially on two grounds. One is that Lord Bingham and Lord Millett should not be taken to have assented to dicta on a topic which had not featured at all in the printed cases. I will come in a moment to how the issue entered the argument in their Lordships’ House; but for the reasons I have given, I consider that expressed assents have to be presumed to relate—and to relate only—to whatever is integral to the leading judgment’s reasoning, however it may have got there.

[21] Mr Bowers' second essential ground is that nowhere does Lord Hoffmann or any other member of the Appellate Committee hold in terms that *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 was wrongly decided. This is a much weightier argument. In the ordinary way one would expect a departure at appellate level from a first-instance decision which has enjoyed unquestioned authority for 30 years to be squarely explained. Why then was this not done here?

[22] Mr White has gone some way to providing an answer; although it cannot by itself answer the more fundamental question of the authority of Lord Hoffmann's remarks. The note of argument in the Appeal Cases report of the case ([2003] 1 AC 518), which was not available to the EAT, shows that the *Norton Tool* case came without objection into the argument when counsel for the employee, Edward Faulks QC, citing the decision, submitted (at 523) that to force his client back upon the statutory remedy would deny him compensation for any but economic loss. David Pannick QC for the employer countered this by submitting (at 524) that there was no good reason, the *Norton Tool* case notwithstanding, why tribunals 'should not be able to make an award for the psychiatric injury itself as well as the financial consequences. Tribunals should be empowered to make such awards'. Mr Faulks, continuing the role reversal, urged in reply that the common law should not be developed on the premise that a case such as the *Norton Tool* case had been wrongly decided.

[23] Pausing here, it does not look as though Mr Pannick was seeking the reversal of the *Norton Tool* case—hence Mr Faulks' guarded reply. He seems to have been arguing that Parliament should reverse it by legislation. Hence too, I think, the less than definite tone of para [55] of Lord Hoffmann's speech, to which Mr Bowers has drawn attention. But the fact remains that Lord Hoffmann's remarks, in contrast to counsel's submission, are not about the law as it could or should be: they are about the law as it is—specifically about the breadth of the true construction of s 123. They are not hedged or qualified like, for example, his recent remarks in *Wainwright v Home Office* [2003] UKHL 53 at [51]–[52], [2003] 4 All ER 969 at [51]–[52], [2003] 3 WLR 1137, on the availability of an art 8 action for an invasion of privacy: 'Speaking for myself, I am not so sure ... Be that as it may...' This very clearly, and in contrast to the material passage in *Johnson's* case, is the vocabulary of a judicial aside.

[24] What seems to me, moreover, to indicate that para [55] is not a judicial aside but an integral step in Lord Hoffmann's reasoning is the way he begins para [56]: 'Part X of the 1996 Act *therefore* gives a remedy for exactly the conduct of which Mr Johnson complains.' With all respect to the EAT, the preceding passage cannot have had the character that they ascribe to it of simply expressing a view as to what tribunals should do 'notwithstanding *Norton Tool*'. Either the *Norton Tool* case continues to bind tribunals, or it is wrong in law and does not. There is no way in which, short of being overruled, it can be stripped of its authority and ignored by tribunals. So whatever he was doing, Lord Hoffmann cannot have been making the suggestion ascribed to him by the EAT.

[25] It seems to me, in the end, that Lord Hoffmann (at [55]) was grasping a nettle which, although it had sprung up only in oral argument, he recognised as having a sting: that to deny a remedy at common law on the ground that a parallel statutory scheme existed, when the statutory scheme apparently denied the very remedy that was being sought at common law, was intellectually unsatisfactory and in practice would leave a black hole. It was to fill that

a jurisprudential space that, as it seems to me, he said what he did in the critical passage.

[26] Given what therefore seems to me the true choice, I find myself driven to the conclusion that para [55] is an essential step in Lord Hoffmann's reasoning. If so—indeed because it is so—the assent expressed by Lord Bingham and Lord Millett gives it the force of binding authority in this court. Its inexorable meaning and effect—acknowledging, as I do, the force of Mr Bowers' point that one would b have expected it to be expressly said—are that the *Norton Tool* case is not good law.

IS THE NORTON TOOL CASE RIGHTLY DECIDED?

[27] In case I am wrong—and (for reasons expressed with some muscularity c by Brooke LJ) I may well be—about the authority of para [55] of *Johnson v Unisys Ltd*, it is necessary to consider independently whether the *Norton Tool* case was rightly decided. The *Norton Tool* case has never been frontally questioned at this level, and we have of course heard much fuller argument than was available to their Lordships on it. In the intervening years the decision has been repeatedly d followed in the NIRC and its successor the EAT, and so by industrial and employment tribunals throughout the country: see *Robert Normansell (Birmingham) Ltd v Barfield* (1973) 8 ITR 171 at 174; *Vaughan v Weighpack Ltd* [1974] IRLR 105 at 107, [1974] ICR 261 at 265; *Wellman Alloys Ltd v Russell* [1973] ICR 616 at 619; *Fougère v Phoenix Motor Co Ltd* [1977] 1 All ER 237, [1976] ICR 495. In this e court and in their Lordships' House it has been more than once taken as given law: see *O'Donoghue v Redcar and Cleveland BC* [2001] EWCA Civ 701, [2001] IRLR 615; *Mahmud v BCCI SA (in liq)*, *Malik v BCCI SA (in liq)* [1997] 3 All ER 1 at 9, 21, [1998] AC 20 at 39, 52. But it is without question open to challenge in this court, and in my judgment Mr White's challenge to it is well founded.

[28] The *Norton Tool* case was to be one of the seminal decisions of the NIRC, f and it has continued to govern the operation of the unfair dismissal jurisdiction during its successive metamorphoses. In it, in relation to what was then s 116(1) of the 1971 Act, Sir John Donaldson (President) held ([1973] 1 All ER 183 at 186–187, [1972] ICR 501 at 504–505):

g "The court or tribunal is enjoined to assess compensation in an amount which is just and equitable in all the circumstances, and there is neither justice nor equity in a failure to act in accordance with principle. The principles to be adopted emerge from [s 116 of the 1971 Act]. First, the object is to compensate, and compensate fully, but not to award a bonus, save h possibly in the special case of a refusal by an employer to make an offer of employment in accordance with the recommendation of the court or a tribunal. Second, the amount to be awarded is that which is just and equitable in all the circumstances having regard to the loss sustained by the complainant. "Loss", in the context of (s 116), does not include injury to pride or feelings. In its natural meaning the word is to be so construed, and that this meaning is intended seems to us to be clear from the elaboration j contained in sub-s (2). The discretionary element is introduced by the words "having regard to the loss". This does not mean that the court or tribunal can have regard to other matters, but rather that the amount of the compensation is not precisely and arithmetically related to the proved loss. Such a provision will be seen to be natural and possibly essential, when it is remembered that the claims with which the court and tribunals are concerned are more often than not presented by claimants in person and in

conditions of informality. It is not therefore to be expected that precise and detailed proof of every item of loss will be presented, although, after making due allowance for the skills of the persons presenting the claims, the statutory requirement for informality of procedure and the undesirability of burdening the parties with the expense of adducing evidence of an elaboration which is disproportionate to the sums in issue, the burden of proof lies squarely on the complainant.' a

[29] The weak link in this reasoning, in my very respectful view, is the proposition that "'having regard to the loss" ... does not mean that the court or tribunal can have regard to other matters'. One asks why not. If, as Mr Bowers rightly accepts, the governing phrase in the formula for compensation is 'such amount as the tribunal considers just and equitable in all the circumstances', the natural implication of adding 'having regard to' is that the matters which follow must be compensated for but that compensation is to include whatever else justice and equity require. b

[30] This highlights another problem with the *Norton Tool* reading of the statutory formula: it leaves the governing concept—compensation which is just and equitable—without a role. Mr Bowers argues that this is not so. He cannot of course introduce contributory fault on the employee's part by this route, since it has always been separately provided for in the legislation. But he submits that it allows an uplift for something akin to a *Smith v Manchester* award for loss of employability (see *Smith v Manchester Corp* (1974) 17 KIR 1), and a reduction of the kind established in *Polkey v AE Dayton Services Ltd* [1987] 3 All ER 974, [1988] AC 344, where an unfairly dismissed employee could in the circumstances have been dismissed without unfairness. The difficulty with these examples is that the first (as Mr Bowers recognised) is an orthodox form of economic loss, while the second is not allocated anywhere in the speeches in their Lordships' House to the 'just and equitable' element of the statutory formula. Only in the Court of Session's decision in *Campbell v Dunoon and Cowal Housing Association Ltd* [1993] IRLR 496 at 497 (para 3), is this rationale for *Polkey's* case advanced. c

[31] Mr Bowers has also drawn our attention in this regard to the decision of the House in *W Devis & Sons Ltd v Atkins* [1977] 3 All ER 40, [1977] AC 931, where it was the 'just and equitable' test that was held to warrant the reduction or extinction of compensation for an employee who has been unfairly dismissed and then found to have been liable to summary dismissal. This certainly gives reality to the formula in the context of economic loss. But Mr Bowers has been able to give no example, either from authority or hypothetically, of its use to enhance an award of compensation for economic damage. It is, he has to submit, a purely negative factor. The decision of the House, however, goes further than this. Viscount Dilhorne, with whose speech the other members of the Committee agreed, said of the legislative provision with which we too are concerned (see [1977] 3 All ER 40 at 49, [1977] AC 931 at 955): d

'The paragraph does not, nor did s 116 of the 1971 Act, provide that regard should be had only to the loss resulting from the dismissal being unfair. Regard must be had to that but the award must be just and equitable in all the circumstances, and it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed.' e

- a Lord Simon of Glaisdale ([1977] 3 All ER 40 at 52, [1977] AC 931 at 959–960) said that although his first impression had been that ‘having regard to’ governed and therefore limited what was ‘just and equitable in all the circumstances’, the converse reading preferred by Viscount Dilhorne as the natural one did no great violence to language and obviated injustice. Lord Diplock ([1977] 3 All ER 40 at 43, [1977] AC 931 at 948) seems to have considered that the ordinary grammatical
- b meaning of the provision had to give way in order to achieve this result. But Lord Edmund-Davies and Lord Fraser of Tullybelton concurred with Viscount Dilhorne without any such reservation.

- [32] The reasoning of their Lordships in the *Devis* case seems to me centrally relevant to the question before this court. It indorses the view, which I would independently have reached, that the governing provision for compensation is
- c that it is to be a sum that is just and equitable in all the circumstances. It establishes in terms that resultant loss is not the only element to which regard is to be had. If that reasoning operates, as it did in the *Devis* case, to diminish an award below the amount of the economic loss actually suffered, there is in my judgment no reason why in an appropriate case it should not operate to elevate
- d it above the amount of purely economic loss.

- [33] This is Mr White’s principal argument. His alternative argument is that the word ‘loss’ itself is apt to include more than monetary loss. He needs this argument only if he fails in his principal submission that in s 123(1) loss is not the defining category but a sub-set of the larger category of just and equitable compensation.

- e [34] For my part I find the meaning of ‘loss’ in the present statutory context problematical. Although, as Mr White suggests, loss can and often does include far more things than money, I agree with Mr Bowers that its more natural meaning in s 123 is pecuniary loss. Yet, accepting this, sub-s (2)(b) also requires compensation to cover lost benefits, which are not always monetary—they may
- f consist of in-service training or sabbaticals, for example—and which therefore have to have a round figure put on them like other forms of general damage. It ceases, however, to be problematical if one treats loss, as it seems to me Parliament has treated it, as one constant element in a range of things that it may be just and equitable to award compensation for. And that is Mr White’s principal argument.

- g [35] One initial attraction of Mr Bowers’s contrary submission on the principal argument was that the constraining words which follow— ‘in consequence of ... attributable to ... ’ —appear to govern only ‘loss’, leaving wider aspects of compensation hazardingly at large. But the answer to his submission is that it will never be just or equitable to award compensation under
- h s 123(1) for harm which is not caused by or is too remote from the unfair dismissal. For the rest, Mr Bowers has candidly accepted that his construction of s 123 involves reading the words ‘having regard to the loss sustained’ as meaning ‘having regard solely to the loss sustained’. I can find no warrant for doing this, and very clear syntactical and semantic indicators to the contrary—first and
- j foremost that it is not what the statute says. I respectfully resist Brooke LJ’s suggestion that this is mere logic-chopping.

[36] Mr Bowers has argued forcefully that if, nevertheless, Parliament has left the impact of *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 untouched for 30 years, during which time it has amended the employment protection legislation in numerous other respects, it should be taken to have abstained deliberately and by so doing to have indorsed the NIRC’s decision. He

invites us to adopt the approach to be found in *EWP Ltd v Moore* [1992] 1 All ER 880 at 891–892, [1992] QB 460 at 474–475, where Bingham LJ, in a short assenting judgment, noted that the construction favoured, despite the anomaly it produced, by all three members of the court was one which had been the subject of a long-standing decision at first instance and that ‘despite abundant opportunities Parliament has not acted to cure the anomaly, which cannot have escaped the attention of departmental lawyers and administrators’. This is without doubt a frequently relevant consideration. But it is not a canon of construction. One reason is found in what Bingham LJ said next: ‘The inference must be either that this apparent anomaly is not regarded as such or that it is regarded as a desirable or tolerable anomaly.’

[37] The reasons why possible, even desirable, legislative measures do not reach the statute book are legion. They include shortage of time in the government’s legislative programme, the want of a sponsor who has come high enough in the ballot for private members’ Bills, a lack of departmental time or interest, a political preference for letting sleeping dogs lie, and so on. Desirable amendments may be laid before Parliament and then lost for procedural or political reasons which have nothing to do with their merits. And these hazards do not beset only minor measures. Important legislative proposals which have the weight of the Law Commission behind them not infrequently fail to reach the statute book for one or more of these reasons. Very often the only inference one can draw from Parliament’s failure to revise a statute in response to a particular judicial interpretation of it is that it was not thought to be important enough to earn the attention of ministers or whips. Parliament may be omnipotent, but it is not omniscient. Many anomalies highlighted by the judicial interpretation of legislation, as Bingham LJ suggests, are just tolerated.

[38] Here, moreover, there has been a positive disincentive to intervene because the continued presence of a financial cap on the amount of the compensatory award has meant that to enlarge compensation beyond the *Norton Tool* limit would add little to what most claimants recovered. The cap, as Mr Bowers has helpfully shown us, was still only £8,000 in 1985. By 1998 it had risen to £12,000. If pressure was going to be exerted in or through Parliament, it was on the amount of the cap, rather than in the first instance on the *Norton Tool* case, that it was likely to be exerted. It was in 1999 (just after *Johnson v Unisys Ltd* [1999] 1 All ER 854, [1999] ICR 809 had been decided in this court) that the cap had to be raised in a single jump to £50,000; and it was arguably only then that the recoverability of compensation for more than economic losses became a serious issue. Although we do not have comprehensive figures, Mr Bowers has shown us the table reproduced in Elias, Napier and Wallington *Labour Law: Cases and Materials* (1980) p 630; it indicates that in 1977, when the cap was set at £4,300, more than 95% of awards were under £2,000. Only about 4.5% of awards reached or approached the limit. This does indicate a shortfall in awards which might have been made good by a successful challenge to the *Norton Tool* case; but it also suggests that the necessary investment in such litigation (which would almost certainly have had to come from one or more trades unions) was unlikely to be justified by the potential return.

[39] However, Mr Bowers points out that ready-made vehicles for the reversal of the *Norton Tool* case have actually passed through Parliament in the intervening years: any of the Employment Bills which became law in 1980, 1982, 1993, 1998 and 1999 (or at least those which were not pure consolidating measures) could have been used to reverse the NIRC’s decision. This gives

a Mr White the opportunity to point out that the Bill which became the Employment Act 2002 could just as readily have been used to upset (or at least lay the ghost of) *Johnson's* case, which by then was being followed by some tribunals but not by others.

b [40] For my part, I would be prepared to give some interpretative weight to Parliament's non-intervention if I considered that the meaning of the words enacted in 1971 and at intervals thereafter was doubtful. But I do not consider it doubtful; and I do not consider that Parliament, by letting an erroneous interpretation of its words stand uncorrected, can give such error the force of law.

c [41] A number of the arguments addressed to us have been arguments from consequences. One is that employment tribunals are unequipped to adjudicate on contests of psychiatric evidence. Another is that they lack the procedural equipment to deal with conflicting expert testimony. These can at best be secondary arguments, for if Parliament has given tribunals jurisdiction to entertain particular matters, it is their obligation in appropriate cases to do so. But I do not consider the arguments to have substance in any case.

d [42] As to the evaluation of expert evidence, a striking feature of this case is that the parties agree about two things: first, that if s 123 takes tribunals beyond economic loss, it necessarily takes them both into aspects of distress falling short of clinical damage and into clinical forms of mental disturbance; and secondly, that even if s 123 has the limited ambit for which the respondent contends, it still includes the proximate economic consequences of psychological harm—for instance the cost of counselling to enable a badly distressed employee to get back to work. The latter being so, the evaluation of conflicting psychiatric or similar evidence is on any view within the jurisdiction of employment tribunals. If so, the terrors implicit in the former begin to fade. They fade further when one calls to mind that tribunals, which of course have always had legally qualified chairmen, have for some time now possessed full case management powers: see f the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171. There is no more reason why they should be overwhelmed by the occasional conflict of expert witnesses than circuit or district judges are.

g [43] In considering what Parliament intended in 1971, it is useful to turn to the officious bystander's Parliamentary analogue, the industrious backbencher. If that not wholly imaginary individual had asked the minister in committee what h cl 116 would do to help an employee who had been appallingly treated and finally driven out of his job with his self-confidence in tatters, but who had speedily secured himself an equally well-paid job, I doubt whether the minister would have said: 'Nothing.' I think it much likelier that he would have said that the industrial tribunal would be able to award the employee a round sum which h was just and equitable in all the circumstances. He might have added that this would be of particular value to some victims of unfair industrial practices, to which the s 116 formula (as Brooke LJ points out) was also to apply.

j [44] If the backbencher had followed up by asking whether victims of other unfair industrial practices (see [11], above) were going to have to prove pecuniary loss in order to recover compensation, I have little doubt that he would have received the same answer. Both the backbencher and the minister would have been well aware of the then recent case of *Edwards v Society of Graphical and Allied Trades* [1970] 3 All ER 689, [1971] Ch 354, which had been heard and decided by this court in July 1970 and had contributed to the pressure for legislation. Mr Edwards, who was black, was a skilled worker in a 100% union printshop. His employers were compelled to dismiss him after his dues had been allowed to fall

into arrear through a union official's neglect. He had to sue the union in contract. He won his action before Buckley J, but the union appealed to this court on the quantum of damages. The union had at a late stage agreed to readmit him, but it was too late to put him back in his original job, and he had meanwhile found and then lost another job. Lord Denning MR concluded ([1970] 3 All ER 689 at 697, [1971] Ch 354 at 378):

'I feel that damages in such a case as this are so difficult to assess that I would be inclined to view them somewhat broadly. I would start with the loss of earnings which the plaintiff might reasonably be expected to have suffered over two years from his expulsion. That is what was suggested by Lord Donovan's committee. I would then work upwards or downwards from that figure, according to the circumstances of the case.'

Sachs LJ said ([1970] 3 All ER 689 at 698, [1971] Ch 354 at 378–379):

'The union's liability in damages being clear, this appeal is concerned with its measure—an important matter in the particular circumstances. These damages, of course, sound in contract and not in tort. It is, however, as well to record at the outset ... that certain rules laid down in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 touching damages for wrongful dismissal have no application to the present type of case. In other words, whereas in the former class of cases the damages can contain no element for the difficulty the dismissal causes to a plaintiff in getting fresh employment, the essence of the measure in the present case is an assessment of the financial consequences of that very difficulty.'

Megaw LJ, who preferred to segregate past loss from future loss, said ([1970] 3 All ER 689 at 705, [1971] Ch 354 at 387) of the element of future loss:

'Where there are so many incalculables, it would not be right to seek to give an aura of scientific respectability to the assessment of future damages by purporting to apply arithmetical or actuarial formulae to the assessment, or to any individual factor on which the assessment partly depends. One must try to assess. One cannot calculate.'

Of course future loss of this kind is still financial loss and not therefore the kind of damage with which this appeal is concerned. But the importance of *Edwards's* case (which was not cited to their Lordships in *Johnson v Unisys Ltd* [2001] 2 All ER 801) is that it enlarged the doctrine in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1 in relation to what was shortly to become by statute an unfair industrial practice, and that it forms part of the background to the 1971 Act.

[45] In supplementary written submissions invited by the court on related statutory provisions such as those I have just been considering, Mr Bowers has pointed out that the Employment Protection Act 1975, while it effectively reproduced the old s 116 formula in relation to unfair dismissal, replaced the old s 5 rights of trade union members with a separate right (s 53) and a remedy expressed in s 56 in this way:

'... such amount as the tribunal considers just and equitable in all the circumstances having regard to the infringement of the complainant's right under section 53 above by the employer's action complained of and to any loss sustained by the complainant which is attributable to that action.' (My emphasis.)

a The words which I have italicised, it is submitted, demonstrate Parliament's own view, in 1975, that its enactment in 1971 of the remaining words had been restricted to pecuniary loss.

b [46] There is a fundamental problem about this submission. It is not Parliament but the courts who have the constitutional function of interpreting the words on the statute book. The courts do so, of course, with full and careful regard to all the indicia provided by the legislation itself as to what is meant by the words Parliament has used. But it is Parliament which, by strong constitutional convention, takes from the courts what its legislation means and—if it wishes—amends its legislation accordingly. It may very well be, therefore, that s 56 was enacted in response to *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501, consciously enlarging what had been held to be a general limit on the computation of awards. But such a legislative response does not operate as a Parliamentary adoption or indorsement of the NIRC's original decision, and Mr Bowers has not argued that it does. He argues that it tells us what Parliament meant when it enacted s 116 in 1971. That is an argument which, on grounds of constitutional principle, I consider to be unsustainable.

d 'Since interpretation of legislation is a matter for the courts, they are not bound by an expression of Parliament's opinion as to what the law is, whether expressed in or to be inferred from a statute, as distinct from a positive enactment manifesting an intention to declare the law (see 44(1) *Halsbury's Laws* (4th edn reissue) para 1236).'

e [47] What the legislative history does illustrate, however, is the extent to which the *Norton Tool* case has been regarded as settled law. In this respect I entirely share Brooke LJ's concerns. But, accepting his view and that of Evans-Lombe J that para [55] of *Johnson's* case does not bindingly overrule the *Norton Tool* case, it is in my opinion not open to this court, when called upon to decide for itself whether the *Norton Tool* case is good law, to defer to the decision of a lower court which, though venerable and respected, it considers to be wrong. We can neither refuse to decide the point nor decide it on grounds of convenience.

f [48] To hold this is not to hold that every upset caused by an unfair dismissal carries a compensatory award. The power is there to permit tribunals to compensate an employee for a real injury to his or her self-respect. It is likely to become material principally in cases of constructive dismissal where the employee has been driven from his or her job. For the ordinary case of unfair dismissal, assuming that there is no reinstatement or re-engagement, it is the basic award which is there to compensate for the unfairness.

g [49] For these reasons, in my judgment, the statutory formula now found in s 123(1) and (2) embraces non-pecuniary losses caused (in the sense associated with the ordinary principles of remoteness) by an unfair dismissal. To the extent that the *Norton Tool* case holds otherwise I consider it to have been wrongly decided.

h
j IS THE AWARD OF £10,000 SUSTAINABLE?

[50] The EAT considered that the employment tribunal's award for the distress suffered by Mr Dunnachie in consequence of the treatment which constituted his constructive dismissal was insufficiently explained. They did not hold that it was in itself excessive. Nevertheless Mr Bowers has, without objection, sought to sustain the EAT's decision on the latter ground.

[51] The employment tribunal gave a separate set of extended reasons for their award. They summarised the basis of the award for non-economic loss which, pursuant to their understanding of *Johnson's* case, they proposed to make: a

'4. As appears from our decision on the merits, the conduct of the respondent's employee Mr Kitching and the poor management of his superiors effectively drove the applicant from his employment with the respondent. In order to protect his economic interests, the applicant obtained alternative work with Doncaster Metropolitan Borough Council. He began work with that authority on 10 April 2001. b

5. The conduct of the respondent's employees seriously undermined the applicant's health so that he was off work with stress for about three weeks in November 2000. He had, immediately before that date, been driven by the circumstances in which the respondent had put him to lose his self-control in front of his boss. c

6. As a result of losing his job with the respondent, the applicant has lost the congeniality of working in the city of his birth where his family live. He now has to endure an extra 64 miles per day in travel to work. That impacts on time with his family. d

7. Furthermore, the treatment of the applicant by the respondent seriously undermined his self-confidence and self-esteem so that he has been receiving professional help from a counsellor. He is now better.'

It should be added that the loss of self-control mentioned in this passage was not a passing tantrum. It was a humiliating collapse marking the culmination of a prolonged campaign of denigration and harassment which the respondent's management had compounded by inertia. The full fact findings of the employment tribunal had been set out in 34 carefully written paragraphs of their decision on liability, and their decision on compensation must be read together with this. e

[52] I am satisfied for my part that the employment tribunal's award of compensation for non-economic loss sits at an appropriate point on the scale which has now been given the authority of this court in *Vento v Chief Constable of West Yorkshire Police* [2003] IRLR 102, [2003] ICR 318. £10,000 is the centre point of the middle band allocated by Mummery LJ to cases which are serious but not the most serious. That, it seems to me, fairly represents what the tribunal found to have happened, not least because it was aggravated by the respondent's persistence in continuing aggressively to blame the applicant in the tribunal proceedings for his own misfortune. f

[53] I am also satisfied that the employment tribunal gave an adequate and proper explanation of its award. The EAT considered that it had not done so. Burton J (President) said that there was 'no, or no sufficient, consideration of causation and no explanation or reasoning as to how the sum is arrived at'. g

[54] The tribunal reminded itself that Lord Hoffmann in *Johnson v Unisys Ltd* [2001] 2 All ER 801 had said that he saw no reason why in an appropriate case compensation should not reflect distress, humiliation, damage to reputation in the community or to family life and psychiatric damage caused by the manner of dismissal. They reminded themselves of the scale proposed in *ICTS (UK) Ltd v Tchoula* [2000] IRLR 643, [2000] ICR 1191, the precursor of *Vento's* case, which set £10,000 as the top of the lower bracket of discrimination awards. This was the amount for which the applicant had asked and was in their view a reasonable sum: h

- a 'For the applicant has, as a result of the respondent's actions, suffered some loss of professional status. He was humiliated and distressed by the manner of his dismissal. That process lasted over several months. The consequences have clearly affected his family life as we have described earlier. If anything, the applicant's claim is modest in this regard and we have no difficulty in identifying it as being properly at the upper end of the lower scale in
- b *Tchoula's case.*'

- [55] I accept readily that in most legal decisions it is necessary to go from the facts to the conclusion by way of an explanation of how the former leads to the latter. But when damages or compensation at large are being assessed, a recital of or a reference to the facts which justify the award, accompanied by any
- c necessary indication of the scale of quantification which is being used, is ordinarily a sufficient explanation of the award itself. It enables the parties to know, so far as it can be expressed, why the award is what it is; and it enables an appellate tribunal to say whether it was a permissible award or not.

CONCLUSION

- d [56] Compensation for non-economic loss brought about by the manner of an unfair dismissal (we have not been asked to decide whether it also embraces the fact of such a dismissal) is on authority and on principle recoverable. The award of such compensation by the employment tribunal in the present case was not excessive and was adequately explained. I would accordingly allow the appeal and restore the award.
- e [57] Given the division of opinion both within this court as to the effect of *Johnson's case* and between this court and the EAT as to the sustainability of *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501, as well as the impact of these vagaries of authority upon the work of employment tribunals, litigants and advisers, we propose, if asked and if not dissuaded, to grant Hull City
- f Council leave to appeal to the House of Lords in order that a definitive answer may be given to what is ultimately a short question of statutory construction. In the meantime employment tribunals should manage, list and decide cases in the knowledge that the last word has not been said, but is going to be said in the foreseeable future, on this topic.

g EVANS-LOMBE J.

- [58] In this appeal I have had the advantage of reading in draft the judgments of Brooke and Sedley LJ who disagree on the main point for decision, namely, whether the provisions of s 123 of the Employment Rights Act 1996 which substantially re-enacts the provisions of s 116(1) of the Industrial Relations Act
- h 1971 in which they first appeared, contain a power to award compensation for harm, in the section referred to as 'loss', sounding in general, as opposed to special, ie pecuniary damage. A good example of such general damage would be compensation for psychiatric illness resulting from the circumstances of the dismissal for which the employer was responsible but in respect of which no
- j identifiable pecuniary loss had resulted. Thus the 'loss' would be such harm as susceptibility to depressive illness resulting in injury to future employment prospects. The facts of the present case are another example.

[59] In *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501, Sir John Donaldson (President), sitting in the National Industrial Relations Court (NIRC), decided that such 'general' damage, not quantifiable as pecuniary loss was not recoverable in the employment tribunals under s 116(1) of the 1971 Act. That

decision, though not binding on this court, has passed unchallenged until the decision of the House of Lords in *Johnson v Unisys Ltd* [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518. In that case an employee, who had a past history of mental illness, sought to recover in proceedings at common law damages for wrongful dismissal including claims for such general damage. His claim was struck out at first instance as disclosing no reasonable cause of action and that decision was upheld in both the Court of Appeal and the House of Lords on the basis that a claim for damages for wrongful dismissal at common law was inconsistent with the provision by Parliament of a statutory remedy covering the same ground. In the record of the speech of Lord Hoffmann, the following passage appears:

[55] In my opinion, all the matters of which Mr Johnson complains in these proceedings were within the jurisdiction of the industrial tribunal. His most substantial complaint is of financial loss flowing from his psychiatric injury which he says was a consequence of the unfair manner of his dismissal. Such loss is a consequence of the dismissal which may form the subject matter of a compensatory award. The only doubtful question is whether it would have been open to the tribunal to include a sum by way of compensation for his distress, damage to family life and similar matters. As the award, even reduced by 25%, exceeded the statutory maximum and had to be reduced to £11,000, the point would have been academic. But perhaps I may be allowed a comment all the same. I know that in the early days of the National Industrial Relations Court it was laid down that only financial loss could be compensated: see *Norton Tool* ... It was said that the word "loss" can only mean financial loss. But I think that is too narrow a construction. The emphasis is upon the tribunal awarding such compensation as it thinks just and equitable. So I see no reason why in an appropriate case it should not include compensation for distress, humiliation, damage to reputation in the community or to family life.'

[60] In the present case the employment tribunal awarded £10,000 to Mr Dunnachie to compensate him for such general damage arising from the circumstances of his dismissal. That award was disallowed by the Employment Appeal Tribunal (EAT).

[61] Before this court it was first argued that the passage in the speech of Lord Hoffmann which I have set out above formed part of the ratio of his decision binding upon us, because two other members of the Committee agreed with him, Lord Bingham of Cornhill and Lord Millett, and so the question is decided in favour of the employee in this case. I respectfully agree with the conclusion of Brooke LJ, for the reasons which he sets out in his judgment, that what Lord Hoffmann says in the passage which I have set out above was obiter and is not binding on this court.

[62] It was further argued on behalf of the appellant that, notwithstanding that this court might conclude that it was not bound by what Lord Hoffmann said in *Johnson's* case, it should none the less conclude, that the *Norton Tool* case was wrongly decided, notwithstanding that it has stood as authority on the construction of s 123(1) of the 1996 Act and its predecessors down to today.

[63] In my judgment, if the matter was free of authority, the words of sub-s (1) are sufficiently widely drawn so as to permit the tribunal to award compensation for any loss which can be shown to directly flow from an unfair dismissal including compensation for 'general damage'. With respect to those who think

a otherwise there does not seem to me to be any justification for construing the word 'loss' as referring only to pecuniary or economic loss. In my view the construction I favour is supported by the use of the word 'include' in the first line of sub-s (2) where recoverable loss is expressed to 'include' certain types of pecuniary or economic loss set out in sub-ss (a) and (b), those words indicating that the extent of the types of cases in which compensation was recoverable were
b not confined to those described in sub-s (2). In the above quoted passage from the speech of Lord Hoffmann in *Johnson's* case he says: 'It was said that the word "loss" can only mean financial loss. But I think that is too narrow a construction.'

[64] I accept that for the purpose of construing s 123 of the 1996 Act it is necessary to attempt to discern what the intention of Parliament was when it enacted s 22 of the 1971 Act, which created the remedy for 'unfair dismissal' and
c s 116 which defined the extent of any compensation which a tribunal could order for breach of the right, established by s 22 not to be unfairly dismissed, thereby breaching the dam on recovery of damage for breach of contract of which the decision of the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908-10] All ER Rep 1 was a principal building block.

d [65] In his speech in *Johnson's* case Lord Millett conducted an overview of the relevant legislation. He said:

[76] ... The 1971 Act did not expressly provide that the jurisdiction of the industrial tribunals was exclusive, but it did not need to. It was clearly
e predicated on the existing state of the law established in *Addis's* case and confirmed in *Malloch's* case. There would have been no point (for example) in excluding certain categories of employee from obtaining compensation for unfair dismissal if they could obtain a remedy by way of damages at common law ... Prior to 1996, therefore, the jurisdiction of the industrial tribunals to award compensation for unfair dismissal was exclusive in
f practice, not because it was made so by statute, but because it was premised on the absence of a corresponding remedy at common law.

[77] But the common law does not stand still. It is in a state of continuous judicial development in order to reflect the changed perceptions of the community. Contracts of employment are no longer regarded as purely
g commercial contracts entered into between free and equal agents. It is generally recognised today that "work is one of the defining features of people's lives"; that "loss of one's job is always a traumatic event"; and that it can be "especially devastating" when dismissal is accompanied by bad faith ... This change of perception is, of course, partly due to the creation by Parliament of the statutory right not to be unfairly dismissed.'

h Lord Millett continues (at [80]):

'But the creation of the statutory right has made any such development of the common law [the development of a parallel common law cause of
j action] both unnecessary and undesirable. In the great majority of cases the new common law right would merely replicate the statutory right; and it is obviously unnecessary to imply a term into a contract to give one of the contracting parties a remedy which he already has without it. In other cases, where the common law would be giving a remedy in excess of the statutory limits or to excluded categories of employees, it would be inconsistent with the declared policy of Parliament. In all cases it would allow claims to be entertained by the ordinary courts when it was the policy of Parliament that

they should be heard by specialist tribunals with members drawn from both sides of industry.'

[66] For my part I am unable to discern any reason why the legislature, in 1971, should have intended to exclude from recovery under the new remedy they were creating, compensation for any type of loss which could be shown to flow from unfair dismissal. The scheme of the legislation was, in the words of Lord Hoffmann in *Johnson's* case (at [54]) to adopt 'the practical solution of giving the tribunals a very broad jurisdiction to award what they considered just and equitable but subject to a limit on the amount'. There were also, of course, limits on the sorts of employee who could claim such compensation. With respect it does not seem to me that anything in the contents of the Royal Commission on Trade Unions and Employers Associations summarised in Brooke LJ's judgment, points against this conclusion.

[67] The exclusive jurisdiction of the employment tribunals was made express by the introduction of s 205 of the 1996 Act. It is accepted that the effect of that section taken with the decision in *Johnson's* case means, if the narrow construction of the word 'loss' in s 123(1) contended for by the employers is correct, that there is no remedy in respect of general damage as a result of personal injury if caused by the circumstances of an unfair dismissal, which, if it had been negligently caused would have been recoverable. I cannot believe that that result is one that the legislature in 1971 would have contemplated.

[68] In supplementary written submissions invited by the court our attention has been drawn by counsel to ss 101–108 of the 1971 Act and thus to the provisions for compensation in respect of breaches of other requirements of the 1971 Act, apart from s 22, and which were, by that Act, referred for adjudication and assessment to the industrial tribunals and the industrial court, as an aid to the construction of s 116 of the 1971 Act and so to the construction of s 123 of the 1996 Act. It was submitted—

'that it cannot have been the intention of Parliament to allow the possibility of an award [for] injury to feelings, not only for unfair dismissal, but where, for example, collective agreements have been broken, or where an employer has negotiated with a body other than a recognised trades union or joint negotiating panel (s 55), or if an employee induced a breach of contract.'

It was pointed out that it was difficult to see how a trade union or employers' association can suffer injury to feelings.

[69] It does not seem to me that the fact that compensation in respect of other breaches of the requirements of the 1971 Act, where it was impossible or highly unlikely that breach of those requirements would have resulted in non-pecuniary loss to the complainant, should lead to the conclusion that s 116, and thus s 123 should be construed so as to exclude recovery of such loss where it has actually been suffered and the words used by the relevant section (ss 116/123) are wide enough to include it. It is to be observed that a number of the breaches of the requirements of the 1971 Act referred to the tribunals were capable of resulting in non-pecuniary loss, for example, unfair and unreasonable disciplinary action contrary to ss 66 and 70 and trade union victimisation contrary to s 5.

[70] The supplementary written submissions included a further submission on behalf of the respondents arising from the provisions of the Employment Protection Act 1975. Sedley LJ deals with this submission at para [45] and

- a following in his judgment with which I respectfully agree. I would add that if it had been the intention of Parliament in enacting s 56 of the 1975 Act so as deliberately to import into that section a power to award what I have described as general damage for breach of the requirements of s 53 in recognition of a perceived inability to award such compensation for unfair dismissal under s 76 of the same act (an intermediate predecessor of s 123 in substantially similar terms)
- b one would have expected Parliament to do so in much plainer terms than those used in s 56. I am unable to discern what policy considerations can have led to a Parliamentary intention to give a right to award general damage in respect of breaches of the requirements of s 53 while not doing so in respect of awards of compensation for unfair dismissal.

- c [71] I respectfully agree with the conclusions of Sedley LJ on this part of the case, and for the reasons which he gives, together with those which I have sought to express, I conclude that the *Norton Tool* case must be treated as wrongly decided and that s 123(1) should be construed as empowering employment tribunals to award compensation for non-pecuniary damage flowing from the circumstances of unfair dismissal.

- d [72] It was submitted that such a construction of s 123 would open the floodgates to a tide of claims for the recovery of such compensation. I see no reason why this should happen provided that the employment tribunals are firm in requiring proof that an applicant has been occasioned any such loss.

- e [73] As to the issues in respect of the quantum of the award on which Brooke and Sedley LJ are agreed I also agree and have nothing to add.

[74] I would allow this appeal.

BROOKE LJ.

- f [75] The work of employment tribunals administering the law relating to compensation for unfair dismissal was plunged into chaos by Lord Hoffmann's speech in *Johnson v Unisys Ltd* [2001] UKHL 13 at [55], [2001] 2 All ER 801 at [55], [2003] 1 AC 518. The scale of the chaos is vividly described in the Employment Appeal Tribunal's (EAT) judgment now under appeal ([2003] IRLR 384, [2003] ICR 1294). After explaining how compensation claims for what could generically be described as non-economic loss had mushroomed since the decision in *Johnson's* case, Burton J (President) said ([2003] IRLR 384 at 385–386, [2003] ICR 1294 at 1296–1297):

- h '1 ... This latter head of loss has, in the course of the hearing before us, been exemplified or described by reference to different cases in a number of different ways, and under a number of different headings. These include physical injury, recognised psychiatric illness (including mental illness, neurosis and personality change), "non-psychiatric illness" and (in alphabetical order) anger, anguish, anxiety, damage to family life, damage to reputation, depression, disappointment, frustration, grief, humiliation, hurt, impact on family life, inconvenience, injury to feelings, loss of congenial
- j employment, loss of self-confidence, loss of esteem, mental distress, mental suffering, stress, upset and worry.

2. Some tribunals have awarded such compensation, concluding that they are entitled, or obliged, to do so, since *Johnson*. Some have declined to do so, concluding that they were not bound by *Johnson* to do so and had no jurisdiction to do so. Examples of awards in respect of such non-economic loss drawn from the cases before us, and from other decisions in the

employment tribunals known to or discovered by counsel before us, have ranged between £250 and £10,000.’

[76] We were led to understand that in one region the chaos was such that a regional chairman of employment tribunals decided sensibly, but with doubtful authority, to instruct all the tribunals in his region to follow a common line until such time as the uncertainties were straightened out by a higher court. Since legal aid is not available in this class of litigation, costs are generally irrecoverable, and employment law advisers very often operate on restricted financial resources, it is most unfortunate that so much effort has had to be expended throughout the country over the last three years in the task of determining whether this passage of Lord Hoffmann’s speech is binding, and if it is not, whether it should be followed at all.

[77] In the very long paras 44-47 of the EAT’s judgment ([2003] IRLR 384 at 396-399, [2003] ICR 1294 at 1322-1328), which cover no fewer than ten A4 pages, Burton J (President) and his very experienced colleagues described the extent of the massive practical problems thrown up by this paragraph of Lord Hoffmann’s speech. If these matters had been fully ventilated in the courts before the speeches in *Johnson’s* case were released, and if the House of Lords had showed clearly that they had borne all these considerations in mind and were still determined to give a quite novel interpretation to very familiar statutory language, then of course employment tribunals and the lower courts would have loyally followed their decision, however troublesome the practical consequences. But the point was never argued at all. It would be very odd if the doctrine of *stare decisis* compelled us to follow Lord Hoffmann unquestioningly in circumstances as peculiar as these.

[78] The problem arose in this way. When *Johnson’s* case was argued in the Court of Appeal (see the report at [1999] 1 All ER 854, [1999] ICR 809) Mr Patrick Elias QC appeared for the employers. Although he argued that a newly invented implied duty not to dismiss an employee unfairly would be inconsistent with s 205 of the Employment Rights Act 1996, which required a claim for unfair dismissal to be made by way of complaint to an employment tribunal ‘and not otherwise’, it does not appear from the judgment of Lord Woolf CJ in that case that the point loomed very large in the Court of Appeal. *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 was not cited, and the idea that that case was wrongly decided formed no part of Mr Elias’s argument.

[79] Mr David Pannick QC appeared for the employers in the House of Lords. The contention that the concurrent existence of a statutory remedy must stifle any thought of creating a possible new duty at common law loomed very much larger in the argument at that level, and this contention ultimately prevailed. But Mr Pannick never suggested that the *Norton Tool* case was wrongly decided. As Lord Steyn correctly said (in his speech in *Johnson’s* case [2001] 2 All ER 801 at [11]), Mr Johnson’s claim was concerned solely with the recovery of special damages for financial loss. The quite separate question whether an employee might recover compensation for anxiety and mental stress arising from the manner of his dismissal was never raised before Judge Ansell or the Court of Appeal and was not an issue before the House of Lords. Indeed, during the course of his argument Mr Pannick suggested that it might be a good idea if tribunals were empowered to make such awards. It does not seem to have occurred even to that very distinguished advocate that in fact tribunals had

a possessed the requisite power for nearly 30 years, but nobody had ever realised this.

[80] Against this unprepossessing background, three principal matters arise for our decision on this appeal: (i) Are we bound by para [55] in Lord Hoffmann's speech in *Johnson's* case? (ii) If we are not so bound, should we nevertheless follow it? (iii) If the answer to (i) or (ii) is Yes, should we restore the employment b tribunal's award of £10,000 compensation?

[81] My answer to question (i) is unhesitatingly, No. The point was never argued before the House of Lords and it was not necessary for the decision of the majority of the House. They were convinced by the arguments (i) that the duty of mutual trust and confidence could not be called in aid at a time when the employer wished to end the employment relationship; and (ii) that the existence c of a statutory remedy precluded them from importing a quite different implied duty into an employment contract, breach of which would sound in damages at common law. There is no sign in the assenting speeches of Lord Nicholls of Birkenhead and Lord Millett that they were concerned with any issues relating to the adequacy of the statutory remedy as an instrument of complete justice. It was d sufficient for them that it existed, and they were unattracted by the idea of identifying a new common law right covering the same ground as the statutory right not to be unfairly dismissed. As Lord Millett observed (at [80]), all coherence in our law would be lost if it did.

[82] If authority is needed for the proposition that we are not bound by para [55] of Lord Hoffmann's speech in *Johnson's* case, even if the point had ever e been argued, I am content to refer to a passage in the judgment of Schreiner JA in the South African case of *Pretoria City Council v Levison* 1949 (3) SALR 305 at 317:

'As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly f interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts (cf. *Tidy v. Battman* ([1934] 1 KB 319 at 322, [1933] All ER Rep 259 at 260) and (c) (which may cover (a)) that they were necessary for the decision, not in the g sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.'

[83] Mr White, for his part, referred us to the well-known speech of Lord Simonds in *Jacobs v London CC* [1950] 1 All ER 737 at 740–741, [1950] AC 361 at h 369. Lord Simonds was there addressing the problem that arises when several issues are raised in a case and a determination of one of them is decisive in favour of one or other of the parties. What, in these circumstances, is the binding effect of the court's determination on the other issues? It is not in my judgment necessary to refer any further to this speech since Lord Hoffmann's observations j in *Johnson's* case (at [55]) did not determine an issue raised by anyone. In a different context it might have been said that he was on a frolic of his own.

[84] I turn therefore to the second main question we have to answer. If we are not bound by para [55], should we nevertheless follow it? The search for an answer to this question compels us to ask: What do the words of s 123(1) of the 1996 Act (as amended) mean? According to what principles should we construe them?

[85] The 1996 Act was in essence a consolidation Act, following upon the earlier consolidation of this part of our statute law in 1978. It brought together in a convenient way a number of disparate statutory provisions relating to employment rights. For all practical purposes the critical language of s 123(1) is the same as the language of s 116(1) of the Industrial Relations Act 1971 (which, where it differs, I have placed in square brackets as opposed to italics):

‘...the amount of the *compensatory award* [compensation] shall be such amount as the [Court or] tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the *complainant* [aggrieved party] in consequence of the *dismissal* [matters to which the complaint relates] in so far as that loss is [was] attributable to action taken by *the employer* [by or on behalf of the party in default].’

[86] The critical words we have to interpret therefore represent ‘straight consolidation’, which ‘consists of reproduction of the original wording without significant change’ (see *Bennion on Statutory Interpretation* (4th edn, 2002) p 516). Nobody suggested to us that the original wording had changed its meaning since 1971 because of its proximity to the different statutory provisions which now surround it as a consequence of consolidating the law. We must apply the rule, or presumption, that this provision must be construed as if it had remained in the original Act. In *Galloway v Galloway* [1955] 3 All ER 429 at 437, [1956] AC 299 at 320 Lord Radcliffe said:

‘I must confess that I do not lend a sympathetic ear to this last, and almost mystical, method of discovering the law, least of all when it depends on a consolidating Act, the function of which is to repeat, but not to amend, existing statute law.’

[87] Because this is a consolidation Act we do not have to explore the ramifications of the principles of construction explained by the House of Lords in *R v Chard* [1983] 3 All ER 637 at 643–644, [1984] AC 279 at 294–295 per Lords Scarman, Roskill and Templeman, and in *B (a minor) v DPP* [2000] 1 All ER 833 at 840–841, 847–848, [2000] 2 AC 428 at 465–466, 473–474, which are concerned with a different problem of statutory interpretation.

[88] On first principles, therefore, we must go back to 1971 to ascertain what Parliament meant when it created for the first time a statutory right to compensation for unfair dismissal and directed industrial tribunals to award as compensation—

‘such amount as the ... tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the aggrieved party in consequence of the matters to which the complaint relates, in so far as that loss was attributable to action taken by or on behalf of the party in default.’

[89] In order to identify the mischief which these statutory provisions were enacted to avoid (but not to interpret the remedy provided by Parliament to defeat that mischief: see *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810, [1975] AC 591) we can go back to the report of the Royal Commission on ‘Trade Unions and Employers’ Associations (1968) (Cmnd 3623).

[90] Chapter IX of this report addressed these matters. The Commission described how under the present law an employer was legally entitled to dismiss an employee whenever he wished and for whatever reason, provided only that

a he gave due notice. At common law he did not even have to reveal his reason, much less just justify it (para 521). Even if an employee was dismissed without due notice, his remedy was limited to a claim for the net amount of the wages he had lost as a result of the wrongful dismissal. He had no other legal claim at common law, whatever hardship he suffered as a result of the dismissal. In this context the Commission referred (para 522) to the decision of the House of Lords in *Addis v Gramophone Co Ltd* [1909] AC 488, [1908–10] All ER Rep 1.

b [91] After referring to some of the arrangements that had recently been made to mitigate some of these hardships, the Commission reported (para 525) that there was a very general feeling, shared by employers as well as trades unions, that the present situation was unsatisfactory. The Commission said it shared this belief in full (para 521). It described how people built much of their lives around c their jobs, and how for workers in many situations dismissal was a disaster. It ended this section of its report by saying (para 529) that it believed that it was urgently necessary to give workers better protection against dismissal. In spite of a change of government and all the political acrimony that accompanied the public discussion of the Commission's report, the statutory language we have to d interpret unquestionably represents Parliament's choice of remedy for this mischief.

[92] As a matter of history our law recognised two ways of providing financial remedies for wrongs done in the field of employment relations. Both contractual or fiduciary duties might be in question. The common law courts awarded damages as compensation for the breach of a contractual duty. The courts of e equity awarded equitable compensation for the breach of a fiduciary duty. It is therefore hardly surprising that we find in this new scheme for statutory compensation, covering not only unfair dismissal but also unfair industrial practices and unfair treatment by a registered trade union or employers' association (see [97], below) that the words 'just' and 'equitable' both govern the f tribunal's consideration of the amount of compensation it should award in 'all the circumstances'.

[93] Parliament also directed tribunals about the matter to which it should have regard when they decided the amount of compensation it considered just and equitable. This was not to be palm tree justice. Tribunals were to have regard to the loss sustained by the aggrieved party in consequence of the matter g to which his complaint related. Of course in a context different from that of industrial relations legislation in 1971 the word 'loss' might properly be interpreted to include loss of face, loss of confidence, loss of reputation, loss of health, loss of peace of mind, loss of dignity, loss of amenity etc etc, but I find it inconceivable that in this particular context Parliament intended the word to h mean anything other than financial loss. And it is striking that nobody ever thought it worth appealing *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 to the Court of Appeal in quest of a wider meaning. While in the context of an unfair dismissal an individual employee might not have thought the game worth the candle in the presence of the statutory cap to compensation, different j considerations would apply if one of our great trades unions and their distinguished advisers had ever thought the point worth arguing.

[94] I regard as logic-chopping the suggestion that because the word 'solely' does not appear in the subsection, Parliament intended industrial tribunals to range more widely and have regard to other considerations it did not condescend to mention. It should be remembered that in 1971 these tribunals were in their infancy. This Act marked the first major enlargement of their jurisdiction. In

later years, as the EAT's judgment showed, Parliament was willing to entrust them with steadily more extensive powers. But these were very early days. They were not even being entrusted with the resolution of very low value claims for wrongful dismissal in breach of contract, though the 1971 Act contained empowering provisions which could be triggered off when the time was considered ripe for such an extension: even then they had to keep well clear of personal injury claims, however much bound up with the subject matter of the complaint (see s 113).

[95] It is tempting to interpret an Act passed in 1971 through the eyes of 2003, but the temptation must be resisted. In 1971 the financial limits of a county court judge's jurisdiction were much more restricted than they are today. Damages for loss of reputation may still be sought only in the High Court 32 years later. Compensation for psychiatric injury still bristles with difficulties: very significant difficulties relating to causation have yet to be resolved. The seed of an implied contractual duty of mutual trust and confidence was not even germinating. In claims based on the breach of a duty of care, damages could only be awarded for psychiatric injury, anxiety or distress if linked with a claim for damages for physical injury (except in the sluggishly developing corner of the law concerned with the 'nervous shock' cases). In claims based on breach of contract, *Addis's* case dominated the law, although a slim line of authority permitting the award of such damages following the breach of a particular type of contract was starting to emerge. Equity, for its part, concerned itself only with financial loss, and not with any injury to feelings or psychiatric injury consequent on the breach of a fiduciary duty.

[96] In these circumstances, unless impressed by very clear language, I cannot believe that Parliament in 1971 intended to give these new tribunals the sweeping powers suggested by Lord Hoffmann in his speech in *Johnson v Unisys Ltd* [2001] 2 All ER 801 at [55]. In 1971 they would have been unfitted for the task. The results would have been chaotic. In my judgment the EAT in the present case was wholly justified in maintaining the authority of the *Norton Tool* case for the reasons it gave.

[97] Sedley LJ has asked what answer an industrious backbencher would have received to the question he poses at [43], above. He would have received the reply that cl 116 provided a comprehensive compensation code not only for complaints of unfair dismissal, but also for all the other matters for which an industrial tribunal was now being empowered to award compensation on a complaint under Pt VI of the 1971 Act. It would have been explained to him that the same code had been devised to provide remedies for: (i) a breach of a right to be a member of a trade union, or not to be a member, or if a member, to take part in trade union activities at an appropriate time (s 5); (ii) the application of pressure by an employer to anticipate the result of a ballot in respect of a closed shop by a lock out or the threat of a lock out or to induce a trade union to refrain from making an application for a ballot for a closed shop (s 16); (iii) a breach by a union or an employer to break a legally enforceable collective agreement (s 36); (iv) the instigation or threatened instigation of industrial action pending questions as to the recognition by the employer of a sole bargaining agent (s 54); (v) engaging in collective bargaining with a union other than a recognised union in the context of collective bargaining procedures regarding recognition of a union (s 55); (vi) a breach by an organisation of workers of the guiding principles set out in s 65 (s 66); (vii) a breach by an organisation of employers of the guiding principles set out in s 69 (s 70); (viii) inducing or threatening to induce a breach of

a contract in contemplation or furtherance of a trade dispute, except when done by a trade union or employers' association (s 96); (ix) taking industrial action in support of an unfair industrial practice (s 97); (x) taking industrial action against parties extraneous to a dispute (s 98).

[98] He would have been told that the government did not intend for the present to give industrial tribunals the duty of deciding difficult questions of law relating to the recoverability of general damages (not attributable to ascertainable financial loss) in relation to this very wide variety of different situations. The law on some of these matters was difficult enough for judges in the mainstream courts, and he would have been told that the government judged it premature to give the new tribunals even the task of deciding whether damages should be payable for wrongful dismissal (indeed, they were not considered suitable for this task for a further 20 years).

[99] He would also have been told that people aggrieved in all these fields might well suffer in some or more of the ways generically described by the EAT as 'non-economic loss' in its judgment (see [75], above), but the government had decided as a matter of policy that compensation for all these complaints should be limited to provable financial loss and not include something akin to a solatium for hurt feelings or damages for psychiatric illness. This was why the government had not accepted the recommendation of the Donovan Commission (para 553) to the effect that a tribunal should be able to compensate an unfairly dismissed employee for injured feelings and reputation. It would have been very easy to draft the Bill to accommodate such claims if that had been the intention. Instead the word 'loss' was used.

[100] Like Sedley LJ, I would not attach great significance to the 1975 Act as a guide to the interpretation of the 1971 Act. But given that the 1971 Act was repealed in its entirety in 1974, it is very surprising that when the unfair dismissal provisions reappeared (via Sch 1 to the Trade Unions and Labour Relations Act 1974) in the Employment Protection Act 1975 Sedley LJ's industrious backbencher did not take industrious steps to ensure that the language of s 76 (which was virtually identical to s 116 of the 1971 Act) made in future it crystal clear that it was the intention of Parliament that compensation for unfair dismissal should extend beyond mere financial loss. Not only did *Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, [1972] ICR 501 remain unchallenged, but Parliament did not take this early golden opportunity of rectifying things so that its original intention (if Sedley LJ is right) would be effectively fulfilled.

[101] I would conclude this part of my judgment in this way. When interpreting the meaning of an expression in an Act of Parliament, it is not sufficient merely to analyse the meaning of particular words in isolation. They have to be interpreted in their context. An important part of the 1971 context was Parliament's decision not to entrust the remedies for all these unfair practices, including unfair dismissal, to the regular courts, but to tribunals containing a majority of lay people. The instructions they gave to these tribunals were to have regard to the loss sustained by the victims of each of these practices and nothing more. The National Industrial Relations Court in the *Norton Tool* case provided a very natural interpretation of those instructions and nobody in the next 30 years, so far as I am aware, ever suggested that this interpretation was wrong. In my judgment it was right, and thousands of skilled employment lawyers (and academic lawyers, too?) in all the years that followed 1972 were right not to challenge its correctness.

[102] Finally, although in the light of my earlier conclusions I regard the issue as an academic one, I consider that the award of £10,000 by the employment tribunal was not manifestly too high. They were in a very good position to judge the gravity of the respondent council's conduct and the effect that it had had on Mr Dunnachie, a grown man of 34. At one time Mr Dunnachie was in such distress at his employers' unfeeling conduct that he was reduced to crouching with his hands around his head on the floor in the office of the council's Chief Public Protection Officer shouting 'No!' There is nothing I can usefully add to Sedley LJ's judgment on this issue, with which I agree. a
b

Appeal allowed. Permission to appeal granted.

Kate O'Hanlon Barrister.

a **R (on the application of M) v Secretary of State for Constitutional Affairs and Lord Chancellor and another**

[2004] EWCA Civ 312

b COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, KENNEDY AND NEUBERGER LJ

24, 25 FEBRUARY, 18 MARCH 2004

- c *Magistrates – Proceedings – Interim anti-social behaviour order – Without notice applications – Justices’ clerk granting applications for permission to apply for interim orders without notice – District judge granting applications – Whether procedure lawful – Whether proceedings a determination of the claimants’ rights for the purposes of their right to a fair trial – Test to be applied when making interim orders – Crime and Disorder Act 1998, s 1D – Human Rights Act 1998, Sch 1, Pt I, art 6(1) – Magistrates’ Courts (Anti-Social Behaviour Orders) Rules 2002, r 5.*

e A local authority and a police force sought interim anti-social behaviour orders (ASBOs) under the Crime and Disorder Act 1998 in respect of 66 individuals, including the claimant, who were said to be linked to the drug trade in the local area. They applied to the justices’ clerk for permission, which was granted, to make those applications without notice under r 5^a of the Magistrates’ Courts (Anti-Social Behaviour Orders) Rules 2002. The applications were then made and the district judge made the orders. The claimant applied for judicial review of the decision to make an interim order, on the ground that the order had been made at a hearing of which he had had no notice, and that r 5 of the 2002 rules was f incompatible with common law and with the right to a fair hearing provided by art 6(1)^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The application was dismissed, and the claimant appealed. He contended that the judge had erred, *inter alia*, (i) in holding that art 6(1) did not apply because an interim ASBO did not determine a claimant’s civil rights or obligations; (ii) in g holding that r 5 was not unlawful; and (iii) in his formulation of the test for making an interim order.

h **Held** – (1) There was nothing intrinsically objectionable about the power to grant an ASBO without notice. Since an application for an interim ASBO without notice could only be made when the justices’ clerk was satisfied that it was necessary for the application to be made without notice, and when the court considered that it was just to make such an order; and it could only be made for a limited period; and could be reviewed or discharged, it was impossible to say that it determined civil rights (see [39], below).

j (2) The test to be adopted by a magistrates’ court when deciding whether or not to make an interim ASBO was the statutory test, namely whether it was just

a Rule 5, so far as material, is set out at [11], below

b Article 6, so far as material, provides: ‘(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’

to make such an order. That involved consideration of all the relevant circumstances, including, in a case such as the instant case, the fact that the application had been made without notice. The court had to consider whether the application for the final order had been properly made, but there was no justification for requiring the magistrates' court, when considering whether to make an interim order, to decide whether the evidence in support of the full order disclosed an extremely strong *prima facie* case. In the instant case the correct test had been applied and there had been ample evidence to support the district judge's conclusion that it was just for an interim order to be made in respect of the claimant. The appeal would therefore be dismissed (see [39], below).

Decision of Owen J [2004] 1 All ER 1333 affirmed.

Notes

For anti-social behaviour orders, and for the right to a fair trial in civil proceedings, see, respectively, Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1262B and 8(2) *Halsbury's Laws* (4th edn reissue) para 135.

For the Crime and Disorder Act 1998, s 1D, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1697.

For the Human Rights Act 1998, Sch 1, Pt I, art 6(1), see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

For the Magistrate's Courts (Anti-Social Behaviour Orders) Rules 2002, SI 2002/2784, r 5, see 11 *Halsbury's Statutory Instruments* (2003 issue) 669.

Cases referred to in judgments

Albert v Belgium (1983) 5 EHRR 533, [1983] ECHR 7299/75, ECt HR.

Ansah v Ansah [1977] 2 All ER 638, [1977] Fam 138, [1977] 2 WLR 760, CA.

Bennett v Horseferry Road Magistrates' Court [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42, [1993] 3 WLR 90, HL.

Calvin v Carr [1979] 2 All ER 440, [1980] AC 574, [1979] 2 WLR 755, PC.

Dick v UK App No 26249/95 (23 October 1997, unreported), E Com HR.

Findlay v UK (1997) 24 EHRR 221, [1997] ECHR 22107/93, ECt HR.

Markass Car Hire Ltd v Cyprus App No 51591/99 (2 July 2002, unreported), ECt HR.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.

R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787.

R (on the application of the DPP) v Camberwell Youth Court [2003] EWHC 3217 (Admin), DC.

R v Hereford Magistrates' Court, ex p Rowlands [1998] QB 110, [1997] 2 WLR 854, DC.

R v Lord Chancellor, ex p Witham [1997] 2 All ER 779, [1998] QB 575, [1998] 2 WLR 849, DC.

S (children: care plan), Re, Re W (children: care plan) [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.

Schuler-Zraggen v Switzerland (1993) 16 EHRR 405, [1993] ECHR 14518/89, ECt HR.

- a *St Brice v Southwark London BC* [2001] EWCA Civ 1138, [2002] LGR 117, sub nom *Southwark London BC v St Brice* [2002] 1 WLR 1537.

Cases referred to in skeleton arguments

- Alsterlund v Sweden* (1988) 56 DR 229, E Com HR.
- Anderson v UK* (1998) 25 EHRR CD 172, E Com HR.
- b *APIS as v Slovakia* App No 39754/98 (13 January 2000, unreported), ECt HR.
- Bates v Lord Hailsham of St Marylebone* [1972] 3 All ER 1019, [1972] 1 WLR 1373.
- Boca v Belgium* App No 50615/99 (12 June 2001, unreported), ECt HR.
- BR v Poland* [2003] ECHR 43316/98, ECt HR.
- Bryan v UK* (1996) 21 EHRR 342, [1995] ECHR 19178/91, ECt HR.
- c *Chappell v UK* (1990) 12 EHRR 1, [1989] ECHR 10461/83, ECt HR.
- Ewing v UK* App No 14720/89 (6 May 1989, unreported), E Com HR.
- Jaffredou v France* App No 39843/98 (15 December 1998, unreported), ECt HR.
- Kress v France* App No 39594/98 (29 February 2000, unreported), ECt HR.
- Moura Carreira v Portugal* App No 41237/98 (6 July 2000, unreported), ECt HR.
- d *Noviflora Sweden Aktiebolag v Sweden* App No 14369/88 (12 October 1992, unreported), E Com HR.
- Osterreichische Schutzgemeinschaft fur Nichtraucher and Rockenbauer v Austria* App No 17200/91 (2 December 1991, unreported), E Com HR.
- R (Bono) v Harlow DC* [2002] EWHC 423 (Admin), [2002] 1 WLR 2475.
- e *R v Bradford Justices, ex p Wilkinson* [1990] 2 All ER 833, [1990] 1 WLR 692, DC.
- Ribstein v France* App No 31800/96 (16 April 1998, unreported), ECt HR.
- S (a child) (Family Division: without notice orders), Re* [2001] 1 All ER 362, [2001] 1 WLR 211.
- Verlagsgruppe News GmbH v Austria* App No 62763/00 (16 January 2003, unreported), ECt HR.
- f *Wookey v Wookey, Re S (a minor)* [1991] 3 All ER 365, [1991] Fam 121, [1991] 3 WLR 135, CA.
- X v Belgium* (1981) 24 DR 198, E Com HR.
- X v UK* (1981) 24 DR 57, E Com HR.
- g **Appeal**
- The claimant, M, appealed with permission given by Laws LJ on 12 January 2004 from the decision of Owen J on 5 December 2003 ([2003] EWHC 2963 (Admin), [2004] 1 All ER 1333) dismissing his claim against (i) the Secretary of State for Constitutional Affairs and Lord Chancellor and (ii) Leeds Magistrates' Court for judicial review of the decision of District Judge Darnton on 2 September 2003, sitting at Leeds Magistrates' Court, to make an interim anti-social behaviour order against him. Leeds City Council appeared as an interested party. The facts are set out in the judgment of the court.
- h
- j *Peter Weatherby* (instructed by *Davies Gore Lomax*, Leeds) for M.
- Timothy Otty* (instructed by the *Treasury Solicitor*) for the Secretary of State.
- Rabinder Singh QC* and *Anesh Pema* (instructed by *Nichole Jackson*, Leeds) for the interested party.

18 March 2004. The following judgment of the court was delivered.

KENNEDY LJ.

INTRODUCTION

[1] For quite some time prior to July 2003 there were increasingly serious problems with drug dealing and associated crime in the Little London area of Leeds. Police operations were difficult, and there was a lot of violent crime, which made life miserable for law-abiding citizens who lived there, so the city council and the police, in consultation with other agencies, including the Home Office, decided to seek anti-social behaviour orders (ASBOs) against those involved with drug dealing, and their associates. Intelligence was collated from intelligence records, and witness statements were obtained from police officers. By late August 2003 it had been decided to seek orders against 66 individuals said to be linked to the drugs trade in the area.

[2] On 27 August 2003 an application was made to a justices' clerk, in fact Mr Martin Lee, the legal manager of the civil team at Leeds Magistrates' Court, and he gave leave for applications for interim ASBOs to be made without notice to those named in the proposed interim orders.

[3] The applications were then made by Leeds City Council and West Yorkshire Police and on 2 September 2003 sixty six such orders were made by District Judge Darnton, sitting at Leeds Magistrates' Court, including an order against M, who was then seventeen-and-a-half years of age. The court found it just to make the interim order 'pending the determination of the application for an ASBO', which application was attached to the interim order. The interim order in summary required M not to be involved with or to harass others (prohibitions 1, 2, 3, 5, 6 and 7, most of the acts described being criminal offences), and the order also (a) by prohibition 4, required him not to enter or remain within the Little London area (marked on a plan), and (b) by prohibition 8, required him not to have contact in public with 13 named individuals. The order was granted until 15 December 2003, but meanwhile, as recorded in the order, the court required that all parties attend at the magistrates' court on 15 September 2003. The other orders which were made at the same time were in broadly similar but not identical terms.

[4] On 16 October 2003 M applied to discharge the interim order made against him. It was modified, but not discharged. Then, by letter dated 12 November 2003, Leeds City Council applied to extend the interim order to 15 March 2004, and that application for an extension was granted on 11 December 2003. Arrangements were made for the application for a full ASBO to be heard before the end of the extension period, and we were told that the hearing has been fixed for 10 March 2004.

[5] On 4 November 2003 M commenced proceedings for judicial review of the decision to make an interim order on 2 September 2003, on the grounds that the order was made at a hearing of which M had no notice. That is envisaged as a possibility by r 5 of the Magistrates' Courts (Anti-Social Behaviour) Rules 2002, SI 2002/2784, but the rule was said to be incompatible with common law and with art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). It was further asserted that the hearing was held without notice for no appropriate reason, and there were three further allegations relating to the way in which the district judge approached M's case, and the weight of evidence in

- a relation to his case. In these judicial review proceedings the Secretary of State for Constitutional Affairs was named as first defendant, and the Leeds Magistrates' Court as second defendant, but the Leeds City Council has appeared as an interested party. The matter was brought before the Administrative Court with commendable expedition, and after hearing argument on 20 and 21 November 2003 Owen J gave judgment on 5 December 2003 ([2003] EWHC 2963 (Admin),
b [2004] 1 All ER 1333), refusing M the relief sought, but granting relief to his fellow claimant, Kenny, on the basis that the evidence against him was insufficient.

FINDINGS OF THE JUDGE

- [6] The judge accepted that M and Kenny were entitled to seek judicial review even though they could have appealed against the interim ASBOs to the Crown
c Court. He rejected the attack on the legality of r 5 of the 2002 rules. He considered the test to be applied by the justices' clerk when deciding whether to give permission to apply for an interim ASBO without notice, and whether that test was applied in this case. The judge then turned to the test to be applied by the district judge when considering the applications for ASBOs, and whether the
d district judge applied the appropriate test in general, and specifically in relation to each claimant. Owen J having found against the claimant refused permission to appeal, but permission was granted by Laws LJ on 12 January 2004.

GROUND OFS OF APPEAL

- [7] The grounds of appeal assert that the judge erred in five respects: (1) in
e holding that art 6(1) of the convention did not apply because interim ASBOs do not determine M's civil rights or obligations; (2) in holding that r 5 is not unlawful, in allowing an application for an interim ASBO to be made without notice; (3) in finding that art 6 became engaged only after an interim order was made, and that s 1D(4)(b) of the Crime and Disorder Act 1998 and r 5(8) ensured
f procedural fairness; (4) in his formulation of the test for the making of an interim order; (5) in finding that this application, in relation to M, necessitated a 'without notice' procedure.

STATUTORY FRAMEWORK

- [8] Before we turn to the arguments advanced in relation to each of the five
g grounds of appeal it is necessary to set out in summary form the statutory framework in relation to ASBOs, and in particular in relation to interim ASBOs.

- [9] Section 1 of the 1998 Act enables a relevant authority (such as a local authority or the police) to apply to a magistrates' court for an ASBO if it appears to the authority that certain conditions are fulfilled with respect to any person
h aged ten or over, namely—

- j '(a) that the person has acted, since the commencement date, in an anti-social manner, that is to say, in a manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and (b) that such an order is necessary to protect relevant persons from further anti-social acts by him.'

If when the application is heard by the magistrates' court those conditions are proved then the magistrates' court may make an ASBO prohibiting the defendant from doing anything described in the order. The prohibitions that may be imposed are those necessary to protect people from further anti-social acts by the defendant. The order when made has effect for a period of not less than two

years specified in the order, or until further order, and by sub-s (8) the defendant may apply by complaint to the court which made the ASBO for it to be varied or discharged by a further order. But sub-s (9) provides that except with the consent of both parties an ASBO cannot be discharged before the end of two years beginning with the date of service of the order. Subsection (10) sets out penalties which can be imposed if a person is convicted of contravening the prohibitions set out in an ASBO. Following conviction on indictment the penalty can be up to five years' imprisonment and a fine. a
b

[10] Provision for interim ASBOs was made by s 65 of the Police Reform Act 2002, which introduced s 1D into the 1998 Act. Such an order must be for a fixed period, may be varied, renewed or discharged (see s 1D(4)(b)), and if not previously terminated ceases to have effect on the determination of the main application. The power to impose prohibitions, and the sanctions available, are the same when an interim order is made as are available in relation to a full ASBO, but a defendant may apply to the court which made an interim order for that order to be varied or discharged (see s 1D(5) referring back to s 1(8), but not to s 1(9)). An interim order can also be appealed to the Crown Court under s 4 of the 1998 Act, as amended. c
d

[11] The 2002 rules, by r 5, provide as follows:

'(1) An application for an interim order under section 1D, may, with leave of the justices' clerk, be made without notice being given to the defendant.

(2) The justices' clerk shall only grant leave under paragraph (1) of this rule if he is satisfied that it is necessary for the application to be made without notice being given to the defendant. e

(3) If an application made under paragraph (2) is granted, then the interim order and the application for an anti-social behaviour order under section 1 (together with a summons giving a date for the defendant to attend court) shall be served on the defendant in person as soon as practicable after the making of the interim order. f

(4) An interim order which is made at the hearing of an application without notice shall not take effect until it has been served on the defendant.

(5) If such an interim order made without notice is not served on the defendant within seven days of being made, then it shall cease to have effect.

(6) An interim order shall cease to have effect if the application for an anti-social behaviour order is withdrawn. g

(7) Where the court refuses to make an interim order without notice being given to the defendant it may direct that the application be made on notice.

(8) If an interim order is made without notice being given to the defendant, and the defendant subsequently applies to the court for the order to be discharged or varied, his application shall not be dismissed without the opportunity for him to make oral representations to the court. h

[12] Rule 6 makes provision for applications for the variation or discharge of an ASBO. An application must be made in writing, setting out the reasons why it is contended that the order should be varied or discharged, and the rule continues: j

'(3) Subject to rule 5(8) above, where the court considers that there are no grounds upon which it might conclude that the order should be varied or discharged, as the case may be, it may determine the application without

a hearing representations from the applicant for variation or discharge or from any other person.

(4) Where the court considers that there are grounds upon which it might conclude that the order should be varied or discharged, as the case may be, the justices' chief executive shall, unless the application is withdrawn, issue a summons giving not less than 14 days' notice in writing of the date, time and place appointed for the hearing.'

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GROUND 1, 2 AND 3

[13] Mr Weatherby, for M, began his submissions to us in relation to the first three grounds of appeal by stressing the adversarial nature of the English judicial process, which renders proceedings of which one party has no prior notice an anomaly. He accepted that it is, in certain circumstances, a necessary anomaly, but submitted that the reasons for proceeding in that way must be compelling, and the prescribed procedure should provide for what he described as a return to normality as soon as possible. In other words, even if it can be shown to be necessary to take the first step without prior notice the prescribed procedure should provide for that step being no more than provisional until, at an early date, the matter can be properly considered at a hearing of which both sides have prior notice. As Mr Weatherby pointed out, the primary legislation in relation to interim orders does not address the question of whether they can be made without notice being given to the defendant, nor does it say anything about such an order being reconsidered at a hearing of which the defendant does have notice, but it does provide for reconsideration if any party seeks to have an order varied or discharged. Mr Weatherby submits that such provision does not go far enough.

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[14] As Mr Weatherby pointed out, the magistrates' court has very little inherent jurisdiction. In general it can only exercise powers granted to it by statute, and where it is proposed to curtail freedoms the court must act with scrupulous fairness at all stages of the proceedings (see *R (on the application of McCann) v Crown Court at Manchester*, *Clingham v Kensington and Chelsea Royal London BC* [2002] UKHL 39 at [80], [2002] 4 All ER 593 at [80], [2003] 1 AC 787 in the speech of Lord Hope of Craighead). In domestic law that, Mr Weatherby submits, militates against orders being made of which the defendant has no notice, and he invited our attention to what was said by Ormrod LJ in *Ansah v Ansah* [1977] 2 All ER 638 at 642, [1977] Fam 138 at 142–143. In that case it was pointed out that orders made *ex parte* are anomalies in our system of justice which generally demands service of notice of the proposed proceedings on the opposite party. But the court recognised that they are necessary anomalies and when that power is used it must be used with great caution and only in circumstances in which it is really necessary to act immediately. In the context of family law Ormrod LJ said that such cases should be extremely rare and that if an order is to be made *ex parte* it must be strictly limited in time if the risk of causing serious injustice is to be avoided. Similar observations have been made in other reported cases.

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[15] In support of his submission that domestic law leans against orders being made without notice and where that is necessary requires an early return date, Mr Weatherby invited our attention to s 45(2) of the Family Law Act 1996, s 152(7) of the Housing Act 1996, s 3 of the Protection from Harassment Act 1997 and CPR Pt 25.

[16] Mr Weatherby submitted that the procedure under r 6 of the 2002 rules makes provision for supervening changes of circumstance. It was not designed to provide a safeguard against an interim order having been made when no such order should have been made. But of course, as he recognised, what matters is whether or not the procedure is effective for that purpose. He submitted that it is insufficiently effective because it has to be initiated by the defendant, and it is not designed to operate urgently. When an application is made under r 6 to vary or discharge an interim order the justices' chief executive is required by r 6(4) to issue a summons giving not less than 14 days' notice in writing of the date, time and place appointed for the hearing. Mr Weatherby submits that more urgency is required because when an interim order is made the civil rights and liabilities of the defendant are determined, if only for a limited period. He recognised that the fact that the burden of initiating review proceedings is cast upon the defendant cannot of itself be decisive (see *St Brice v Southwark London BC* [2001] EWCA Civ 1138 at [17], [18], [2002] LGR 117 at [17], [18], [2002] 1 WLR 1537, citing *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405) but he submitted that in each of those cases the circumstances were unusual. In *St Brice's* case there had been earlier proceedings, and in *Schuler-Zraggen's* case the person claiming relief had had an earlier opportunity to make representations in writing.

[17] Mr Weatherby invited our attention to the speech of Lord Nicholls of Birkenhead in *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10 at [71], [2002] 2 All ER 192 at [71], [2002] 2 AC 291, where it is pointed out that as a result of the implementation of the Human Rights Act 1998 art 8 rights are now part of the civil rights of those who live in the United Kingdom—in that case parents and children—for the purposes of art 6(1), requiring a degree of judicial control which will vary according to the subject matter of the impugned decision. Mr Weatherby submits that the prohibitions under an ASBO can interfere significantly with recognised freedoms, so there should be a high degree of judicial control.

[18] In *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779, [1998] QB 575 the Divisional Court was concerned with the effect on an unemployed man of an increase in the fees required to take legal proceedings, coupled with the withdrawal of an exemption from the payment of fees previously available to those in receipt of income support. The intending litigant was thus denied access to the courts. That was held to be a constitutional right of which he could only be deprived by primary legislation, not by the purported exercise of subordinate legislation in relation to fees. From that decision Mr Weatherby sought to draw support for his submission that under domestic law the state must by primary legislation make provision for an early return date in order to vest the magistrates' court with the necessary jurisdiction to make an interim ASBO without notice. Whilst we understand the submission we did not entirely understand how it was supported by the authority to which we were referred.

[19] Turning to the impact of the convention, and in particular art 6, Mr Weatherby reminded us that in *McCann's* case the House of Lords held that the making of a full ASBO is a civil proceeding which can involve a determination of civil rights, and thereby engage the right to a fair trial under art 6(1). In the present case the judge held that there is no determination of civil rights within the meaning of art 6(1) on the making of an interim ASBO without notice. Mr Weatherby submits that the judge was wrong to distinguish as he did between an interim order and a final order because an interim order can contain

a the same prohibitions and is subject to the same sanctions as a final order, so, he submits, when an interim order is being made art 6(1) must be applied, at least if it is to last for more than a minimal amount of time. In *Albert v Belgium* (1983) 5 EHRR 533 the doctors were only suspended for short periods, but that, as Mr Otty for the Secretary of State pointed out, was as a result of a final decision of the relevant professional body, so it was the procedure leading to the final decision, and not to an interim decision, which was in issue in that case.

b [20] To substantiate his reliance on art 6(1) Mr Weatherby invited our attention to *Markass Car Hire Ltd v Cyprus* App No 51591/99 (2 July 2002, unreported). A fleet of car hire vehicles were registered in the name of Markass, which Markass contended it was entitled to sell. Kemtours Ltd alleged that the vehicles were subject to a rental agreement under which it was entitled to possession, and it began proceedings against Markass. It obtained an interim order requiring Markass to deliver up the vehicles. Markass appealed. The Cyprus courts took over two years to decide that the interim order was null and void. In the European Court of Human Rights Markass alleged against Cyprus that the delay violated art 6(1), but no complaint was made as to the ex parte nature of the order. The court noted in its judgment, that what was at stake for Markass was its financial survival, because of the content of the interim order. Article 6(1) was regarded as applicable, and was found to have been violated by the delay. So Mr Weatherby submits that an interim order can attract the fair trial guarantees of art 6(1), but it is instructive to go back to the admissibility decision of the European Court in the *Markass* case, delivered on 23 October 2001, to see how the court came to the conclusion that in relation to the interim order under consideration art 6(1) could be said to apply. It noted that the interim decision partly coincided with the main action, and unless reversed by the appeal court within a short time limit was to effect, as it did for a substantial period, the legal rights of the parties resulting from the purported contract. The decision continues:

g 'In this respect the court cannot overlook the drastic character of the interim decision which concerned, as the applicant maintains, almost the whole of the company's fleet of vehicles and disposed to a considerable degree of the other relevant civil action against the applicant. The combined effect of the measure and its duration caused irreversible prejudice to the applicant's interests and drained to a substantial extent the final outcome of the proceedings of its significance. In these circumstances, the court considers that the interim decision in effect partially determined the rights of the parties in relation to the final claim against the applicant in civil action 3315/98, and thereby acquired the character of a "dispute" over a civil right and obligation to which art 6 of the convention was applicable.'

h In the present case Mr Weatherby submits that because ASBO prohibitions can interfere with fundamental rights the character of the dispute renders art 6(1) applicable to the interim order, and in particular to the process by which it comes into existence.

j [21] As to the standard of fair process which is required by common law and by the convention, Mr Weatherby submitted that context is vital. The standard required depends on the subject matter, and he identified three categories, namely: (a) administrative decisions; (b) quasi-judicial decisions, and (c) judicial decisions. In relation to the first of those categories he invited our attention to

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295 which concerned the powers of the Secretary of State in relation to planning matters. Lord Hoffmann said (at [69]): 'In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them.' Having referred to art 6(1) he said (at [74]):

'... I would have said that a decision as to what the public interest requires is not a "determination" of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as art 6 has in contemplation ... The administrator may have a duty, in accordance with the rule of law, to behave fairly ("quasi-judicially") in the decision-making procedure. But the decision itself is not a judicial or quasi-judicial act. It does not involve deciding between the rights or interests of particular persons. It is the exercise of a power delegated by the people as a whole to decide what the public interest requires.'

As an example of his second category Mr Weatherby invited our attention to *Calvin v Carr* [1979] 2 All ER 440, [1980] AC 574, in which the Privy Council considered a decision of the Australian Jockey Club to disqualify a part-owner of a horse and a jockey. The original decision was that of the stewards from whom there was an appeal to the committee of the club. The judge held that although the stewards might have failed to observe the rules of natural justice in certain respects the hearing before the committee was a fresh hearing and cured any defects. In the particular case that approach was approved by the Privy Council, but Lord Wilberforce said ([1979] 2 All ER 440 at 447, [1980] AC 574 at 592) that—

'no clear and absolute rule can be laid down on the question whether defects in natural justice appearing at an original hearing, whether administrative or quasi-judicial, can be "cured" through appeal proceedings.'

[22] In *Albert v Belgium* (1983) 5 EHRR 533 the European Court said (at 541–542 (para 29)) that disciplinary proceedings before a professional body which concerned a civil right must themselves comply with art 6(1) or be subject to subsequent control by a judicial body with full jurisdiction. So Mr Weatherby contends that in relation to his category of quasi-judicial decisions it may be sufficient if there is at least fairness at one level, but he contends that where, as here, the proceedings are wholly judicial there must be fairness at every stage. To support that proposition he invited our attention to *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, [1997] 2 WLR 854 where the Divisional Court was concerned with procedural irregularities in the magistrates' court, from which the defendant could have appealed to the Crown Court. It was held that a party complaining of procedural unfairness or bias in the magistrates' court should not be denied leave to move for judicial review, and left to whatever rights he might have in the Crown Court.

[23] The same approach, Mr Weatherby submits, can be seen to have been adopted in relation to court-martial proceedings by the European Court in *Findlay v UK* (1997) 24 EHRR 221. It was said (at 246 (paras 78–79)) that there were fundamental flaws in the court-martial system which were not remedied by the presence of safeguards, and could not be corrected by subsequent review proceedings:

a 'Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of Article 6(1).'

g GROUNDS 4 AND 5

b [24] As to his fourth ground of appeal, where he criticises the judge's test for the making of an interim order, without notice, Mr Weatherby reminded us that in *R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC* [2002] 4 All ER 593, [2003] 1 AC 787 the members of the House of Lords agreed that, given the seriousness of the matters involved, before making a full ASBO the magistrates must be sure that the defendant has acted in an anti-social manner. But of course we are only concerned with an interim order. As to that, the district judge, having considered the need for action, the role of the defendants, and the need for simultaneous and urgent action, said that he was quite satisfied that there was sufficient evidence that the main application was properly made, and that it was just to make an interim order until resolution of the full applications. He also had express regard to proportionality, saying that he was satisfied that the application was proportionate, that the right of the defendants to a private life and a fair trial had not been offended, and that it was therefore proper to grant the application. Owen J indorsed that approach. Mr Weatherby submits that on an application without notice a more rigorous test was required. The applicants should have been required to put forward an extremely strong prima facie case that the full application would succeed on its merits.

f [25] The fifth ground of appeal concerns the evidence in relation to M. Mr Weatherby contended that there was no need in his case for an application for an interim order to be made without notice. Although there was clearly a serious situation in the area, police operations had been going on for over a year, and the schedule of incidents allegedly involving the defendant extended back over a considerable period. As far as he was concerned there was no obvious catalyst. There were no identified vulnerable witnesses, and if notice had been given of intended applications any consequential delay could have been minimised by good case management.

g THE RESPONSE BY THE SECRETARY OF STATE AND LEEDS CITY COUNCIL

h [26] Mr Otty, for the Secretary of State, submitted that this appeal gives rise to five questions, namely: (1) whether the procedure to obtain an interim order without notice is in conflict with convention law because there is no automatic early return date; (2) whether such a procedure conflicts with natural justice and/or abrogates the right of access to the courts; (3) the proper test to be applied when deciding whether or not to make an interim order where no notice of the application for the order has been given (ground of appeal 4); (4) whether the test was properly applied in this case (ground of appeal 5), a matter on which we heard from Mr Rabinder Singh QC for the city council; (5) whether the relief sought in these proceedings is too broad. Mr Otty began by pointing out the safeguards which primary and secondary legislation have put in place to ensure, as far as possible, that interim orders without notice are only sought and made when required. First of all there can be no application for such an order without the leave of the justices' clerk, who can only grant leave 'if he is satisfied that it is necessary for the application to be made without notice being given to the

defendant' (see r 5(2) of the 2002 rules). Leave having been given the application then has to be made to a magistrates' court, which can only make the order if it considers it just to do so. If it decides to make an order it must give reasons in writing, because r 4(6) requires the order to be in the form set out in Sch 6, and that form makes provision for reasons. The form also requires the court to specify when the order will end, and either to fix a return date when the matter will be brought back before the court or to fix a hearing date for the main application. Unlike some interlocutory orders made without notice an interim ASBO is ineffective until it is served (and ceases to be available for service if not served within seven days) so a defendant has to be aware of its terms before he can be bound by them. He can apply to vary or discharge the order at any time, and if the order was made without notice he must then be heard. Rule 6(4) is clumsily drafted in relation to interim orders made without notice, because when an application is made by a defendant to vary or discharge such an order he must be heard, whether or not the court considers that there are grounds for granting him the relief sought, but the rule can be interpreted as requiring the justices' chief executive to give 14 days' notice of the hearing date. Such a period is, we accept, realistic to enable the parties to prepare properly for the hearing, and in this context it is relevant to remember the relatively limited extent to which, at least in this case, the freedoms of the defendant are being impaired.

[27] As the judge held ([2004] 1 All ER 1333 at [61]), and as Mr Otty accepts, if an application is made by a defendant to vary or discharge an interim order made without notice the defendant does not assume any burden of proof. The relevant authority has to justify the continuation of the order in its present form, and the defendant can still appeal to the Crown Court or seek relief by way of judicial review.

[28] Mr Otty pointed out that the magistrates' court does have some inherent jurisdiction. It can protect itself from abuse of process, as indicated by the House of Lords in *Bennett v Horseferry Road Magistrates' Court* [1993] 3 All ER 138, [1994] 1 AC 42 and by the Divisional Court in *R (on the application of the DPP) v Camberwell Youth Court* [2003] EWHC 3217 (Admin) at [63], a case concerned with the power to reopen a decision as to mode of trial. So, as Mr Otty submits, a magistrates' court could reconsider an interim ASBO if for example, it was alleged to have been obtained in bad faith, but it is difficult to envisage that situation arising in circumstances where the court would not also have jurisdiction pursuant to r 6.

[29] There are, as Mr Otty submitted, distinctions to be drawn between interim and final ASBOs. First, and most obviously, an application for a full ASBO is the initiating step taken by an authority if it appears to the authority that the specified conditions are fulfilled. An application for an interim ASBO is ancillary and the application for the interim order, or the interim order if already made, will become ineffective if the application for an ASBO is withdrawn. In order to make a full order the magistrates' court must be sure that the defendant has acted in an anti-social manner, and must judge that the order is necessary to protect persons in the area from further anti-social acts (see *McCann's case* [2002] 4 All ER 593 at [37], [2003] 1 AC 787 at [37]). For an interim order the legislation requires a different approach. The magistrates' court may make such an order where it considers that it is 'just' to make it, pending the determination of the main application. So the approach of the court must be different. Although it must always act fairly it is patently not inhibited from acting unless it is *sure* that the defendant has acted in a particular way. We were told that in practice the

a time span from the initiation of proceedings to a final order is usually between three and six months. An interim order must be for a fixed period, whereas a final order must be for at least two years, and may be until further order. Once a final order has been made it cannot be discharged within the first two years, except by consent, but an application to vary or discharge an interim ASBO can be made at any time. As already noted, the form which must be used to make an interim order requires the court to order all parties to attend on a specified date unless the date for the hearing of the main application can be specified, in which case the summons requiring attendance will relate to that date. It follows that from first to last an interim order will be kept under the court's supervision and control. In the case with which we are concerned all parties were required to attend court on 15 September 2003, 13 days after the order was made, and although that attendance was not pursuant to any summons issued under r 6(5), it seems to us that the court must then have been able to act to vary or discharge the order, otherwise there would seem to be no justification to fix that return date.

d [30] Finally in terms of distinctions, as Mr Otty pointed out, whereas an ASBO is the end of the road an interim ASBO can facilitate a fair and proper hearing of the full application by reducing the scope for witness intimidation, allowing for orderly resolution of overlapping applications, and ensuring that further instances of anti-social behaviour are not allowed to take place pending the determination of the substantive application.

e [31] Turning to the first of his five questions, Mr Otty submitted that when an interim order is being sought without notice art 6(1) of the convention is not engaged because no determination is being made of the defendant's civil rights. That is not the case with a final order (see *McCann's* case) but a final order is made on notice, it takes effect immediately, and it cannot be discharged for at least two years. By contrast an interim order can be made without notice, and if so made takes effect only on service. It exists for a defined period, and can be brought back before the court at any stage. Its impact on the defendant may be similar to that of a final order, and that can be relevant, as in *Markass Car Hire Ltd v Cyprus*, but as Clayton and Tomlinson say in their *Law of Human Rights* (2000) (p 623 (para 11.157)) in the passage cited by the judge, determination in this context refers to the final decision on the merits of the case, and so in general applications for interim relief are by their nature not determinative. They are only regarded as determinative if they cause irreversible prejudice to the defendant's interests, and drain to a substantial extent the final outcome of the main proceedings of its significance, as was the case in the *Markass* case.

h [32] In the present case the interim order is not drastic in its effect, it causes no significant irreversible prejudice, it is of limited duration, allows for prompt discharge or variation, and is accompanied by a host of safeguards. It certainly does not drain the proceedings for a final order of its significance. Although the matter is not critical in this case Mr Otty made it clear that the Secretary of State does not accept that art 6 has any application even to attempts to set aside or vary interim ASBOs, but it is of course accepted that the requirements of natural justice apply at every stage.

j [33] Mr Otty did not accept that anything of value emerges from an attempt to categorise decisions according to whether they are administrative, or made by a quasi-judicial or judicial body. As he pointed out, it would be odd if the participation of lawyers were to render procedures even more open to challenge but he submitted that even if the procedure to obtain and maintain an interim

order did have to comply with art 6, in fact it did so. The first thing to be recognised was that this was a civil procedure, and under convention law contracting states have greater latitude when dealing with civil cases. The interests of others such as victims, witnesses, and the community at large, can be taken into consideration (see *McCann's case* [2002] 4 All ER 593 at [7], [113], [2003] 1 AC 787 at [7], [113]). In the civil context the whole process by which rights are determined must be taken into consideration to see if art 6 is breached, and there need not be compliance at every stage (see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929, [2003] 2 AC 295, especially per Lord Clyde at [152]). *R v Hereford Magistrates' Court, ex p Rowlands* [1998] QB 110, [1997] 2 WLR 854 can be distinguished because it was concerned with criminal trials and the defect relied upon could not be cured at the same judicial level, only by an appeal. That is not so in this case. Similarly *Findlay v UK* (1997) 24 EHRR 221 was concerned with criminal proceedings, so art 6 had to apply at every level, and in fact the procedure was found to be flawed at every stage, which cannot be said in this case.

[34] As noted above it is not intrinsically wrong to require the person whose rights are in issue to initiate process, or to apply for an oral hearing. In *Schuler-Zraggen v Switzerland* (1993) 16 EHRR 405 there had been no earlier inter partes hearing, and the relevant rules of procedure provided for the possibility of a hearing on the application of one of the parties or of the court's own motion. The European Court observed (at 433 (para 58)):

'As the proceedings in that court generally take place without a public hearing, Mrs. Schuler-Zraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered, therefore, that she unequivocally waived her right to a public hearing in the Federal Insurance Court.'

Mr Otty submitted that there is no reason why the institution of proceedings without notice should have any impact on the fairness of the proceedings as a whole, provided that appropriate guarantees are available when the matter is considered inter partes. That, he submitted, is illustrated by the admissibility decision in *Dick v UK* App No 26249/95 (unreported) decided on 23 October 1997. The applicant was a Canadian citizen, with a permanent address in Jersey, but living in Germany. Whilst on a visit to Jersey he was arrested and incarcerated because of money owed in family proceedings in the United States. He was not even allowed to collect insulin which he required, but the European Commission of Human Rights held that the draconian interim measure had no impact on the fairness of the proceedings as a whole. Later hearings were inter partes, the applicant was legally represented, and he was ultimately successful.

[35] Mr Otty then turned to his second question, namely whether the procedure for obtaining an interim order without notice is in breach of natural justice or interferes improperly with access to courts. As he pointed out, there are many types of orders which are made without notice, for example, freezing orders, search orders and non-molestation orders in family proceedings. That is because they are considered to be necessary and safeguards are in place to enable the absent party to be heard. That, Mr Otty submitted, applies equally to interim ASBOs and in this context it is important to note that where such an order is

a obtained without notice it is ineffective until served, and the person affected has an immediate right to have it varied or discharged.

[36] As to question 3, the proper test to be applied when deciding whether or not to make an interim order without notice, Mr Otty pointed out that the test applied by the judge reflected s 1D(2) of the 1998 Act. An order can be made when 'the court considers that it is just to make an order', and in guidance given b by the Home Office in November 2002 it is stated that—

c 'When considering when to make an interim order the court will be aware that it may not be possible at the time of the interim order application to compile all the evidence that a full ASBO is necessary. Rather the court will determine the application for the interim order on the question of whether the application for the full order has been properly made and whether there is sufficient evidence of an urgent need to protect the community.'

d There is, Mr Otty submitted, no statutory or other justification for Mr Weatherby's submission that the test should be more stringent, and in this context the judge was right to have regard to matters such as the need to protect members of the public, including children, the seriousness of the behaviour in issue, the need to take urgent action, the extent to which action will be rendered e less effective if notice is given, and the relatively limited impact of an order upon the defendant.

[37] That brings us to Mr Otty's fourth question, namely whether the test was properly applied in this case, and as to that we heard from Mr Rabinder Singh. He pointed out that on the evidence it is not right to say that the police operation had been going on for many months, and the need for an interim order without f notice was set out in writing as part of the application for the interim order. That paragraph is worth quoting. It reads:

g 'There is an urgent need for an order to be made without notice. Such an order is needed as the community in which the defendant has committed the acts of anti-social behaviour and where the activities of drug sale and usage are perpetrated (being the same area) are at significant risk of retaliatory behaviour from the defendant and his associates. The residents and those engaged in a lawful activity in the area are extremely concerned that if an interim order is not made immediately they will be victimised before any h on-notice hearings could occur. In the light of the organisation of the drug "industry" in this area if orders are not made without notice the residents will be without protection for some considerable period as hearings for on-notice hearings could not be capable of being heard for many weeks especially as the defendant would be likely to seek legal advice and seek an adjournment pending such advice. The orders which are sought in the interim are not j draconian and only reflect basic levels of reasonable behaviour and an exclusion for non-residents from the particular area where drugs are being sold and taken on a daily basis. The defendant will have the opportunity to contest these matters at an on-notice hearing and to contest the making of a final order and the more restrictive terms at a final hearing.'

Mr Martin Lee set out in writing his reasons for concluding that it was necessary for the application for an interim order to be made without notice, and again it is worth setting out what he said:

‘Having read the working documents setting out the incidents complained of and having heard from (counsel) the detail and background to these applications, I am satisfied that it is necessary that these applications are heard without notice for the following reasons. 1. There are a number of potential witnesses who would be able to provide first-hand evidence but would be unwilling to do so if notice that they were to give evidence were given because of fear of reprisals from those involved. 2. The incidents complained of, all related in one way or another, to large scale drug dealing, are continuing daily and I accept that there is a risk that there could be an escalation before the matters could all be listed for an on-notice application. 3. Giving notice of the applications might undermine the overall effectiveness of any orders that might be granted by the court. I am mindful that granting permission for these applications to be heard without notice does affect the rights of the defendants named below, as they will not have an immediate opportunity to challenge the making of the orders. However, I am told that the applications made at the interim stage will be somewhat less far-reaching than the orders that will be sought at a hearing on notice. I am therefore satisfied that the rights of the defendants will be protected sufficiently in view of the fact that they will have an opportunity of a full hearing within a reasonable period of time, that the orders will be less onerous than those ultimately sought in respect of each person and that, in effect, the order will seek to remove the defendants from the area where they do not live and do not have any apparent legitimate reason for visiting.’

When the matter came before District Judge Darnton he was addressed about not only the general situation but also the position of each defendant in turn. In the case of M there was, attached to the application for a full order, a schedule setting out in the first section 13 incidents of anti-social behaviour in the relevant area in which M was alleged to have been involved between March and August 2003. The district judge had before him a detailed bundle of statements, which we have seen. He also heard oral evidence from Det Sgt Thompson and saw a video film of what was said to be drug dealing in the area. It was against that background that he reached his conclusions, as set out in the judgment of Owen J ([2004] 1 All ER 1333 at [18]). Plainly, it was submitted, if the test adopted by the district judge was correct, then his conclusions must stand because there was before him a wealth of evidence to support it.

[38] Mr Otty’s fifth question addresses the remedy claimed in these proceedings. The judge found it unnecessary to decide whether the court had power to quash r 5. Mr Otty submitted that even if the appeal were to succeed that would not be an appropriate remedy. In accordance with s 3 of the Human Rights Act 1998 the procedural rule could and should be read in such a way as to overcome the identified defect. Mr Weatherby submitted that would not be possible because it would be tantamount to rewriting legislation.

CONCLUSION

- a [39] In the light of the helpful submissions which are summarised above it seems to us that it is possible to reach certain conclusions. (1) Although it is unusual for a court in this country to make an order against a person who has not been given notice of the proceedings that course is adopted when it is necessary to do so, and subject to safeguards which enable the person affected at an early stage to have the order reviewed or discharged. (2) The more intrusive the order b the more the court will require proof that it is necessary that it should be made, and made in the particular form sought, but there is nothing intrinsically objectionable about the power to grant an interim ASBO without notice. (3) It is important to note that an interim ASBO made without notice is ineffective until served, and when made as required in the standard form it does make provision c for all parties to attend at court, either on a return date or on a date fixed for the hearing of the full application. If it be the former then, in our judgment, it would be open to the court to reconsider the order, either to vary it or discharge it, if it considered that to be the appropriate course. We were told by Mr Rabinder Singh that it is the practice at Leeds always to ask the court to fix an early return d date—in the present case it was 13 days after the date of the order, and that seems to us to be desirable. Reliance upon the date for the hearing for the full application would seem to be undesirable unless it can be heard at a very early date. (4) From the time that the order is served the person upon whom it is served can apply under r 6 to have the order varied or discharged, and the requirement that the justices' chief executive give not less than 14 days' notice e of the hearing of the application is in our judgment a sensible and realistic procedural requirement, which does not undermine the right of the person affected to seek rapid relief. Nothing, in our judgment, can be made of the fact that under r 6 it is for the parties and not for the court to seek a review. (5) Because an application for an interim order without notice can only be made f when the justices' clerk is satisfied that it is necessary for the application to be made without notice, and because the order can only be made for a limited period, when the court considers that it is just to make it, and in circumstances where it can be reviewed or discharged as indicated above, it seems to us to be impossible to say that it determines civil rights. Certainly for a time it restricts certain freedoms, and the restriction can be enforced by sanctions, but that is the g nature of any interim order, so in our judgment provided the interim order follows its normal course art 6 of the convention will not be engaged. (6) Although art 6 is not engaged the procedure must be fair, and there is no apparent unfairness in the procedure we have had to examine. (7) If art 6 were engaged it would be appropriate to look at the process as a whole, bearing in h mind that the application for an ASBO is a civil procedure to which an application for an interim order is ancillary, and if that approach were adopted no contravention of the requirements of art 6 could be discerned. (8) The test to be adopted by a magistrates' court when deciding whether or not to make an interim order must be the statutory test, whether it is just to make the order. That involves consideration of all relevant circumstances, including in a case such j as this the fact that the application has been made without notice. Obviously the court must consider whether the application for the final order has been properly made, but there is no justification for requiring the magistrates' court, when considering whether to make an interim order, to decide whether the evidence in support of the full order discloses an extremely strong *prima facie* case. (9) The correct test having been used in the present case, there was ample

evidence to support the conclusion of District Judge Darnton that in relation to M it was just for an interim order to be made. The fact that no vulnerable witnesses were identified by name was of no significance when the available evidence and information was considered as a whole. (10) There is therefore no substance in any of the grounds of appeal, and it is unnecessary to consider the availability of the relief sought. If the procedure had been successfully impugned it would certainly be necessary to consider the possible impact of s 3 of the 1998 Act before deciding to quash r 5. For those reasons we therefore dismiss this appeal. a
b

Appeal dismissed.

Kate O'Hanlon Barrister.

R v Bentham

[2003] EWCA Crim 3751

COURT OF APPEAL, CRIMINAL DIVISION

KENNEDY LJ, CURTIS AND FORBES JJ

5 DECEMBER 2003.

Firearms – Possession of firearm or imitation firearm at time of committing offence – Defendant positioning his hand inside his jacket during robbery so as to make it appear he had a firearm – Whether possession of imitation firearm – Firearms Act 1968, ss 17(2), 57(4).

A and his partner B were asleep at home. The defendant woke them up. He had his hand inside his jacket, forcing the material out so as to create the impression that he had a gun. He told them to give him all the money in the house and all the jewellery B was wearing, 'or else I'll shoot you'. A handed over a large amount of money. The defendant was arrested and charged with offences including 'possession' of an imitation firearm in the course of a robbery, contrary to s 17(2)^a of the Firearms Act 1968. Section 57(4)^b of the 1968 defined an imitation firearm as '[a]nything which has the appearance of a firearm'. At trial the defendant sought a ruling from the judge that fingers inside a jacket could not constitute possession of an imitation firearm. The judge ruled in favour of the Crown. The defendant then pleaded guilty. He appealed against conviction, contending that the judge's ruling had been incorrect in that a person could not be in possession of his own fingers and that the offence required that the offender have an instrument with him.

Held – Fingers inside a jacket with the appearance of a firearm could constitute possession of an imitation firearm within s 17(2) of the 1968 Act. Section 17(2) was clearly designed to protect victims presented with what they reasonably believed to be a firearm or an imitation firearm. Had the matter in the instant case gone to trial the jury would have had to consider whether at the critical time when threatening A and his partner the defendant had in his possession anything which had the appearance of a firearm. If in the opinion of the jury an item had had the appearance of a firearm it would not have mattered whether the item was made of plastic, or wood, or fabric stiffened by a finger. Accordingly, the ruling of the judge had been correct, and the appeal would therefore be dismissed (see [23]–[26], below)

R v Morris (1984) 79 Cr App Rep 104 applied.

Notes

For the offence of possession of firearms while committing offences, see 11(1) *Halsbury's Laws* (4th edn reissue) para 232.

For the Firearms Act 1968, ss 17, 57, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 15, 461.

^a Section 17, so far as material, is set out at [7], below

^b Section 57, so far as material, is set out at [8], below

Cases referred to in judgment

Brutus v Cozens [1972] 2 All ER 1297, [1973] AC 854, [1972] 3 WLR 521, HL. a

Lockyer v Gibb [1966] 2 All ER 653, [1967] 2 QB 243, [1966] 3 WLR 84.

R v Pawlicki [1992] 3 All ER 902, [1992] 1 WLR 827, CA.

R v Debreli [1964] Crim LR 53, CCA.

R v Hussain (Iftikhar) [1981] 2 All ER 287, [1981] 1 WLR 416, CA.

R v Kelt [1977] 3 All ER 1099, [1977] 1 WLR 1365, CA. b

R v Morris (1984) 79 Cr App Rep 104, CA.

R v Sloan (1974) 19 CCC (2d) 190, BC CA.

Warner v Metropolitan Police Comr [1968] 2 All ER 356, [1969] 2 AC 256, [1968] 2 WLR 1303, HL. c

Appeal

Peter Bentham appealed against his conviction on 30 July 2002 in the Preston Crown Court before Judge Badley of the offence of possession of an imitation firearm contrary to s 17(2) of the Firearms Act 1968 following his plea of guilty to that offence after unsuccessfully seeking a ruling from the judge that fingers inside a jacket giving the appearance of having a firearm could not constitute possession of an imitation firearm. The facts are set out in the judgment of the court. d

Charles Lander (assigned by the Registrar of Criminal Appeals) for the appellant. e

Ian Dacre (instructed by the Crown Prosecution Service) for the Crown.

KENNEDY LJ.

[1] On 30 July 2002 in the Crown Court at Preston the appellant pleaded guilty to robbery, which was count 1 in the indictment and doing acts intending and intended to pervert the course of public justice, which was count 3. Sentence was then adjourned pending trial in respect of possessing an imitation firearm during the course of a robbery, which was count 2, to which the appellant pleaded not guilty. On 5 September 2002 the appellant appeared for trial on count 2 before Judge Badley. Before the commencement of the trial proper a ruling was sought from the judge as to whether or not fingers inside a jacket could constitute possession of an imitation firearm. f

[2] For the purposes of the ruling the facts were taken to be that on 24 May 2002 at about 6.20 am, at a time when he believed that he was owed money as a result of work done for a man named Angus, the appellant went to the home of Angus and into his bedroom where he was asleep in bed with his partner. The appellant had his hand inside his jacket, forcing the material out so as to create the impression that he had a gun. In a loud and aggressive manner he said, 'I want every penny in the house and all the jewellery off her neck', meaning the neck of Angus' partner Barbara, 'or else I'll shoot you'. In the result Mr Angus in fear handed over a significant amount of money and the appellant left. g

[3] The police were informed and he was arrested later that day. h

[4] The judge ruled in favour of the Crown and the appellant then pleaded guilty on a written basis of plea which reads: j

'The defendant pleads guilty on the basis that it was his fingers inside his jacket that gave the appearance to the witnesses, Angus and Knowles, that

a the defendant had in his possession a gun. The defendant denies that he had any object inside his jacket.'

That was signed by counsel on his behalf.

[5] Counsel for the prosecution endorsed that saying: 'The Crown do not necessarily accept this version but they are not in a position to gainsay it.' That was also signed.

b [6] The sole issue raised in this appeal is whether or not that ruling was correct. Mr Lander appears on behalf of the appellant and he contends that the offence charged in count 2 of the indictment, which was possessing an imitation firearm during the course of a robbery contrary to s 17(2) of the Firearms Act 1968, has to be strictly construed in accordance with its wording. With that we

c agree.

[7] The relevant wording reads thus:

'If a person at the time of his committing ... an offence specified in Schedule 1 to this Act [robbery is there specified], has in his possession a firearm or imitation firearm, he shall be guilty of an offence ...'

d [8] In s 57(4) of the Act an imitation firearm is defined as: 'any thing which has the appearance of a firearm ...'

[9] Mr Lander submits that a person cannot have or be in possession of his own fingers, and when opening his submissions to us today he stressed the words 'a person' and 'in his possession'. He submits that those latter words in s 17(2) and 'with him' in s 18(1), which sets out a similar offence, are inappropriate when

e applied to fingers.

[10] In his skeleton argument he refers to the case of *R v Kelt* [1977] 3 All ER 1099, [1977] 1 WLR 1365, where the appellant was charged under s 18(1) of the 1968 Act with having a firearm with him with intent to commit an indictable

f offence. The appeal succeeded because the trial judge did not direct the jury as to the need for the requisite intent. That, of course, is not the issue in the present case.

[11] He also invited our attention to the decision of this court in *R v Pawlicki* [1992] 3 All ER 902, [1992] 1 WLR 827. That was also a case under s 18(1) of the 1968 Act. Robbers' guns were in their locked car outside the premises where

g the robbers were arrested, but it was held that they were sufficiently accessible for those guns to be 'with them'. In that case Steyn LJ, giving the judgment of the court, made some observations about the overall purpose of the legislation which were referred to by Mr Dacre when making his submissions on behalf of the Crown before us.

h [12] He said this:

'That purpose [that is to say the purpose of the 1968 Act in broad terms] ... is to combat the use of the firearms in and about the commission of crime and to protect public safety. The legislative technique, in so far as it is relevant, involves prohibitions on possession of firearms, and prohibitions

j on having a firearm. It was intended to be a relatively comprehensive statute.' (See [1992] 3 All ER 902 at 907, [1992] 1 WLR 827 at 831-832.)

[13] As to 'possession' Mr Lander drew our attention to a number of other authorities, his submission being that that word should be given, as he put it, its ordinary sense and that a person cannot be said to be in possession of any part of his own anatomy. We were invited to consider the decision of this court in

Lockyer v Gibb [1966] 2 All ER 653, [1967] 2 QB 243. In that case it was the decision of the court that the alleged offender had to know that she had an article in her holdall even if she did not know that it was a drug. We were also invited to consider *Warner v Metropolitan Police Comr* [1968] 2 All ER 356, [1969] 2 AC 256, where the issue before the House of Lords related to tablets in a box in a van. It was held that it was necessary to know that they were there, but it was not necessary to know the quality of the particular items as found by scientific analysis. a
b

[14] In *Brutus v Cozens* [1972] 2 All ER 1297, [1973] AC 854, there was, again, some discussion of the issue of possession and the giving effect to the ordinary meaning of words. In *R v Hussain (Iftikhar)* [1981] 2 All ER 287, [1981] 1 WLR 416 the court was concerned with possession of a firearm without a certificate, in that case the implement in question being a tube with a spring. The question which had to be decided was whether it amounted to a firearm given that it could in fact fire cartridges. c

[15] Mr Lander was not so much inviting us to follow any particular authority, but to give effect to what, he submits, would be an ordinary commonsense approach to these words. The difficulty, of course, that he faces is that the word 'possession' can be used in many circumstances. As was put to him during the course of his submissions, it is common place for people to say of someone else that 'he is in full possession of his faculties' or, for example, if they have had the misfortune to lose a limb that 'he has lost the lower part of his leg'. So the concept of possession is in fact frequently applied and understandably applied to various parts of the human body. d
e

[16], [17] The high watermark of the submission on behalf of the appellant is to be found in the Canadian case of *R v Sloan* (1974) 19 CCC (2d) 190. There the British Columbia Court of Appeal was considering a charge of robbery contrary to s 302 of the Criminal Code which, so far as material, provides that:

'Everyone commits robbery who ... (d) steals from any person while armed with an offensive weapon or imitation thereof.' f

[18] The information alleged attempted robbery from an hotel while armed with an imitation of an offensive weapon, to wit a gun. The evidence showed that the appellant had come into the hotel at 2.40 am with his head and upper body partially covered by a bed sheet. He ordered the night desk man to open the office where the money was. The night desk man refused. He was prodded backwards in the chest by something protruding under the sheet. He said, 'Don't push me, I've got a couple of cracked ribs'. The appellant threatened him, saying, 'If you don't open the door you'll be in worse shape'. The desk man then turned and as he did he hit the protruding object, which he realised was a finger not a gun barrel, and the appellant then fled. g
h

[19] McIntyre JA giving the judgment of the court said (at 192) that there was no contravention of s 302(d) of the Code. He said:

'To come within s. 302(d) the person charged must be armed with an offensive weapon or an imitation thereof. In this case all that is shown is that the appellant in this adventure simulated the conduct of a man armed with a weapon. He acted a part or played out a pantomime to give the impression that he had a weapon.' j

[20] And a little later:

a 'To arm oneself with a weapon means equip oneself, to acquire, to become possessed of some instrument which is either a weapon or an imitation of a weapon. I am not of the opinion that in these circumstances a man can be armed with his own finger and I am satisfied that the word "imitation" as used in s. 302(d) of the Criminal Code refers to an imitation of the weapon and cannot be stretched to include a simulation of conduct or actions.'

b [21] In *R v Morris* (1984) 79 Cr App Rep 104 the Canadian case of *R v Sloan* (1974) 19 CCC (2d) 190 was considered in this court. The two appellants had committed a robbery at a jeweller's shop when one of them was armed with two metal pipes taped together. They were convicted of, amongst other things, having with them an imitation firearm with intent to commit an indictable offence contrary to s 18(1) of the 1968 Act. The woman in the shop believed she was being threatened with a double-barrelled shotgun, but counsel for the appellants cited *R v Sloan* in support of a submission that the test of what amounted to an imitation firearm was an objective test.

d [22] In *R v Debreli* [1964] Crim LR 53 it had been said that the wording of the definition section shows that the question to be asked is, 'does the thing look like a firearm?', and that is a question for the jury.

[23] In *R v Morris* (1984) 79 Cr App Rep 104 at 107, after referring to *R v Debreli*, Dunn LJ continued:

e 'In the view of this Court, the material time for the jury to consider is the time when the accused actually had the thing with him ... if there is any doubt about that it is resolved by the wording of section 18(1) itself, which states that the offence is committed if the accused had the necessary intent while he had the firearm or imitation firearm with him. The Court is not, therefore, concerned with whether or not the thing looked like a firearm at some other time. In considering whether or not the thing looked like a firearm at that time, the jury are entitled to have regard to the evidence of any witnesses who actually saw the thing at that time, together with their own observations of the thing itself, if they have seen it ...'

So the objective test was clearly rejected.

g [24] In this case Mr Lander, as it seems to us, is attempting once again to derive assistance from the decision in *R v Sloan*. But he does, as it seems to us, have to have regard to the object of the section which we have to consider, namely, s 17(2). That section, as we read it, is clearly designed to protect victims presented with what they reasonably believed to be a firearm or an imitation firearm. We agree with Mr Dacre that one has to, in accordance with what was said by this court in *R v Pawlicki* [1992] 3 All ER 902, [1992] 1 WLR 827, adopt, to some extent, a purposive approach to the interpretation of the 1968 Act. Many of its sections, as he pointed out, ss 16A, 17(1) and (2), 18(1) and 20, all deal with imitation firearms and the protection which the Act seeks to afford is protection to the public who are being put in fear.

j [25] Consequently, if that approach is adopted in relation to the statutory words with which we are confronted, one is left, as it seems to us, in this position. In our judgment, the wording of the English statute as explained in *R v Morris* shows that the ruling of the circuit judge in the present case was right. If the matter had gone to trial (and what is important is the view of the jury), the jury would have had to consider whether at the critical time when threatening Mr Angus and his partner the appellant had in his possession an imitation firearm.

That is to say, having regard to the statutory definition, anything which had the appearance of a firearm. We cannot see that it mattered whether or not that item was made of plastic, or wood, or simply anorak fabric stiffened by a finger, if in the opinion of the jury at the relevant time it had the appearance of a firearm then, in our judgment, they were entitled to find that the offence was made out.

[26] Accordingly, we dismiss this appeal against conviction.

Appeal dismissed. The court refused permission to appeal to the House of Lords but certified that a point of general public importance was involved in its decision, namely whether it is an offence pursuant to s 17(2) of the Firearms Act 1968 for an offender so to position his hand inside a garment which he is wearing as to make it appear that he has a firearm.

Sanchia Pereira Barrister.

1 April 2004. The Appeal Committee of the House of Lords gave leave to appeal.

R (on the application of Junttan Oy) v Bristol Magistrates' Court

[2003] UKHL 55

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD SLYNN OF HADLEY, LORD STEYN, LORD
HOBHOUSE OF WOODBOROUGH AND LORD MILLETT

6, 7 MAY, 23 OCTOBER 2003

Health and safety at work – Manufacturer's duties – Manufacture and supply of machines – Prosecution – Whether prosecution in respect of unsafe machines to be brought under domestic legislation or under regulations implementing European Union directive – Health and Safety at Work Act 1974, s 6 – Supply of Machinery (Safety) Regulations 1992, Sch 6, para 7 – EP and Council Directive (EC) 98/37, art 7.

The claimant designed and manufactured piling rigs. It supplied a rig to a company. While the company was operating the rig, the hammer was accidentally released, killing one of the company's employees. After the accident the Health and Safety Executive (the HSE) issued a prohibition notice against the use by the company of any of the claimant's piling machines. The claimant made certain modifications to its piling rigs located in the United Kingdom in order to satisfy the concerns of the HSE. The HSE considered that it could bring charges against the claimant either under the Health and Safety at Work etc Act 1974 or under the Supply of Machinery (Safety) Regulations 1992 which had been made to implement the United Kingdom's obligations under European directives which were consolidated subsequently into Council Directive (EC) 98/37 on the approximation of the laws of member states relating to machinery (the directive). Under s 6^a of the 1974 Act it was the duty of anyone who designed, manufactured or supplied any article for use at work to ensure that the article would be safe at all times when it was being used by a person at work. A person found guilty of an offence under s 6 was liable on conviction on indictment to an unlimited fine. The 1992 regulations prohibited manufacturers supplying machinery unless it satisfied the relevant health and safety requirements and was 'in fact safe'. Charges under the 1992 regulations were triable summarily and were punishable only by a moderate fine. The HSE brought charges against the claimant under the 1974 Act. At the magistrates' court, the claimant submitted: (i) that the court had no jurisdiction to hear and determine a prosecution based on an offence under the 1974 Act, because the courts were required to give effect to the United Kingdom's obligations under the directive which had been implemented by the 1992 regulations so that the claimant could only be prosecuted under the 1992 regulations; and (ii) that the HSE had failed to follow a mandatory procedure set out in art 7^b of the directive under which a member state was required to take certain steps if it formed the view that machinery might endanger the safety of persons, including withdrawing it from the market, prohibiting it from use, and informing the European Commission. The district judge held that the

^a Section 6, so far as material, is set out at [69], below

^b Article 7, so far as material, is set out at [77], below

magistrates did have jurisdiction to determine the prosecution, and the claimant applied for judicial review of that decision. The Divisional Court held that the claimant could only be prosecuted under the 1992 regulations. They considered that para 7^c of Sch 6 to the 1992 regulations which provided that 'Nothing in these regulations shall be construed as preventing the taking of any action in respect of any relevant machinery or a relevant safety component under the provisions of the 1974 Act ...' should be given a narrow interpretation so that it incorporated the administrative enforcement provisions of the 1974 Act into the 1992 regulations but not the prosecution provisions. The court rejected the submission that the HSE had failed to comply with art 7 of the directive. The HSE appealed against the first decision and the claimant appealed against the second decision. Before the House of Lords the issue arose as to the effect of the Interpretation Act 1978 on the question as to whether the claimants could be prosecuted under the 1974 Act. Section 18^d of the 1978 Act provided, inter alia, that where an act constituted an offence under two or more Acts the offender was 'unless the contrary intention appears' liable to be prosecuted under either of those Acts and s 18 also applied where the two offences were contained in a statute and a statutory instrument.

Held – (1) (Lord Nicholls of Birkenhead and Lord Hobhouse of Woodborough dissenting) Nothing in the 1992 regulations prevented a prosecution under s 6 of the 1974 Act. The obvious meaning of the words 'any action' in para 7 of Sch 6 to the 1992 regulations was wide enough to include the power of prosecution. There was no sensible contextual purpose served by the restrictive construction adopted by the Divisional Court. In the context there was at stake a cogent countervailing legal policy: the protection of health and safety at work was of overriding importance. It could hardly have been the purpose of the 1992 regulations that even the worst conceivable failure to ensure safety of machinery resulting in many deaths could only be prosecuted summarily, with penalties which would be derisory, rather than on indictment under the 1974 Act. Moreover, even if para 7 was read as restricted to administrative action, there was nothing in the 1992 regulations which prevented a prosecution under s 6 of the 1974 Act or which was capable of displacing the operation of s 18 of the 1978 Act. The scheme of the 1992 regulations was to incorporate, for the purposes of enforcing those regulations, certain enforcement provisions of the 1974 Act. The directive did not require the adoption of a different approach. The 1974 Act and the 1992 regulations functioned in parallel at different levels of seriousness. Their co-existence did not undermine the purposes of the directive (see [57]–[61], [64], [83]–[86], [91], [92], [116], [129], below).

(2) Once the rig had been modified, which had happened before the prosecution commenced, the procedure under art 7 of the directive ceased to be relevant. Accordingly, the HSE's appeal would be allowed and the claimant's appeal would be dismissed (see [34], [64], [94], [96], [97], [115], [129], below).

Decision of the Divisional Court [2002] 4 All ER 965 reversed in part.

Notes

For offences under the health and safety at work legislation and duties in respect of the supply and fabrication of machinery, see 20 *Halsbury's Laws* (4th edn reissue) paras 518, 623.

^c Paragraph 7, so far as material, is set out at [82], below

^d Section 18, so far as material, is set out at [79], below

a For the Health and Safety at Work etc Act 1974, s 6, see 19 *Halsbury's Statutes* (4th edn) (2003 reissue) 710.

For the Supply of Machinery (Safety) Regulations 1992, see 9 *Halsbury's Statutory Instruments* (2002 issue) 249.

Cases referred to in opinions

b *European Commission v Netherlands* Case C-144/99 [2001] ECR I-3541, ECJ.
X (Criminal proceedings against) Joined cases C-74/95 and C-129/95 [1996] ECR I-6609, ECJ.

Sagulo (Criminal proceedings against) Case 8/77 [1977] ECR 1495, ECJ.

Cases also cited in list of authorities

c *A-G's Ref (No 1 of 1988)* [1989] 2 All ER 1, [1989] AC 971, [1989] 2 WLR 729, HL.
Cremonini (Criminal proceedings against) Case 815/79 [1980] ECR 3583, ECJ.

EC Commission v France Case 173/83 [1985] ECR 491, ECJ.

EC Commission v Germany Case 29/84 [1985] ECR 1661, ECJ.

EC Commission v Greece Case 192/84 [1985] ECR 3967, ECJ.

d *Institute of Professional Representatives before the European Patent Office v European Commission* Case T-144/99 [2001] ECR II-1087, ECJ.

ITT Promedia NV v European Commission Case T-111/96 [1998] ECR II-2937, CFI.

Jennings v US Government [1982] 3 All ER 104, [1983] 1 AC 624, [1982] 3 WLR 450.
 HL.

e *Karl Könecke GmbH & Co KG, Fleischwarenfabrik v Bundesanstalt für Landwirtschaftliche Marktordnung* Case 117/83 [1984] ECR 3291, ECJ.

Keck (Criminal proceedings against) Joined cases C-267/91 and C-268/91 [1993] ECR I-6097, ECJ.

Lo-Line Electric Motors Ltd, Re [1988] 2 All ER 692, [1988] Ch 477, [1988] 3 WLR 26.

Procureur du Roi v Dassonville Case 8/74 [1974] ECR 837, ECJ.

f *R v Davis* (1783) 1 Leach 271, 168 ER 238.

R v Dept of Trade and Industry, ex p Alba Radio (29 November 2000) Pleming QC.

R v F Howe & Son (Engineers) Ltd [1999] 2 All ER 249, CA.

Radiosistemi Srl v Prefetto di Genova Case C-388/00 and C-429/00 [2002] ECR I-5845, ECJ.

Ratti (Criminal proceedings against) Case 148/78 [1979] ECR 1629, ECJ.

g *Secretary of State for Trade and Industry v Deverell* [2000] 2 All ER 365, [2001] Ch 340, [2000] 2 WLR 907, CA.

Stark v Post Office [2000] ICR 1013.

Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

SW v UK, CR v UK (1995) 21 EHRR 363, ECt HR.

h *Thoburn v Sunderland DC* [2002] EWHC 234 (Admin), [2002] 4 All ER 156, [2003] QB 151, [2002] 3 WLR 247.

Tuck & Sons v Priester (1887) 19 QBD 629, CA.

Conjoined appeals

j The Health and Safety Executive (HSE) and the claimant, Junttan Oy, each appealed, with permission of the Appeal Committee of the House of Lords given on 11 July 2002, from the decision of the Divisional Court of the Queen's Bench Division (Lord Woolf CJ and Wright J) ([2002] EWHC 566 (Admin), [2002] 4 All ER 985, [2002] ICR 1523) on 19 March 2002 allowing in part the claimant's application for judicial review of the decision of District Judge Thomas at Bristol Magistrates' Court on 22 June 2001 holding that the magistrates' court had

jurisdiction to hear and determine a prosecution brought against the claimant by the HSE for offences under ss 3 and 6 of the Health and Safety at Work Act 1974. The Divisional Court certified that points of law of general public importance, set out at [76] and [77], below were involved in its decision. The facts are set out in the opinions of Lord Nicholls of Birkenhead and Lord Steyn.

Gerald Barling QC and Sarah Lee (instructed by *CMS Cameron McKenna*) for Junttan Oy.
Paul Lasok QC and Jason Coppell (instructed by *Bond Pearce, Plymouth*) for the HSE.

Their Lordships took time for consideration.

23 October 2003. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, this case arises out of a tragic accident at Avonmouth sewage plant in February 1999. Junttan Oy, a Finnish company, manufactures piling rigs. It manufactured the Junttan PM20 LC piling rig, serial number 1189. The rig bore a CE mark following a European Community declaration of conformity. Junttan UK, on behalf of Junttan Oy, agreed to supply this piling rig to an English company at a cost of £305,000. The rig was delivered to the docks at Felixstowe in September 1998, and transported to a site in Bristol on 30 November 1998.

[2] On 9 February 1999 Steven Thompson was operating the rig and Andrew Bourner was working on the ground attaching the chains to the piles and lining them up ready to be driven into the ground. The accident then occurred. The hammer of the rig descended upon Mr Bourner, causing fatal injuries.

[3] Subsequently the Health and Safety Executive (HSE) issued a prohibition notice against the use of any Junttan PM20 piling machines. The HSE expressed concern about the risk of the hammer being released accidentally. On 22 February 1999 the HSE issued an improvement notice pursuant to s 21 of the Health and Safety at Work etc Act 1974 requiring the contravention of s 6 of the Act to be remedied by 15 April 1999. Following discussions between all concerned, Junttan Oy made modifications to all its piling rigs in use in the United Kingdom, and to all new piling rigs built by it after March 1999. The HSE withdrew the improvement notice. But in November 1999 the HSE laid an information against Junttan Oy at Bristol Magistrates' Court, alleging contravention of s 6 of the 1974 Act.

[4] On 22 June 2001 District Judge Thomas, sitting in the Bristol Magistrates' Court, rejected arguments that the prosecution was unlawful. Junttan Oy commenced judicial review proceedings in respect of that decision. The application was heard by the Divisional Court, comprising Lord Woolf CJ and Wright J (see [2002] EWHC 566 (Admin), [2002] 4 All ER 965, [2002] ICR 1523). On 19 March 2002 the court upheld one of the grounds relied upon by Junttan Oy and declared the prosecution was unlawful. The court certified two questions as points of law of general public importance.

[5] The first question is whether the HSE was entitled, as a matter of United Kingdom and European Community law, to prosecute Junttan Oy for contravention of s 6 of the 1974 Act, as distinct from bringing proceedings under reg 29(a) of the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073. An important practical difference between a prosecution under the 1974 Act and a prosecution under the 1992 regulations is that an offence under the Act carries a

a significantly heavier maximum penalty than an offence under the regulations. The Divisional Court held the HSE was not so entitled.

[6] This first question calls for examination of the inter-relationship of the 1974 Act, the Machinery Directive, by which I mean EP and Council Directive (EC) 98/37 (on the approximation of laws of the member states relating to machinery) (OJ 1998 L207 p 1), and the 1992 regulations.

b THE 1974 ACT

[7] Part I of the 1974 Act imposes general duties on employers, employees, manufacturers and others. The primary object of these duties is to secure the health, safety and welfare of people at work. Section 6, in its amended form, prescribes general duties of manufacturers:

c '(1) It shall be the duty of any person who designs, manufactures, imports or supplies any article for use at work ... (a) to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being set, used, cleaned or maintained by a person at work ...'

d [8] Under s 33(1)(a) of the Act it is an offence for a person to fail to discharge a duty to which he is subject by virtue of s 6. The offence is punishable on summary conviction to a fine not exceeding £20,000 or, on conviction on indictment, to a fine of unlimited amount.

e THE MACHINERY DIRECTIVE

[9] The Machinery Directive is a consolidating directive, concerned with the approximation of the laws of member states relating to machinery. This directive has its origins in Council Directive (EEC) 89/392 (on the approximation of laws of the member states relating to machinery) (OJ 1989 L183 p 9). It has the twofold objective of promoting safety standards of machinery and the free movement of machinery within the Community. The directive is intended to be in the nature of a code, with which the laws of member states must accord. One reason for this is that, as noted in the preamble to the directive, the legislative systems of member states regarding accident prevention are very different. Although these differences do not necessarily lead to different levels of health and safety, these disparities none the less constitute barriers to trade within the Community: see recital (6). Accordingly, existing national health and safety provisions regarding protection against the risks caused by machinery must be approximated to ensure free movement of machinery on the market without lowering existing justified levels of protection in member states: see recital (7).

h [10] Regarding safety standards, the preamble notes that harmonisation must be confined to the requirements necessary to satisfy 'essential health and safety requirements' relating to machinery. These requirements 'must replace the relevant national provisions because they are essential': see recital (9). The maintenance or improvement of the level of safety attained by member states is one of the essential aims of the directive and of 'the principle of safety as defined by the essential requirements': see recital (10). The essential health and safety requirements must be observed in order to ensure machinery is safe: see recital (14).

j [11] I turn to the substantive articles of the directive. Articles 2 and 3 are concerned to ensure the safety of machinery. Article 2 requires member states to take all appropriate measures to ensure that machinery may be placed on the market only if it does not 'endanger the health or safety of persons'. Article 3

provides that machinery must satisfy the essential health and safety requirements set out in Annex I. Annex I contains a detailed list of requirements. These requirements set out general principles including, for instance, the principles to be applied by manufacturers, in order of priority, when selecting the most appropriate method of manufacture. One of the detailed requirements is that control devices must be designed or protected so that the desired effect, where a risk is involved, cannot occur without an intentional operation. a

[12] Articles 4 and 5 of the directive are concerned with the free movement of machinery which satisfies the safety requirements. It is not open to a member state to prescribe different standards. Member states must not 'prohibit, restrict or impede' the marketing or use in their territory of machinery which complies with the directive: see art 4. Member states must regard machinery bearing the CE marking, accompanied by the European Community declaration of conformity, as conforming to all the provisions of the directive: see art 5. b

[13] Article 13 requires member states to communicate to the Commission of the European Communities the text of the provisions of national law they adopt in the field governed by the directive. The United Kingdom communicated the text of the 1992 regulations. c

THE 1992 REGULATIONS d

[14] The purpose of the 1992 regulations was to implement this country's obligations under Council directives which were consolidated subsequently in the Machinery Directive. The regulations were made by the Secretary of State for Trade and Industry pursuant to powers conferred by s 2(2) of the European Communities Act 1972. In short, the 1992 regulations prohibit manufacturers supplying machinery unless the machinery satisfies the relevant essential health and safety requirements and 'is in fact safe': see regs 11 and 12. The 'essential health and safety requirements' are those set out in Annex I to the Machinery Directive. They are reproduced in full as Sch 3 to the 1992 regulations. 'Safe' means that when the machinery is— e

'properly installed and maintained and used for the purposes for which it is intended, there is no risk (apart from one reduced to a minimum) of its endangering the health of or of its being the cause or occasion of death or injury to persons ...' f

When considering whether a risk has been reduced to a minimum, regard is to be had to the practicability of so reducing that risk when the machinery was constructed: see reg 2. g

[15] Under reg 29 it is an offence to contravene or fail to comply with reg 11. The punishment, on summary conviction, is imprisonment for up to three months and, alternatively or additionally, a fine up to level 5 on the standard scale. Currently that is £5,000. Puzzlingly, there is no provision for trial on indictment. This level of maximum fine is to be contrasted with the unlimited fine prescribed by the 1974 Act for failure to discharge a s 6 duty. It is a defence for the person charged to show he took all reasonable steps and exercised all due diligence to avoid committing the offence: see reg 31. h

THE FIRST QUESTION: CO-EXISTENCE OF MANUFACTURERS' DUTIES UNDER THE 1974 ACT AND UNDER THE 1992 REGULATIONS j

[16] As already seen, one effect of the 1974 Act and the 1992 regulations is that on the face of these legislative provisions there exist side by side two sets of duties imposed on machinery manufacturers: duties imposed by the 1974 Act and duties

a imposed by the 1992 regulations. Contraventions of these duties attract their own criminal sanctions. At the heart of the first certified question is the issue whether, so far as the 1974 Act is concerned, the co-existence of these two sets of duties is compatible with the United Kingdom's obligations under the Machinery Directive.

b [17] In considering this issue the appropriate starting place is to note the Community law setting in which the 1992 regulations were made. The 1974 Act was not enacted so as to give effect to any directive relating to machinery. It was not until 1989 that the first directive relating to machinery, Directive 89/392, was adopted by the Council of the European Communities. That was long after the enactment of the 1974 Act. The 1992 regulations, however, were made expressly for the purpose of implementing the 1989 directive. In their present, amended form the 1992 regulations are intended to implement the Machinery Directive of 1998.

d [18] It is common ground that the 1992 regulations are effective for this purpose. They are framed in terms which effectively transpose into national law the obligations imposed by the Machinery Directive. In particular, the obligations imposed on manufacturers by the 1992 regulations duly reflect the obligations imposed on member states by arts 2 and 3 of the Machinery Directive. In other words, the 1992 regulations faithfully reproduce the safety code prescribed by the Machinery Directive. Standing by themselves the 1992 regulations achieve that object.

e [19] As I see it, as a matter of general approach, this comprehensive transposition by the 1992 regulations leaves little room for pre-existing legislation, such as the 1974 Act, to continue to operate on ground covered by the 1992 regulations. Were the 1974 Act to continue to apply to the same matters as the 1992 regulations discrepancies between the two sets of legislation, to greater or lesser extent, would almost inevitably emerge. Discrepancies or, at the very least, ambiguities would be likely to arise because the 1974 Act was not framed with the Machinery Directive, or its predecessor directives, in mind.

g [20] These discrepancies would represent a failure by the United Kingdom properly to implement the Machinery Directive. This would be so even if they were no more than ambiguities. Implementation of a directive calls for clarity and precision of transposition. Those who are intended to be benefited by a directive need to know, and are entitled to know, where they stand. Obscure and uncertain legal provisions will not suffice. This is particularly important where, as in the present case, nationals of other member states are intended to be accorded rights: see *European Commission v Netherlands* Case C-144/99 [2001] ECR I-3541 at 3565 (paras 17, 18) and Advocate General Tizzano (at 3555 (paras 35, 36)).

j [21] The need for clarity and certainty is also particularly important where member states attach criminal sanctions to non-compliance with national law obligations whose lawfulness depends upon their conforming to the terms of a directive. Those intended to benefit from a directive are not to be inhibited from doing so by the ambiguous scope of national criminal sanctions. Moreover, criminal proceedings may not be brought in respect of conduct not clearly defined as culpable (see *Criminal proceedings against X* Joined cases C-74/95 and C-129/95 [1996] ECR I-6609 at 6637 (para 25)).

[22] With these principles in mind I turn to the legislation. Section 6(1)(a) of the 1974 Act imposes a duty to ensure, so far as is reasonably practicable, that machinery is so designed and constructed that it will be safe. The effect of regs 11

and 12(1)(e) of the 1992 regulations is to prohibit the supply of machinery which is not 'in fact safe'. So far there is no difficulty. But 'safe' is not an absolute standard. There may be differences of view on whether the degree of safety of a particular piece of machinery is acceptable. Unlike the 1974 Act, the 1992 regulations define what is meant by safe. At once there may be room for argument that the standards set by the 1974 Act and the regulations are not necessarily the same. This in itself is not satisfactory. As already noted, the inhibiting effect of differently worded provisions having much the same result was one of the matters the Machinery Directive was specifically intended to eradicate: see recital (6) in the preamble.

[23] A more acute problem arises over the scope of the respective criminal sanctions. Contravention of reg 11 is not always an offence under the regulations. Regulation 31(1) provides a 'due diligence' defence. A person who has contravened reg 11 will not commit an offence, even though he has contravened reg 11, if he can show he took all reasonable steps and exercised all due diligence to avoid committing the offence. This is to be contrasted with the position under the 1974 Act. Under the 1974 Act failure to discharge the s 6 duty is an absolute offence. Reasonable practicability is built into s 6 itself, but the Act makes no provision for a 'due diligence' defence.

[24] A further problem should be noted. It is important that criminal provisions take effect according to their tenor. The HSE submitted there is no divergence between the standards set by the Machinery Directive and those set by the 1974 Act. Both require machinery to be 'safe'. But the HSE accepted, and rightly so, that it would be open to Junttan Oy to contend at the trial that it may be convicted under the 1974 Act only if it has breached the requirements of the Machinery Directive. The effect of art 5(1) of the Machinery Directive is to raise a rebuttable presumption that machinery bearing a CE mark and accompanied by the requisite declaration conforms to all the provisions of the directive. Thus in such a case, and the prosecution of Junttan Oy is such a case, on any prosecution under the 1974 Act the prosecutor would have to establish in what respect the Machinery Directive and the essential health and safety requirements were breached.

[25] This intermingling is far from satisfactory. Indeed, placing this burden on the prosecution illustrates how unsatisfactory is the use of the pre-existing 1974 Act in aid of the safety obligations prescribed by the Machinery Directive. The prosecution would effectively be a prosecution under a combination of the Act and the 1992 regulations which transpose the directive into national law and reproduce its requirements almost verbatim.

[26] I turn, then, to the crucial question: overall, is the continuing co-existence of manufacturers' duties under the 1974 Act alongside their duties under the 1992 regulations productive in practice of such inconvenience and ambiguity that this constitutes an impediment to the free movement of machinery and, to that extent, a failure properly to give effect to the Machinery Directive?

[27] I have found this a difficult question, but I have come to the conclusion that the answer must be Yes. As already noted, the existence of two parallel codes is inherently unsatisfactory. In the present case the two codes are substantially the same but not entirely so. I do not feel able to dismiss the differences as of no consequence, especially when criminal sanctions are involved. Moreover, it is inherently unattractive that, in respect of an alleged breach of the safety standards set by the Machinery Directive, a manufacturer should be prosecuted, not for breach of the national legal provision expressly adopted to transpose these

- a standards into national law, but by recourse to a pre-existing national legal provision attracting a more severe punishment. That manner of proceeding accords ill with the avowed object of the 1992 regulations and, indeed, of the Machinery Directive.

THE CONSEQUENCE OF THIS INCOMPATIBILITY

- b [28] With this conclusion in mind I turn to the interpretation of the 1992 regulations. Given the purposes of the Machinery Directive, one would expect that the 1992 regulations were intended to set out exhaustively the extent of the duties of manufacturers of machinery to which the regulations apply. This is what one would expect because the Machinery Directive is now the overriding instrument, and the regulations were intended to implement that directive.

- c [29] However, on a careful reading of the 1992 regulations it is clear that the 1974 Act in general, and the duties imposed on manufacturers by that Act, were intended to continue to co-exist with the new regulations. The 1992 regulations were not intended to supersede and replace the relevant provisions in the 1974 Act. One pointer in this direction is that reg 33 makes express provision for what is described as consequential 'disapplication' of United Kingdom law.
- d Regulation 33 disapplies machinery safety requirements in numerous statutory provisions. The 1974 Act is not one of the listed enactments.

[30] More significantly, and to my mind conclusively, is the savings provision in para 7 in Sch 6 to the regulations:

- e 'Nothing in these Regulations shall be construed as preventing the taking of any action in respect of any relevant machinery ... under the provisions of the 1974 Act ...'

- In some respects the scope of this savings provision is less than crystal clear. But this savings provision is clearly apt to apply to improvement notices or
- f prohibition notices served under the 1974 Act. Service of such notices falls easily within the phrase 'the taking of any action in respect of any relevant machinery'. But contravention of duties under the Act is a pre-requisite to service of these notices. Thus, inescapably, this savings clause in the regulations presupposes these duties under the 1974 Act will continue to exist notwithstanding the coming into force of the regulations. This leaves no scope for interpreting the 1992 regulations as having impliedly repealed the duties imposed on manufacturers by
- g the 1974 Act.

- [31] That is not the end of the matter. The effect of s 2(1) of the 1972 Act is to require the courts to give effect to the United Kingdom's obligations under the Machinery Directive. Given the transposition of the health and safety
- h requirements into this country's law by the 1992 regulations, and given that the continuing existence of the manufacturers' duties under the 1974 Act is incompatible with this country's obligations under the Machinery Directive, the result which must follow is that the requirements in the 1974 Act imposing these duties have to be disapplied so far as they relate to activities falling within the
- j scope of the Machinery Directive. By this means United Kingdom law is brought into line with this country's obligations under the Machinery Directive.

[32] For these reasons I agree with the decision of the Divisional Court on the first certified question. The HSE was not entitled to prosecute Junttan Oy for contravention of s 6(1)(a) of the 1974 Act. I would dismiss this appeal. If the maximum penalties prescribed for offences under reg 29(a) of the 1992 regulations are thought to be too light, the remedy lies in amendment of the regulations.

THE SECOND QUESTION

[33] Article 7 of the Machinery Directive provides that where a member state finds that machinery bearing the CE marking is 'liable to endanger the safety of persons' the member state must take all appropriate measures to withdraw the machinery from the market, or to prohibit its being placed on the market or put into use. In such cases member states 'shall immediately inform the Commission of any such measure, indicating the reason for its decision'. In the present case that was not done by the HSE, either with regard to the prohibition notice served on Junttan Oy, or the improvement notice, or the commencement of the prosecution under the 1974 Act. The second certified question concerns the effect of this failure on the prosecution of Junttan Oy under the 1974 Act.

[34] The conclusion I have reached on the first question means that the second question does not arise. The consequence of my conclusion, if accepted by your Lordships, would be that the existing prosecution under the 1974 Act will not continue. Nor can Junttan Oy be prosecuted now for contravention of reg 11 of the 1992 regulations. It is too late to commence such a prosecution. However, since a majority of your Lordships are of a different opinion on the first question the second question also needs to be answered. On this second question I agree with the views expressed by my noble and learned friend Lord Steyn.

LORD SLYNN OF HADLEY.

[35] My Lords, the relevant facts on this appeal are set out in the opinions of my noble and learned friends Lord Nicholls of Birkenhead and Lord Steyn which I have had the advantage of reading in draft and to which I refer without repeating.

[36] As a result of the tragic incident on 9 February 1999 causing Mr Bourner's death the Health and Safety Executive (HSE) brought proceedings under s 6 of the Health and Safety at Work etc Act 1974 against Junttan Oy, the manufacturer of the rig. They contend that the controls of the piling hammer on the rig did not protect against an accidental release of the hammer so that the necessary safety standards were not satisfied in the design and manufacture of the rig. Objection was taken by Junttan Oy before District Judge Thomas in the magistrates' court that proceedings could not be brought under s 6 of the 1974 Act but could only be brought under the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073, as amended which were adopted to give effect to EP and Council Directive (EC) 98/37 (on the approximation of laws of the member states relating to machinery) (OJ 1998 L207 p 1).

[37] The basic reason for this objection was that under the 1974 Act the events could be triable either summarily (when the maximum fine was £20,000) or on indictment, in the latter case the fine being unlimited (s 33(1A)), whereas under the 1992 regulations the offence could only be tried summarily and the maximum penalty was three months' imprisonment or a fine not exceeding level 5 on the standard scale. This of course is not only the reason for the objection to jurisdiction; it is the very reason why HSE brought proceedings under the Act because of the serious consequences of the incident.

[38] The district judge held that he had jurisdiction to hear a case under the 1974 Act. On an application for judicial review the Divisional Court (Lord Woolf CJ and Wright J) ([2002] EWHC 566 (Admin), [2002] 4 All ER 965, [2002] ICR 1523) ordered and declared that the 'prosecution under s 6 of the Health and Safety at Work Act is unlawful' and they quashed that part of the district judge's decision to the contrary. The Divisional Court certified two

a questions as raising points of law of general public importance. The first which deals with the point to which I have referred was in the following terms:

b [7] ... Was the Health and Safety Executive entitled as a matter of United Kingdom and European Community law to prosecute the defendant under s 6 of the Health and Safety at Work etc Act 1974 in respect of the supply of machinery and questions of the safety of its design and construction, or was it only permissible for the Health and Safety Executive to bring proceedings against the defendant under reg 29(a) of the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073, which regulations deal with the supply of machinery and safety of its design and construction and were notified to the EC Commission as being intended to implement the Council Directive (EC) 98/37?

c [39] Lord Woolf CJ (at [53]) (with all of whose judgment Wright J agreed) concluded that:

d '... it is inappropriate and wrong for the Executive to prosecute for an offence under s 6 of the 1974 Act when there is a specific statutory offence under the 1992 regulations covering exactly the same ground as s 6 but in different language so that different issues can arise as to the standard of safety which is required, and imposing a different penalty.'

e He so concluded 'Partly as a matter of interpretation, and partly because it appears to me that it would be a form of misuse of the powers of the 1974 Act to rely on s 6'. He accepted, however, that if the offence prosecuted under s 6 was not '(one covering exactly the same ground as the offence in the 1992 regulations) I would take a different view'. He also accepted that a prosecution could be brought under s 3 of the 1974 Act alleging a failure to 'ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety'.

f [40] The first question has been treated as turning on the relationship both in domestic law and Community law of the Act to the Machinery Directive and the implementing regulations. It is necessary to set out the relevant provisions for this purpose.

g THE 1974 ACT

h [41] The 1974 Act, adopted initially of course without reference to a directive, provides in s 1 that the provisions of Pt I shall have effect 'with a view to—(a) securing the health, safety and welfare of persons at work'. Section 6 which is in Pt I has the sub-heading 'General duties of manufacturers etc as regards articles and substances for use at work' and provides in particular in sub-s (1) that—

j 'it shall be the duty of any person who designs, manufactures, imports or supplies any article for use at work or any article of fairground equipment—(a) to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being set, used, cleaned or maintained by a person at work ...'

[42] On the face of it the facts alleged here fall within that section and the HSE is empowered to bring proceedings under s 33 of the Act where a breach of that section is alleged.

The 1992 regulations

[43] The Supply of Machinery (Safety) Regulations 1992, SI 1992/3073, were made to give effect to Council Directive (EEC) 89/392 (on the approximation of the laws of member states relating to machinery) (OJ 1989 L183 p 9), as subsequently amended, and as replaced ('consolidated') by the Machinery Directive which came into force 20 days from 23 July 1998, the date of publication in the Official Journal of the European Communities. They provide in reg 11 that:

'Subject to paragraph (4) below, no person who is a responsible person for the purposes of these Regulations shall supply relevant machinery ... unless the requirements of regulation 12 below are complied with in relation thereto.'

The manufacturer of the machinery is a 'responsible person' (reg 2(2)). The 'Essential Health and Safety Requirements Relating to the Design and Construction of Machinery and Safety Components' are set out in Sch 3.

[44] By reg 12(1): the requirements of this regulation are that:

'(a) the relevant machinery or relevant safety component satisfies the relevant essential health and safety requirements ... (e) the relevant machinery or relevant safety component is in fact safe.'

[45] By reg 29 any person who contravenes or fails to comply with reg 11 above shall be guilty of an offence and liable for the penalties to which I have already referred set out in reg 30.

[46] Regulation 31, subject to the detailed provisions of that regulation, provides:

'(1) ... in proceedings against any person for an offence under Regulation 29 above it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.'

[47] Schedule 6 pursuant to reg 28 deals with 'Enforcement'.

[48] In particular by para (1) certain sections of the 1974 Act are to apply for the purposes of providing for the enforcement of these regulations and in respect of proceedings for contravention thereof subject to modifications, and by para (3) certain sections of the 1974 Act, including ss 28-35, 'shall apply for the purposes of providing for the enforcement of these Regulations and in respect of proceedings for contravention thereof as if' certain amendments were incorporated. By para 7 of Sch 6: 'Nothing in these Regulations shall be construed as preventing the taking of any action in respect of any relevant machinery ... under the provisions of the 1974 Act, the Order or the 1987 Act.'

The Machinery Directive

[49] The Machinery Directive applies the essential health and safety requirements defined in Annex I to machinery as defined in art 1(2). Machinery and safety components covered by the directive 'shall satisfy [those] requirements':

'Article 2

1. Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on

a the market and put into service only if they do not endanger the health or safety of persons and, where appropriate, domestic animals or property, when properly installed and maintained and used for their intended purpose.

2. This Directive shall not affect Member States' entitlement to lay down, in due observance of the Treaty, such requirements as they may deem necessary to ensure that persons and in particular workers are protected when using the machinery or safety components in question, provided that this does mean that the machinery or safety components are modified in a way not specified in the Directive.'

[50] By art 4:

c '1. Member States shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of machinery and safety components which comply with this Directive.'

Article 5 provides that machinery bearing a CE marking and a certificate of conformity shall be regarded as conforming to all the provisions of the directive subject to special procedures laid down in art 7 where a member state ascertains that machinery used in accordance with its intended purposes is liable to endanger the safety of persons when it may withdraw such machinery or prohibit the placing of the machinery on the market or its use and restrict the free movement thereof.

d [51] The recitals to the Machinery Directive stress the importance of reducing the number of accidents by having inherently safe design and construction of machinery. It is however member states who 'are responsible for ensuring the health and safety on their territory of persons ... and, in particular, of workers, notably in relation to the risks arising out of the use of machinery' (see recitals (4) and (5)). Adequate safety standards must therefore be laid down and achieved. It is however recognised that this can be done in different legislative ways supplemented by mandatory technical specifications and voluntary standards which may not necessarily lead to different standards of health and safety. These disparities may, however, constitute barriers to trade within the Community, ie between member states.

e [52] Accordingly recital (7) provides that 'existing national health and safety provisions providing protection against the risks caused by machinery must be approximated to ensure free movement on the market of machinery', but this is to be 'without lowering existing justified levels of protection in the Member States'.

f [53] The tension between safety, harmonisation and free movement is recognised. Thus in recital (8):

g 'Whereas Community law, in its present form, provides—by way of derogation from one of the fundamental rules of the Community, namely the free movement of goods—that obstacles to movement within the Community resulting from disparities in national legislation relating to the marketing of products must be accepted in so far as the provisions concerned can be recognised as being necessary to satisfy imperative requirements ...'

j Harmonisation must be limited to those requirements 'necessary to satisfy the imperative and essential health and safety requirements relating to machinery; whereas these requirements must replace the relevant national provisions because they are essential' (recital (9)) and—

'the maintenance or improvement of the level of safety attained by the Member States constitutes one of the essential aims of this Directive and of the principle of safety as defined by the essential requirements ...' (See recital (10)).

The question

[54] It is plain that the Machinery Directive is seeking to impose on member states an obligation to achieve the essential health and safety requirements set out in Annex I (art 3) and that by art 4 the directive provides that member states shall not prohibit or restrict or impede the placing on the market or use of machinery which does comply with this directive. To facilitate free movement it provides for the marking of goods with the CE mark. At the same time the directive squarely puts on member states an obligation to take appropriate measures to ensure that machinery is only placed on the market and put into service if it does not endanger the safety of persons when properly installed and used for its intended purpose (art 2(1)). In other words, consistently with recital (5) member states must, certainly may, take steps to ensure that the machinery is safe. The directive recognises that some member states may have higher standards of protection. It is clearly provided in recital (7) that it is not the intention that the implementation of the directive shall lower the standards of protection in member states and art 7 of the directive requires member states to take steps to withdraw machinery from the market or to prevent its use if it is not safe even if it bears the CE marking and the declaration of conformity. The latter thus gives a rebuttal of presumption of conformity with the essential safety requirements but not more.

[55] There seems thus a tension between the three requirements—free movement, achieving harmonised essential requirements and ensuring safety—but it does not seem to me that the aim of free movement, where there is a compliance with the essential requirements, cuts down or impinges on the obligation and power of the member state to act where safety is not assured. Accordingly it does not seem right to proceed on the basis that nothing can be done beyond enforcing essential requirements without violating the rules against prohibiting restrictions on the free movement of machinery.

[56] It has, however, been accepted by both members of the Divisional Court that the prosecution here under the Act covered the same ground as a prosecution under the 1992 regulations implementing the Machinery Directive would have done. If that is right does it follow that to proceed under the Act, where the penalties are higher, is not permissible as a matter of interpretation of para 7 of Sch 6 to the regulations, or because it constitutes an abuse or misuse of power?

[57] As to the first point para 7 provides that nothing in the regulations is to be construed as preventing the taking of 'any action' in respect of any relevant machinery under the 1974 Act. The Divisional Court construed this as meaning that only 'administrative enforcement' proceedings such as a prohibition notice fell within 'any action'. I do not for my part think that the words 'any action' in themselves have necessarily to be interpreted in this way. Nor does the context compel it. Schedule 6 itself under the heading 'Enforcement' is dealing with both administrative enforcement and prosecution. Paragraph 1(b) provides that certain sections of the 1974 Act, including s 33, though with amendments, shall apply 'for the purposes of providing for the enforcement of these Regulations' and 'in respect of proceedings for contravention thereof'. The result of this is that

a the provisions of the Act, subject to modifications, are incorporated in the 1992 regulations for the purpose of enforcing the regulations but that the powers in the 1974 Act for the enforcement of the Act continue. This result follows also from the Interpretation Act 1978. Section 18 of the latter provides that where an act constitutes an offence under two or more Acts or under an Act and at common law then the offender shall be liable to be prosecuted either under any
b of those Acts or at common law.

[58] Section 23 makes it clear that in the absence of a contrary intention s 18 applies to subordinate legislation to the extent specified as it does to Acts. In my opinion para 7 of Sch 6 to the 1992 regulations is entirely consistent with that. It adopts the same approach and no contrary intention is shown. Even if any action were to be read as meaning any administrative action there is nothing in the
c regulations which specifically excludes the bringing of prosecutions under the Act even if such a provision were possible.

[59] Moreover I do not consider that in this legislation there is a presumption of law against interpreting the provision of para 7 of Sch 6 as continuing in the Act even greater penal powers than those provided for in the regulations. The
d protection of the public, in particular workers, is itself an important objective but since if both the 1974 Act and the regulations achieve the same result is it an abuse of power to proceed under the Act with the greater penalties?

[60] Moreover, it seems to me that it would have been perfectly possible to include both the greater and the lesser penalties in the statute. The fact that the 1992 regulations could not provide for the trial on indictment with the higher
e penalties does not in my view mean that they could not be left to stand in the Act. It is not an abuse or otherwise unlawful by subordinate legislation to give the HSE an option whether to go for the lesser penalties for the less serious offence or for the higher penalties in respect of the more serious offence. If the facts are established this seems on the face of it a case where it was justified to bring
f proceedings enabling the greater penalties to be imposed.

[61] I do not consider that there is any principle of Community law that the obligations imposed by a directive cannot be provided for in more than one legislative enactment or order. It is in addition well established that a member state can show that its obligations under directives are already fulfilled under
g existing legislation. The case of *Criminal proceedings against Sagulo* Case 8/77 [1977] ECR 1495 expressed this clearly and the Court of Justice of the European Communities has not infrequently followed it since. The issue in subsequent cases has not been whether such a defence is available but whether the existing legislation, whether found in one Act or in several different provisions, has with sufficient clarity and certainty already provided for the conditions or obligations
h required to be fulfilled by the directive.

[62] The Divisional Court proceeded on the basis that the charge under the Act covered the same ground as the regulations and that if it were not so the decision on jurisdiction would have been different. I accept that the words used in the Act and in the directive (as carried into the regulations) are not identical. It
j does not seem to me, however, that there is a real divergence between the two.

[63] In this regard it is to be noticed that the HSE recognises in its argument that the test of liability must be interpreted consistently with the requirement of Community law or be displaced by provisions of Community law having direct effect, and further that it will be open to Junttan Oy to argue that it can only be convicted under the Act if it has breached the requirements contained in the directive. Moreover—

'one of the submissions to be made by the HSE at the trial will be that the standard of safety required by the 1974 Act was breached precisely because Junttan did not comply with the requirements of the Directive, in particular those relating to the design of the controls of the rig.'

These are all matters for the trial when it may or may not be that a question referable under art 234 EC will arise. It does not seem to me that within the terms of art 234 EC it is necessary to decide them in order to give judgment on this appeal.

[64] I would accordingly allow the HSE's appeal and hold that the district judge has jurisdiction to hear the prosecution under the 1974 Act. As to the second question referred—

'Has the Health and Safety Executive failed to follow a procedure which was mandatory in the present case (namely that set out in art 7 of EP and Council Directive (EC) 98/37) and, if so, what are the effects of that failure on the prosecution being brought by the Health and Safety Executive under s 6 of the Health and Safety at Work etc Act 1974?'

It seems to me that the Divisional Court came to the right decision for the reasons given by my noble and learned friend Lord Steyn and like him I would dismiss Junttan Oy's appeal.

LORD STEYN.

[65] My Lords, on 9 February 1999, at Bristol, Mr Andrew Bournier, an employee of Simplex Piling Ltd, was killed. His head was crushed when the piling hammer of a rig was accidentally released while he was working under it. Junttan Oy, a company incorporated in Finland, designed and manufactured the rig in Finland and supplied it to an English company. On 30 November 1998 the rig was delivered to the site where the fatal accident occurred. The rig was described as a Junttan PM20 piling rig, with serial number 1189. It bore a CE mark following an European Community declaration of conformity of the rig for machinery made by Junttan Oy as the manufacturer dated 4 September 1998.

[66] The Health and Safety Executive (the HSE) contends that it has evidence, fit to be placed before a criminal court, which shows that: (a) the machine was not designed and manufactured in accordance with appropriate safety standards in that, in particular, there was insufficient protection against the accidental release of the piling hammer; and (b) employees of Junttan Oy were aware of the risk of the piling hammer being accidentally released, because the hammer was accidentally released whilst they were training employees of Simplex to use the machine, but they took no action. The correctness of these allegations cannot be tested on the present appeal. For present purposes it must be assumed that the HSE may be able to prove these allegations.

[67] The HSE took the view that it was competent to bring charges either under ss 3 and 6 of the Health and Safety at Work etc Act 1974 or under reg 11(1) of the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073. The regulations were made to comply with Council Directive (EEC) 89/392 (on the approximation of laws of the member states relating to machinery) (OJ 1989 L183 p 9) which was subsequently superseded by consolidating EP and Council Directive (EC) 98/37 (on the approximation of laws of the member states relating to machinery) (OJ 1998 L207 p 1) (the Machinery Directive). (This explains why the regulations predate Directive 89/392.)

a [68] Charges under the regulations must be tried summarily and are punishable only by a moderate fine ie on level 5. On the other hand, charges under s 6 of the 1974 Act may be tried on indictment and, if appropriate, punished by a much higher fine. The HSE considered that the death of Mr Bourner is a matter of great seriousness and that the fatality is to be regarded as an aggravating feature of the industrial accident. Accordingly, the HSE decided to bring charges under sections of the 1974 Act.

b [69] On 19 November 1999 an information in relation to a charge under s 6 of the 1974 Act was laid against Junttan Oy at the Bristol Magistrates' Court. Section 6(1) provides:

c '(1) It shall be the duty of any person who designs, manufacturers, imports or supplies any article for use at work or any article of fairground equipment—(a) to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being set, used, cleaned or maintained by a person at work ...'

d Section 33(1) makes it an offence for a person to fail to discharge a duty under s 6. Section 33(1A) renders a person who is guilty of such an offence liable on summary conviction to a fine not exceeding £20,000, and on conviction on indictment to an unlimited fine.

e [70] On 27 February 2000 a second information in relation to a charge under s 3 of the 1974 Act was laid at the Bristol Magistrates' Court. This charge is not material to the present appeal.

f [71] It is, however, necessary to set out further action initiated by the HSE. On 16 February 1999, the HSE issued a prohibition notice against the use by Simplex of any Junttan PM20 piling machines. No further enforcement action was taken by HSE against Simplex in respect of the accident. Following discussions involving the HSE, Junttan Oy, Junttan Oy's United Kingdom representative, the Federation of Piling Specialists, Simplex, and a consulting mechanical and structural engineer instructed by Simplex, Junttan Oy made certain modifications to its piling rigs located in the United Kingdom in order to satisfy the concerns of the HSE as to the possibility of inadvertent release of the hammer. The modifications were made to all Junttan Oy's piling rigs in use in the United Kingdom, and to all new piling rigs built by Junttan Oy since March 1999. On 22 February 1999 HSE issued an improvement notice pursuant to s 21 of the 1974 Act requiring the remedy of the contravention of s 6 by 30 March 1999. The improvement notice was served on the United Kingdom sales agent of Junttan Oy. On 9 March 1999 the HSE withdrew the improvement notice.

h [72] On 4 May 2001, at the Bristol Magistrates' Court, District Judge Thomas heard, inter alia, submissions on behalf of Junttan Oy that the court had no jurisdiction to hear and determine a prosecution based on an offence under s 6 of the 1974 Act. On 22 June 2001 the district judge ruled that the court had jurisdiction to hear and determine the prosecution. The intention had been that the matter would be transferred to the Crown Court but in view of judicial review proceedings then launched by Junttan Oy that did not happen.

j [73] On 5 September 2001 the claim for judicial review was lodged. In March 2002 the matter came before Lord Woolf CJ, and Wright J, sitting as a Divisional Court. The Divisional Court had to consider two grounds of challenge to the decision of the district judge, namely—(a) that Junttan Oy could be prosecuted only under the 1992 regulations and not under s 6 of the 1974 Act; (b) that the

HSE had failed to follow a mandatory procedure set out in art 7 of the Machinery Directive. The Divisional Court upheld the first objection but rejected the second ([2002] EWHC 566 (Admin), [2002] 4 All ER 965, [2002] ICR 1523). The Divisional Court dealt with the issues in reverse order. a

[74] The HSE now appeals to the House against the first decision of the Divisional Court, and Junttan Oy appeals to the House against the second decision. It will be convenient to deal first with the decision that Junttan Oy may only be prosecuted under the regulations. b

[75] The core of the reasoning of the Divisional Court on this point was stated by Lord Woolf CJ (at [53]):

‘I have found this issue one of considerable difficulty and finely balanced. However, I have come to the conclusion that it is inappropriate and wrong for the Executive to prosecute for an offence under s 6 of the 1974 Act when there is a specific statutory offence under the 1992 regulations covering exactly the same ground as s 6 but in different language so that different issues can arise as to the standard of safety which is required, and imposing a different penalty. The offence under the 1992 regulations is the offence which gives effect to Directive 98/37. In addition, the 1974 Act was there in the background. If there was an intention to prosecute for a different offence (not one covering exactly the same ground as the offence in the 1992 regulations), I would take a different view. Partly as a matter of interpretation, and partly because it appears to me that it would be a form of misuse of the powers of the 1974 Act to rely on s 6, I have come to the conclusion that it was not open to the Executive to bring proceedings under s 6. They should have brought proceedings under the 1992 regulations. It may be that the penalty under the 1992 regulations is lower than it should be. If so, the 1992 regulations should be amended. Indeed, I consider that attention should be given to the question of whether the penalties under the 1992 regulations are sufficient. However, the person manufacturing the machinery to which the regime established by Directive 98/37 applies is entitled to have his conduct judged by the standards set in that directive. Those standards are reflected in the 1992 regulations, but not precisely reproduced by s 6 of the 1974 Act. Accordingly, I conclude that the decision of the district judge was wrong in that regard.’ c
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In a separate judgement Wright J expressed agreement with the judgment of Lord Woolf CJ. g

[76] The Divisional Court certified a point of law of general public importance on this aspect. It read as follows:

‘Was the Health and Safety Executive entitled as a matter of United Kingdom and European Community law to prosecute the defendant under s 6 of the Health and Safety at Work etc Act 1974 in respect of the supply of machinery and questions of the safety of its design and construction, or was it only permissible for the Health and Safety Executive to bring proceedings against the defendant under re 29(a) of the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073, which regulations deal with the supply of machinery and safety of its design and construction and were notified to the EC Commission as being intended to implement the EP and Council Directive (EC) 98/37?’ h
j

This is the question to be examined on the appeal of the HSE to the House.

a [77] The second point (addressed first by the Divisional Court) relates to art 7 of the Machinery Directive. In order to explore the issue it is necessary to set out art 7 in extenso. It provides:

b '1. Where a Member State ascertains that:
—machinery bearing the CE marking, or
—safety components accompanied by the EC declaration of conformity, used in accordance with their intended purpose are liable to endanger the safety of persons, and, where appropriate, domestic animals or property, it shall take all appropriate measures to withdraw such machinery or safety components from the market, to prohibit the placing on the market, putting into service or use thereof, or to restrict free movement thereof.

c Member States shall immediately inform the Commission of any such measure, indicating the reason for its decision and, in particular, whether non-conformity is due to:

- d (a) failure to satisfy the essential requirements referred to in Article 3;
(b) incorrect application of the standards referred to in Article 5(2);
(c) shortcomings in the standards themselves referred to in Article 5(2).

e 2. The Commission shall enter into consultation with the parties concerned without delay. Where the Commission considers, after this consultation, that the measure is justified, it shall immediately so inform the Member State which took the initiative and the other Member States. Where the Commission considers, after this consultation, that the action is unjustified, it shall immediately so inform the Member State which took the initiative and the manufacturer or his authorised representative established within the Community. Where the decision referred to in paragraph 1 is based on a shortcoming in the standards, and where the Member State at the origin of the decision maintains its position, the Commission shall immediately inform the committee in order to initiate the procedures referred to in Article 6(1).

f 3. Where:
—machinery which does not comply bears the CE marking,
—a safety component which does not comply is accompanied by an EC declaration of conformity,
g the competent Member State shall take appropriate action against whom so ever has affixed the marking or drawn up the declaration and shall so inform the Commission and other Member States.

4. The Commission shall ensure that Member States are kept informed of the progress and outcome of this procedure.'

h It was common ground before the Divisional Court that the HSE did not in fact follow the procedure set out in art 7 of the directive. Two questions arose: (1) was there a failure to comply with art 7? (2) if so, what are the consequences? Lord Woolf CJ (with whom Wright J agreed) concluded (at [48]):

j 'With respect to Miss Lee, I regard this argument as one without any merit whatever. Article 7 provides that a member state is required to take steps if it forms the view that machinery may endanger the safety of persons. In this case, before the prosecution was commenced, the machinery had been modified. It was no longer liable to endanger the safety of persons, though it had been responsible for an unfortunate death. In those circumstances it would be purposeless to withdraw such machinery from the market or to

take any of the other action referred to in art 7. The position would be the same if, after the machinery had been used but before it was appreciated that it was not satisfactory from the point of view of safety, it was removed from this country. If it was appropriate to regard the manufacturer of the machinery as having committed a criminal offence, it could not be the intention that art 7 should prevent a prosecution. In my judgment, art 7 has no relevance to enforcement action which consists of taking criminal proceedings. Its relevance is confined to taking the measures referred to in art 7(1).'

Junttan Oy contends that the Divisional Court erred on this point. The Divisional Court certified the following question as a question of law of general public importance:

'Has the Health and Safety Executive failed to follow a procedure which was mandatory in the present case (namely that set out in art 7 of Directive 98/37) and, if so, what are the effects of that failure on the prosecution being brought by the Health and Safety Executive under s 6 of the Health and Safety at Work etc Act 1974?'

This is the question which arises on the appeal of Junttan Oy. It is a live issue only if the appeal of the HSE succeeds.

THE FIRST CERTIFIED QUESTION

[78] It will be recalled that the Divisional Court based its conclusion on a twofold basis, viz because as a matter of interpretation the HSE could not bring a prosecution under the s 6 of the 1974 Act but only under the 1992 regulations, and because 'it would be a form of misuse of the powers of the 1974 Act to rely on section 6'. On appeal to the House the second ground was not supported by Junttan Oy. If the first ground is sound, the second does not arise. On the other hand, if the first ground fails, because it was open to the HSE to prosecute under s 6 of the 1974 Act or under the 1992 regulations, no question of a misuse of power could arise. To this extent therefore the reasoning of the Divisional Court cannot be accepted.

[79] It may well be that the Divisional Court would not have fallen into this error if s 18 of the Interpretation Act 1978 had been cited to it. Section 18 provides:

'Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, the offender shall, *unless the contrary intention appears*, be liable to be prosecuted and punished under either or any of those Acts or at common law, but shall not be liable to be punished more than once for the same offence.' (My emphasis.)

Section 23 of the 1978 Act makes it clear that s 18 applies where two offences are contained in a statute, on the one hand, and a statutory instrument, on the other hand. It is therefore necessary in the first place to examine the 1992 regulations with a view to ascertaining whether they reveal a contrary intent, viz an intent that a prosecution may not be brought at the discretion of the HSE under either the 1974 Act or the 1992 regulations.

[80] The regulations were made by the United Kingdom under s 2(2) of the European Communities Act 1972 and were notified to the Commission of the

a European Communities as implementing the directive. It is now necessary to refer to some of the provisions of the 1992 regulations. Regulation 11 provides:

'(1) Subject to paragraph (4) below, no person who is a responsible person for the purposes of these Regulations shall supply relevant machinery or a relevant safety component unless the requirements of regulation 12 below are complied with in relation thereto.

b (2) Subject to paragraph (4) below, it shall be the duty of any person who supplies relevant machinery or a relevant safety component, but who is not a person to whom paragraph (1) above applies, to ensure that that relevant machinery or relevant safety component is safe.

c (3) Where a person—(a) being the manufacturer of relevant machinery or a relevant safety component, himself puts that relevant machinery or relevant safety component into service in the course of a business; or (b) having imported relevant machinery or a relevant safety component from a country or territory outside the European Economic Area, himself puts that relevant machinery or relevant safety component into service in the course of a business, for the purposes of these Regulations that person shall be deemed to have supplied that relevant machinery or relevant safety component to himself.'

Regulation 12 provides:

e '(1) The requirements of this regulation are that—(a) the relevant machinery or relevant safety component satisfies the relevant essential health and safety requirements ... (e) the relevant machinery or relevant safety component is in fact safe.'

Regulation 2(2) provides a relevant definition:

f '... "safe" in relation to relevant machinery or a relevant safety component means that, when the machinery or the safety component is properly installed and maintained and used for the purposes for which it is intended, there is no risk (apart from one reduced to a minimum) of its endangering the health of or of its being the cause or occasion of death or injury to persons or, where appropriate, to domestic animals or damage to property, and cognate expressions shall be construed accordingly ...'

Subject to a defence of due diligence provided by reg 31, it is an offence under reg 29 to fail to comply with reg 11. Regulation 30 provides for penalties as already explained.

h [81] Regulation 28 and Sch 6 make provision for enforcement action (eg by prohibition notice) and places the duty to take such action on the HSE. Parts of the 1974 Act are incorporated by reference into the regulations.

[82] Paragraph 7 of Sch 6 contains a general saving provision:

j 'Nothing in these Regulations shall be construed as preventing the taking of any action in respect of any relevant machinery or a relevant safety component under the provisions of the 1974 Act, the Order or the 1987 Act.'

On the face of it this provision rules out the argument that by reason of the provisions of the 1992 regulations it is impossible to bring a prosecution under s 6 of the 1974 Act. The Divisional Court confronted this argument. Lord Woolf CJ observed ([2002] 4 All ER 965 at [54]):

'In order to come to that conclusion it is necessary to give full weight to para 7 of Sch 6 to the 1992 regulations. That paragraph, as it seems to me, is capable of a broad interpretation or a narrow interpretation. It can be interpreted so that it is confined to taking action in respect of any relevant machinery—that is, taking action such as making a prohibition order in relation to relevant machinery directly against the machinery; or it can be construed broadly so that it can be taken to have the effect of enabling a prosecution to be brought under the 1974 Act. Particularly in relation to a penal provision, such as those contained in s 6 of the 1974 Act, it seems to me to be right to adopt the interpretation which is more favourable to the subject. I would therefore adopt the narrower interpretation to para 7 of Sch 6. If that narrower interpretation is adopted, it can be seen that the effect of the 1992 regulations as a whole, and in particular the provisions contained in para 1 of Sch 6, is to incorporate into the 1992 regulations the recognition of what I will describe as the administrative enforcement provisions of the 1974 Act, but not the prosecution provisions.'

It is now necessary to examine this part of the judgment of the Divisional Court.

[83] There are formidable difficulties inherent in this reasoning. Even if para 7 of Sch 6 is read as the Divisional Court read it, ie restricted to administrative action, such as a prohibition notice, there is still no provision of the 1992 regulations which prevents a prosecution under s 6 of the 1974 Act or which is capable of displacing the operation of s 18 of the 1978 Act. The narrow construction adopted by the Divisional Court does not support the conclusion that as a matter of interpretation of the 1992 regulations a prosecution under s 6 of the 1974 Act is no longer possible.

[84] In any event, the restrictive construction adopted by the Divisional Court in effect interprets the words 'any action' in para 7 as 'some actions but not others'. It cuts down the ordinary meaning of the language. The obvious meaning of the operative words is wide enough to include the power of prosecution. It is, therefore, necessary to consider whether the restriction imported into the language serves any sensible contextual purpose. The Divisional Court considered that its interpretation was justified because a penal provision is at stake. That may sometimes be a relevant consideration. But our courts nowadays rarely apply the rule of strict construction. If it has a role to play it is as a rule of last resort: it is only to be applied if all other grounds of determining legislative intent have failed: see *Cross on Statutory Interpretation* (3rd edn, 1995) pp 172–175. In the present context there is at stake a cogent countervailing legal policy: the protection of health and safety at work is of overriding importance. On the Divisional Court's interpretation even the worst conceivable failure to ensure safety of machinery resulting in many deaths could only be prosecuted summarily, with penalties which would be derisory, rather than on indictment under the 1974 Act. That could hardly have been the purpose of the regulations.

[85] In any event, counsel for the HSE has persuaded me that there is no logical basis for the distinction inherent in the interpretation of the Divisional Court. In his printed case he succinctly and correctly summarised the position as follows:

'41. ... the scheme of the 1992 regulations is to incorporate, with modifications, certain enforcement provisions of the [1974 Act] for the purposes of enforcing the regulations. For example, the power of the HSE under

s 22 [of the 1974 Act] to issue a prohibition notice is expressly incorporated into the regulations by para 1(b) of Sch 6. That power is then a power under the regulations for the purposes of enforcing the Regulations and its exercise does not involve any exercise of the similar power under the [1974 Act]. Therefore, it cannot be said that para 7 of Sch 6 is intended only to leave open the possibility of administrative enforcement action under the [1974 Act] in order to enforce the provisions of the regulations: the structure of the material parts of the regulations shows that the intention was to replicate in the Regulations the relevant powers in the [1974 Act] without excluding the continued operation of the latter (in the absence of an express provision to the contrary.)

42. The matter can be tested in this way. Adopting (for the sake of argument) the narrower construction, the draftsman was content to preserve the operation of two parallel powers to issue prohibition notices: one under the [1974 Act] and the other under the 1992 regulations (the latter using the provisions of the former to that end). That being so, what is the logic that leads to the inference that the draftsman did *not* intend to preserve the existence of two parallel *prosecution* powers? After all, logically, if the draftsman was content to maintain parallel powers in one case, why should he have not entertained the same intention in relation to the other: is that not the significance of the phrase "any action"?

For all these reasons I conclude that the regulations are not capable of bearing the restricted meaning favoured by the Divisional Court.

[86] Dealing at this stage only with the interpretation of the regulations, I conclude that there is nothing in them which prevents a prosecution under s 6 of the 1974 Act.

[87] It is now necessary to examine whether the Machinery Directive requires a different approach to be adopted. The Machinery Directive was adopted under art 100a of the EC Treaty (now renumbered art 95 EC). The aim was to harmonise technical standards so as to improve free trade within the European Community. The primary focus of the Machinery Directive was therefore the promotion of free trade. On the other hand, the recitals, detailed provisions, and structure of the Machinery Directive made clear that the protection of health and safety is of overriding importance. Thus recital (7) expressly stated that existing levels of health and safety in member states are not to be lowered as a result of the Machinery Directive. Recital (10) stated that one of the essential aims of the directive is the maintenance and improvement of the level of safety *attained by the member states*. The relevance of these recitals to the provisions of the pre-existing s 6 of the 1974 Act is obvious.

[88] Article 1 provides that the Machinery Directive applies to machinery and lays down essential health and safety requirements as defined in Annex I: see also art 3. Article 4 provides that member states shall not prohibit, restrict or impede the placing on the market and putting into service in their territory of machinery and safety components which comply with the directive. Article 5 provides:

'1. Member States shall regard the following as conforming to all the provisions of this Directive, including the procedures for checking the conformity provided for in Chapter II:

—machinery bearing the CE marking and accompanied by the EC declaration of conformity referred to in Annex II, point A,

—safety components accompanied by the EC declaration of conformity referred to in Annex II, point C. a

In the absence of harmonised standards, Member States shall take any steps they deem necessary to bring to the attention of the parties concerned the existing national technical standards and specifications which are regarded as important or relevant to the proper implementation of the essential safety and health requirements in Annex I. b

2. Where a national standard transposing a harmonised standard, the reference for which has been published in the *Official Journal of the European Communities*, covers one or more of the essential safety requirements, machinery or safety components constructed in accordance with this standard shall be presumed to comply with the relevant essential requirements. c

Member States shall publish the references of national standards transposing harmonised standards.

3. Member states shall ensure that appropriate measures are taken to enable the social partners to have an influence at national level on the process of preparing and monitoring the harmonised standards. d

The Commission has correctly observed in comments on the Machinery Directive, para 166, that 'Compliance with harmonized standards implies 'presumption of conformity' to the regulations'. Plainly the CE marking creates no more than a rebuttable presumption. This is clear from art 2. It provides:

'1. Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service only if they do not endanger the health or safety of persons and, where appropriate, domestic animals or property, when properly installed and maintained and used for their intended purpose.' e

This is an absolute obligation and is not dependent on whether or not the machinery or components comply with the requirements of the Machinery Directive. Safety is a matter of fact and the directive requires that machinery and components must not in fact endanger health or safety. This is hardly surprising. f

[89] It is therefore clear from the provisions and structure of the Machinery Directive that the basic safety requirement in art 2(1) prevails over the free trade obligation in art 4. Thus under art 7(1), member states are *obliged* to take appropriate measures to withdraw machinery from the market, prohibit its placing on the market, putting into service or use or restrict its free movement where they ascertain that the machinery is dangerous *even if the machinery (properly) bears the CE marking*. The purpose of the Machinery Directive is to set minimum rather than maximum health and safety standards. It creates a floor of protection. Member states are free to introduce safety measures which go further than the Machinery Directive, and to rely on pre-existing measures which impose additional or higher standards than the directive. g

[90] The Divisional Court ([2002] 4 All ER 965 at [53]) observed that: (i) 'The offence under the 1992 regulations is the offence which gives effect to Directive 98/37'; (ii) 'the person manufacturing the machinery to which the regime established by Directive 98/37 applies is entitled to have his conduct judged by the standards set in that directive'; and (iii) 'Those standards are reflected in the 1992 regulations, but not precisely reproduced by s 6 of the 1974 Act'. The first h

a proposition is not entirely accurate. The Machinery Directive does not prescribe any form of criminal sanction for failure by a manufacturer of machinery to comply with the requirements set out in Annex I of the directive or the general duty to ensure that machinery is safe. Community law does not therefore prescribe what the criminal sanctions must be under domestic law. The second and third propositions appear to suggest that there is a disharmony between s 6(1)(a) of the 1974 Act and the directive. That is, however, not correct. Section 6(1)(a) of the 1974 Act imposes an obligation on persons who design, manufacture, import or supply any article for use at work 'to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health'. Article 2(1) of the Machinery Directive provides:

c 'Member States shall take all appropriate measures to ensure that machinery or safety components covered by this Directive may be placed on the market and put into service only if they do not endanger the health or safety of persons ...'

d There is also no dissonance between the requirement that an article must be 'safe and without risks to health' and the requirement that machinery '[does] not endanger the health and safety of persons'.

[91] Nothing in the Machinery Directive affects the pre-existing right of member states to take action against machinery that is believed to be unsafe. The 1974 Act and the 1992 regulations function perfectly sensibly in parallel in as much as they operate at different levels of seriousness. The Machinery Directive and its purposes are not in any way undermined by the co-existence of the 1974 Act and the 1992 regulations. Whether such a regime is appropriate is a matter for domestic law.

f [92] I would therefore hold that the HSE was entitled to prosecute Junttan Oy under s 6 of the 1974 Act and I would rule that the Divisional Court erred in ruling to the contrary. It was agreed at the hearing that it is not necessary to refer a question to the Court of Justice of the European Communities under art 234 EC. That remains the position.

THE SECOND CERTIFIED QUESTION

g [93] It is now necessary to deal with the second certified question. Article 7 of the Machinery Directive has already been set out. The facts have also been described. After the accident the HSE issued a prohibition notice. Following multi-party discussions the machinery was modified. That took place before the prosecution was commenced. As a result of the modifications the machinery no longer posed a danger to the safety of persons.

h [94] Lord Woolf CJ made clear that in the circumstances the argument of Junttan on the failure to operate the art 7 procedure was without merit. I am in complete agreement with him on this point. The procedure under the Machinery Directive ceased to be relevant once the rig had been modified. There was no sense in requiring the mechanism to be triggered where the manufacturer had already agreed to make the modifications and had done so. In its *Guide to the Implementation of Directives Based on the New Approach and the Global Approach* of September 1999 the Commission explains the conditions for invoking the safeguard clause as follows (pp 53–54):

'Conformity can be enforced if the national authority requests the manufacturer of the authorised representative to take the necessary

measures, or if the product is modified or voluntarily withdrawn from the market. Unless a formal decision is taken in these cases, to prohibit or restrict the placing on the market of the product or to have it withdrawn from the market, the safeguard clause procedure is not invoked. Thus, a direct exchange of information between market surveillance authorities may be necessary ... Where the manufacturer, the authorised representative, or other responsible person, agrees to modify the product in such a way that it complies with the applicable provisions, the Member State should withdraw the safeguard clause notification.'

While these statements are not authoritative, they are in keeping with the purposive approach of European law and in my view is the only sensible and businesslike approach.

[95] Junttan Oy's only answer is that its actions were not voluntary but motivated by commercial pressures. That is, however, a hopeless contention in European and domestic law. Junttan Oy could have challenged the lawfulness of the prohibition notice. It did not do so. The motives of Junttan in agreeing to modifications are irrelevant.

[96] On this narrow ground I would answer the certified question by holding that on the facts there was no failure to follow the safeguard procedure. The answer is obvious. In these circumstances it is unnecessary to consider other questions debated on the appeal of Junttan. And there is no relevant question to be referred to the Court of Justice under art 234 EC.

CONCLUSION

[97] I would allow the appeal of the HSE and dismiss the appeal of Junttan Oy.

LORD HOBHOUSE OF WOODBOROUGH.

[98] My Lords, this case arises out of a tragic accident at the Avonmouth sewage plant on 9 February 1999 which caused the death of Mr Bourner. He was fatally injured when the hammer of a piling rig fell on him. For present purposes, it is to be assumed that the descent of the hammer was caused by two relevant factors. The first was the act of the rig-operator in causing the rig to drop the hammer onto Mr Bourner who was standing below it. The second was the fact that the rig had not been designed by its manufacturers in a way which made it impossible for the operator to make such a mistake. The two men were employees of an English company Simplex Piling Ltd (earlier known as DEL Piling Contractors). Simplex (DEL) had bought the rig the previous year from a Finnish company, Junttan Oy, which carried on business in Finland as the manufacturers of piling rigs. The rig in question had been manufactured in Finland by Junttan Oy in accordance with one of their designs. It had been delivered to Simplex in England. Hence there had been a supply of the rig in England by Junttan Oy.

[99] The questions argued on this appeal relate to the power of the United Kingdom Health and Safety Executive (HSE) to prosecute Junttan Oy under ss 6(1) and 33(1) of the Health and Safety at Work etc Act 1974. The summons commencing the prosecution before the Bristol Magistrates' Court was served on Junttan Oy in Finland. The summons charged Junttan Oy with having failed to discharge their duty to ensure that the rig was so designed and manufactured that it would be safe and without risks to health at all times when it was being used by persons at work.

a [100] It must be pointed out at once that this summons is most unhappily worded. The criminal acts it charges are the design and manufacture of the rig. Both these acts took place outside the United Kingdom and the English courts have no jurisdiction over Junttan Oy in respect of those acts. They cannot be the subject of criminal proceedings in the English courts. Besides, the 1974 Act is purely municipal and does not have extra-territorial effect. The jurisdiction of the English courts in respect of this transaction first arose at the time of the import of the rig into the United Kingdom and its supply to Simplex (DEL). The act which should have been charged was the supply of the rig, not anything that happened in Finland.

b [101] The preamble to the 1974 Act states that its purpose is, among other things, 'to make further provision for securing the health, safety and welfare of persons at work'. The same purpose is reiterated in the heading to Pt I of the Act and in s 1(1). Sections 3 to 5 deal with the duties of employers and those responsible for the work place. Section 6, as amended by the Consumer Protection Act 1987, provides:

d '(1) It shall be the duty of any person who designs, manufactures, imports or supplies any article for use at work ... (a) to ensure, so far as is reasonably practical, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being ... used ... by a person at work ...'

e Section 33 of the Act provides that following a conviction on indictment the offender shall be liable to an unlimited fine.

f [102] The HSE submit that the situation is straightforward. There was an offence committed within the jurisdiction—the supply of the rig. It was dangerous as is demonstrated by the occurrence of the accident. In any event, the question whether it was dangerous will be a question of fact for the jury to decide at the trial. No question whether it was reasonably practical to design and construct a safe rig can arise since after the accident Junttan Oy modified the rig in compliance with a notice served upon them by the HSE so as to eliminate the possibility of any repetition of the same accident. Accordingly, no defence under ss 6 and 40 (the reversal of the burden of proof provision) can arise; but, if it did, it would again be a question of fact for the jury. The accident had fatal consequences and a trial on indictment is justified together with a power to impose an unlimited fine. There can be no valid objection to the prosecution of Junttan Oy under the 1974 Act proceeding.

g [103] Junttan Oy object at the outset, in my opinion rightly, that to describe questions of safety as simple questions of fact, just as if one was asking whether a given bird is a sparrow or a sparrowhawk, is to make a fundamental and elementary mistake. Safety is a question of opinion. There is no such thing as absolute safety. All safety is relative. Two men can legitimately hold different opinions whether a machine is safe or unsafe. Different assessments can be and are made of the safety of a particular machine by the authorities in different countries. They differ on the margin of safety to be required. Or, one may consider that another's safety device in fact increases the risks inherent in the machine rather than reducing them. Junttan Oy then go on to submit that this is the present case. The piling rig was considered safe in Finland and, they say, in a number of other European countries, though not in England by the HSE. They submit that this conflict and its impact on the working of the single market is the subject of the European directive to which I now turn.

[104] Junttan Oy argue that the field covered by this prosecution is now governed by the regime required by the EP and Council Directive (EC) 98/37 (on the approximation of laws of the member states relating to machinery) (OJ 1998 L207 p 1), a consolidating directive which replaced the earlier like directive, Council Directive (EEC) 89/392 (on the approximation of laws of the member states relating to machinery) (OJ 1989 L183 p 9), which since 1989 had been frequently amended. There are 25 recitals. They are too lengthy to quote in full. The basic principle is stated in recital (2): 'Whereas the internal market consists of an area without internal frontiers within which the free movement of goods ... is guaranteed ...' Succeeding recitals stress the disparity between the existing accident prevention laws of member countries and the fact that they 'constitute barriers to trade within the Community' (recital (6)), and 'obstacles' to the free movement of goods (recital (8)). Recital (7) is to the same effect. Recitals (7) to (9) stress the requirement that the various national laws be 'approximated' or 'harmonised'. This reflects the 'New Approach' and 'Global Approach' as explained in the Commission of the European Communities' *Guide to the Implementation of Directives Based on the New Approach and the Global Approach* of 1999. As is also made clear in the recitals, and in the Guide, there are two further basic features of the new legislation. These are the CE marking system and the 'safeguard clause procedure'. Recital (16) states that 'it is necessary ... to ensure the free movement and putting into service of machinery bearing the "CE" marking'. Similarly recital (17) includes the words—

'whereas, in order to help manufacturers to prove conformity to these essential requirements and in order to allow inspection for conformity to the essential requirements, it is desirable to have standards harmonised at European level for the prevention of risks arising out of the design and construction of machinery ...'

It is recognised in recital (5) that 'Member States are responsible for ensuring the health and safety on their territory of persons ... in particular, of workers, notably in relation to the risks arising out of the use of machinery'; and recital (19) states that this responsibility is addressed in the 'safeguard clause providing for adequate Community protection procedures'. Recitals (24) and (23) deal further with the 'CE' marking scheme, the standard required, its essential place in the 'global' approach and the presumption of design and construction compliance which it creates.

[105] The substantive provisions of the Machinery Directive follow the scheme of the recitals. Chapter I is entitled 'Scope, Placing on the Market and Freedom of Movement'. It incorporates an annex which sets out the 'essential health and safety requirements'. These are expressed in considerable detail and clearly include the matters of complaint relevant to the present case. Articles 2 and 3 define the duty of each member state in terms of the 'essential requirements'. Article 4(1) provides: 'Member States shall not prohibit, restrict or impede the placing on the market or putting into service in their territory of machinery and safety components which comply with this Directive ...' Article 5 provides:

'1. Member States shall regard ... as conforming to all the provisions of this Directive, including the procedures for checking the conformity provided for in Chapter II:—machinery bearing the CE marking and accompanied by the EC declaration of conformity referred to in Annex II, point A ...'

a Article 7 makes separate provision for where a member state ascertains that machinery bearing a CE marking is liable to endanger the safety of persons. This enables that state to take various appropriate steps, under the supervision of the Commission. It also authorises the 'competent Member State shall take appropriate action against whom so ever has affixed the marking' to the non-compliant machinery 'or drawn up the declaration' but with a concurrent duty to inform the Commission and other member states.

b [106] The relevant rig had at the time of its manufacture in Finland been marked by Junttan Oy with the CE marking and an 'EC Declaration of conformity for machinery' had been issued in Finland by their area sales manager certifying that the rig, which it identified, was 'in conformity with the provisions of the Machinery Directive (Directive 89/392/EEC), as amended, and with national implementing legislation'; it further declared that harmonised standard EN 996 had been applied. No allegation has been made that this declaration was invalid or unlawful. The evidence of Junttan Oy is that this design of rig has been accepted as safe in other member states and the certification has not been questioned.

c [107] To return to the English law, the regulations which the United Kingdom government introduced to comply with the Machinery Directive of 1989 as amended were the Supply of Machinery (Safety) Regulations 1992, 1992/3073. Fresh regulations were not introduced after the 1998 directive. The 1992 regulations specifically apply to the supply of machinery and safety components and not to any other transactions (reg 2(1)). The article supplied must satisfy the essential health and safety requirements', be properly certified and marked and be in fact safe (reg 12(1)). The offence, if any, that Junttan Oy committed was an offence contrary to reg 11. This is made a criminal offence by reg 29(a) and under reg 30(1) it is to be prosecuted summarily; and on conviction the offender, unless sentenced to imprisonment (three months maximum), is to be liable only to a 'level 5' fine. The Divisional Court commented that this is clearly an inadequate limit but the regulation has never been amended (see [2002] EWHC 566 (Admin), [2002] 4 All ER 965, [2002] ICR 1523). Regulation 31 provides for the person prosecuted to have a due diligence defence. The 1992 regulations do not give any effect to the provision of the Machinery Directive that the CE marking and the certifying declaration shall give rise to a presumption of compliance with the essential safety requirements; indeed, they implicitly deny any such presumption or, even, the giving of any evidential value of the marking or declaration (eg regs 12 and 25). The regulations expressly disapply s 33(2A) of the 1974 Act (Sch 6, para 1(b)(vi)). (It is agreed that there is a printing error in the 1992 regulations and that s 33 is what is being referred to.) Paragraph 7 of Sch 6 provides that—

h 'Nothing in these Regulations shall be construed as preventing the taking of any action in respect of any relevant machinery or a relevant safety component under the provisions of the 1974 Act, the Order or the 1987 Act.'

This provision was central to much of the argument in your Lordships' House.

j [108] It is on this material that Junttan Oy submit that the specific provisions in the 1992 regulations and in the directive have superseded, pro tanto, those of the 1974 Act and that any prosecution in respect of their supply of this rig must be brought under the regulations and not be inconsistent with the directive. Their motive in so doing is to take advantage of the presumption, of the due diligence defence and of the requirement of a summary trial with a limited fine. The HSE say that they can still prosecute for this alleged offence under the 1974

Act. They rely upon para 7 and upon s 18 of the Interpretation Act 1978 which preserves the power to prosecute under an earlier Act or under the common law notwithstanding that the power to prosecute in respect of the same conduct has been given by later legislation, unless a contrary intention appears. The Divisional Court, which was not referred to s 18, upheld the submission of Juntan Oy. This raises a question of English law and the construction of the regulations, and particularly of para 7.

DISCUSSION: ENGLISH LAW

[109] The first thing to do is to place the question of construction in its context. The 1974 Act had a different purpose from the Machinery Directive (which did not then exist) and the 1992 regulations. The scope of the former was directed to health and safety in the workplace. It covered many sources of hazard, any 'article' not just machinery; for example, it covered explosive and inflammable substances and fairground equipment. The persons subject to the specified duties included not just, or even primarily, the designers, manufacturers, importers and suppliers of any such article but also employers and 'persons concerned with premises'; they owed duties not only to their employees but also to any other person exposed to the hazard. The Act conferred extensive powers upon the newly formed HSE and its inspectors. They could enter and investigate premises, require evidence to be preserved, take samples, remove evidence, call for and inspect documents and records and so on (s 20). They could serve mandatory 'Improvement notices' (s 21) and 'Prohibition notices' (s 22). It gave powers to obtain information (s 27). It gave the customs a power to detain articles and substances (s 25A). The criminal offences which could be prosecuted under the Act (s 33) covered the whole range of these duties and powers and included collateral matters such as attempting to deceive the inspectors. There is (understandably) nothing in the Act about marking or certification nor about the free movement of goods within the EEC nor any reference to any European legislation.

[110] By contrast the 1992 regulations relate specifically to the supply of machinery. There are cross-references to the European legislation. The marking and certification systems are acknowledged. The relevant sentencing power in the 1974 Act is expressly disappplied and a different power specified. Paragraph 7 is not as wide as might first appear: it covers 'any action in respect of any relevant machinery ... under the provisions of the 1974 Act'. Does this include prosecuting for conduct which is expressly made an offence under the regulations, negating the due diligence defence granted by the regulations, reapplying the disappplied s 33(2A) and seeking a greater penalty than that allowed by s 30(1) of the regulations? Or does it refer to the preservation of the extensive powers granted by ss 20 and following and the prosecution for the many other offences created by the 1974 Act not, as such, involving the import and supply of machinery? Either construction would in my opinion be consistent with the actual wording of para 7. One must then add to that the fact that a prosecution on the terms of the 1974 Act for import into the United Kingdom from another member state of marked and certified machinery would involve the United Kingdom in a breach of its obligations under the Machinery Directive; it would also involve a collateral attack on the presumption requirement in the directive and its scheme for dealing with improper certification. Where does all this leave the question of the correct construction of the regulations?

a [111] I have no doubt that as a matter of English law the correct construction to place upon the regulations is that they pro tanto supersede the corresponding provisions of the 1974 Act. Viewed overall, a contrary intention does appear. The consistent (and sensible) of the two alternative constructions to be placed on the ambiguous para 7 is to be preferred. I therefore agree with the conclusion of the Divisional Court on this point and am reinforced in my conclusion by that
b contained in the opinion of my noble and learned friend Lord Nicholls of Birkenhead and the reasons he has given and the authorities he has cited.

[112] There is a final argument which I should shortly cover. It has been argued by the HSE that, if there is any question whether the 1974 Act is fully compatible with the Machinery Directive, your Lordships should hold that the prosecution of Junttan Oy under the 1974 Act should be allowed to go ahead and,
c it is said, Junttan Oy can raise in those proceedings any defences which they believe they are entitled to under the directive. This argument of the HSE seems to me to amount to a *reductio ad absurdum* of the point in issue on this appeal. It ignores the necessity to construe the 1992 regulations as a matter of English law. It gratuitously courts uncertainty. If the correct decision on this appeal turns
d upon the compatibility of the 1974 Act with the Machinery Directive, this is a point upon which there is no unanimity of opinion in your Lordships' House and is contrary to the decision of the Divisional Court: it is, to put it at the lowest, an arguable point. If it would be incompatible with the Machinery Directive for Junttan Oy to be prosecuted under the 1974 Act, it follows that it is a question of compatibility which should be the subject of a reference to the Court of Justice.
e I do not accept this argument of the HSE.

[113] It is true that even a prosecution under the 1992 regulations would still leave unresolved questions of compatibility with the Machinery Directive in respect of the relevance of marking and certification. The fact that the drafting of the regulations does not seem to take into account marking and certification
f which has occurred in another member state and in accordance with its laws makes this inevitable. What Junttan Oy ask for at present is that they should not be prosecuted under the 1974 Act for this import and supply. If this is acceded to, any other questions, if they arise, would have to be dealt with in the course of a prosecution under the 1992 regulations if it is still permissible to bring one: see s 34 of the Act and para 1(b)(vii)(bb) of Sch 6 of the 1992 regulations. Further, it
g may be that, if Junttan Oy are able to raise the due diligence defence (as they would be on a prosecution under the regulations), the question of the evidential value of the marking and certification would become academic. (Indeed, trying to look into the mind of the draftsman of the regulations, it is not impossible that he, rightly or wrongly, felt that providing this defence was a good way to respond
h to the presumption in the Machinery Directive.)

CONCLUSIONS

[114] The appeal of the HSE should be dismissed and the order of the Divisional Court on this point affirmed.

j [115] There was also an appeal by Junttan Oy against another part of the decision of the Divisional Court. It has already been fully discussed in the opinions of your Lordships. The appeal of the HSE having failed, it is hard to see that this point has any longer any relevance. It can, further, be commented that, on any view, Junttan Oy is not being prosecuted for an offence under regs 28 and 29 and, if it were, the defence under reg 28(2) would appear to be available to it. I agree that this appeal should be dismissed.

LORD MILLETT.

[116] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Steyn and Lord Nicholls of Birkenhead, who have the misfortune to differ on the answer to the first certified question. I have come to the conclusion that in this respect Lord Steyn's answer is to be preferred, and I shall shortly explain my reasons for doing so. a

[117] I am satisfied that as a matter of domestic law it is not an objection to a prosecution under the Health and Safety at Work etc Act 1974 that the conduct complained of also constitutes an offence under the Supply of Machinery (Safety) Regulations 1992, SI 1992/3073. This is the effect of ss 18 and 23 of the Interpretation Act 1978 unless 'a contrary intention appears'. For the reasons given by Lord Steyn I do not think it does. Indeed, as Lord Nicholls has observed, para 7 of Sch 6 to the 1992 regulations presupposes the continued existence of relevant obligations under the 1974 Act. b
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[118] The question is whether the same conclusion is open when regard is paid to the obligations of the United Kingdom under EP and Council Directive (EC) 98/37 (on the approximation of laws of the member states relating to machinery) (OJ 1998 L207 p 1) (the Machinery Directive). The object of the directive is to harmonise member states' varying standards of health and safety in order to prevent them from impeding the free movement of machinery within the single market without compromising workers' health and safety. These twin objectives made it necessary for the directive to set not only minimum standards to be achieved, without which the health and safety of workers could be at risk, but also maximum standards, without which member states would be free to introduce anti-competitive measures under the guise of protecting workers' health and safety. The natural way to ensure the introduction of new maximum and minimum standards is to replace the existing legislation altogether; and recital (9) of the preamble to the directive seems to envisage that this is the method that member states would choose to adopt. But the directive does not commit them to adopt any particular method of transposing the requirements of the directive into national law, provided that the objects of the directive are achieved. d
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[119] Articles 2 and 3 of the Machinery Directive impose minimum standards. Article 2 does so in general terms. It requires member states to take 'all appropriate measures' to ensure that machinery and safety components covered by the Machinery Directive are not placed on the market if they 'endanger the health or safety of persons'. It does not require member states to create new criminal offences or to prosecute offenders; nor does it forbid it. It leaves it to member states to decide for themselves on the measures which they consider to be appropriate to achieve the desired result. These may include criminal sanctions, but they need not do so. g
h

[120] Article 3 condescends to more detail. It provides that such machinery and safety components must satisfy the health and safety requirements contained in Annex I. In fact these requirements are necessarily still in relatively general terms and are couched by reference to the object to be achieved rather than the means of achieving it. Thus the provision which is engaged in the present case is that control devices must be designed or protected so that, where there is a risk to health or safety, the desired effect cannot occur without an intentional operation. j

[121] Articles 4 and 5 are concerned to ensure the free movement of machinery and safety components which do satisfy the health and safety

a requirements of the Machinery Directive. Article 4 provides that member states must not 'prohibit, restrict or impede' the placing on the market and putting into service in their territory of machinery and safety components which comply with the directive. Strictly speaking this does not preclude member states from leaving on the statute book standards of health and safety which are more rigorous than those of the directive, but it does preclude them from enforcing them.

b [122] Article 5 provides that machinery which bears the CE marking, accompanied by the European Community declaration of conformity, must be regarded as conforming to all the requirements of the Machinery Directive. But art 5 is largely circumscribed by art 7 which provides that, where a member state discovers that machinery or safety components marked with a CE marking is in fact nevertheless 'liable to endanger the safety of persons', it must take all

c appropriate measures to withdraw it from the market, prohibit it from being placed on the market or put into service, and restrict its free movement. So, despite everything which might indicate the contrary, when it comes to the crunch the directive puts safety first. Even if the machinery bears a CE marking, a member state may restrict its free movement once it is found to be 'liable to

d endanger the safety of persons'; and there is nothing to prevent it from prosecuting the persons responsible. The question whether something is 'liable to endanger the safety of persons' is a question of fact which cannot be reduced to compliance with a legal text.

[123] One question which has been debated before us is whether the mere co-existence of statutory obligations under the 1974 Act and the 1992 regulations constitutes a breach of the United Kingdom's obligations to give effect to the Machinery Directive. It may or may not be satisfactory; that is a matter for domestic law. But I do not see how in itself it can be said to be a breach of our duties under Community law. Community law requires us to give effect to the directive. It requires us to enforce the standards of safety set out in the directive;

e and subject thereto to allow the free movement of machinery which does satisfy those standards. Provided that we do this, Community law is not concerned with the legislative techniques which we adopt for the purpose. We were obliged to transpose the directive into national law and we have done so by making the 1992 regulations. We were not obliged to repeal or disapply the 1974 Act. It would obviously have been sufficient to provide that machinery which complied with

f the 1992 regulations should be regarded as complying with the requirements of the 1974 Act.

[124] But even this is not strictly necessary. It is the particular case which matters. The question for Community law in the present case is not whether the United Kingdom has properly implemented the Machinery Directive, but

h whether the prosecution or threat of prosecution of Junttan Oy impedes or restricts the free movement of machinery which complies with the directive, that is to say which satisfies the requirements in Annex I and has not been found to be liable to endanger the safety of persons.

[125] To obtain a conviction under the 1974 Act the prosecution must prove

j that that Juntann Oy have failed—

'to ensure, so far as is reasonably practicable, that the article is so designed and constructed that it will be safe and without risks to health at all times when it is being set, used, cleaned, or maintained by a person at work'—

contrary to s 6(1) of the 1974 Act. If it proves this, it will have proved that the machinery is 'liable to endanger the safety of persons' within the meaning of the

directive; in other words that the machinery is of a kind which the United Kingdom is obliged to withdraw from the market and the free movement of which it is bound to restrict. a

[126] But that is not the end of the story. Under the 1992 regulations the prosecution would have had to prove that Juntann Oy had failed to ensure that the machinery satisfied the relevant requirements in Annex I to the Machinery Directive contrary to reg 12 of the 1992 regulations. Even where the prosecution is brought under the 1974 Act, however, it is not sufficient for the prosecution to allege that the machinery is unsafe within the meaning of s 6(1). It must give particulars of the offence to explain the grounds on which the machinery is alleged to be unsafe. The prosecution's case against Juntann Oy is that it is unsafe because it contravenes the provisions of s 3.3.3 of Annex I to the directive. Whether the present prosecution be brought under the 1974 Act or the 1992 regulations, the particulars of the offence charged are the same. b
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[127] I do not overlook the fact that the 1974 Act creates an offence of strict liability, whereas the 1992 regulations allow a defence of due diligence. This does not appear to be required by the directive, and it may be that in this regard the United Kingdom may have gone beyond a mere transposition. Moreover, conviction of an offence under the 1974 Act attracts a significantly heavier penalty than does a conviction under the 1992 regulations. d

[128] These are real differences; but I cannot see that they constitute a breach of the United Kingdom's obligations to give effect to the Machinery Directive. They arise only once the machinery has been found to be unsafe, in the present case because it does not comply with the requirements of Annex I. The Machinery Directive is concerned to prevent such machinery being placed on the market. It is not concerned with the sanctions which member states may impose for contravention. It does not require them to impose criminal sanctions at all; and if they choose to do so the scope of the offence and the nature of the defences which they may allow in relation to machinery which has been found to be unsafe are matters for national law. e
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[129] So I would answer the first certified question by saying that there is nothing in the Machinery Directive which prevents a prosecution under s 6 of the 1974 Act, at least where it is alleged that the machinery is unsafe because it does not comply with a requirement in Annex I to that directive. On the second certified question I agree with the conclusion of my noble and learned friend Lord Steyn. I also agree with him that there is no question to be referred to the Court of Justice of the European Communities. g

Appeal of the HSE allowed. Appeal of Juntann Oy dismissed.

Dilys Tausz Barrister.

R v Goldstein

R v R

[2003] EWCA Crim 3450

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b

COURT OF APPEAL, CRIMINAL DIVISION

LATHAM LJ, MOSES J AND SIR EDWIN JOWITT

22 OCTOBER, 28 NOVEMBER 2003

c

Criminal law – Public nuisance – Nature of offence – Whether common law offence of public nuisance continuing to exist – Whether offence of public nuisance infringing human rights – Human Rights Act 1998, Sch 1, Pt I, arts 7, 8, 10.

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In two otherwise unrelated cases, the defendants had been indicted for the common law offence of causing a public nuisance. According to the definition in *Archbold*, a person was guilty of that offence when he did an act not warranted by law, or omitted to discharge a legal duty, if the effect of that act or omission was to endanger life, health, property, morals or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all of the Queen's subjects. In the first case, the defendant was convicted of causing a public nuisance by sending through the post, at the height of a security alert, an envelope containing salt which had leaked out at the sorting office, causing evacuation of postal workers and the attendance of specialist police officers to determine whether the salt was anthrax. In the second case, the judge made, on a preparatory hearing, an adverse ruling against the defendant who faced an indictment of having caused a nuisance to the public, over a nine-year period, by sending several hundred postal packages containing racially offensive material. On their conjoined appeals to the Court of Appeal, the defendants contended that the definition of the offence of public nuisance was so vague and uncertain in its scope that it should no longer be recognised at common law. Alternatively, they submitted that the offence of public nuisance infringed the principle of legal certainty enshrined in art 7^a of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) because it was not formulated with sufficient precision to enable a citizen to regulate his conduct. The defendants further contended that the offence was capable of resulting in a breach of arts 8^b and 10^c of the convention (the right to respect for private life and the right to freedom of expression respectively) because, inter alia, it was not necessary in a democratic society to meet a pressing social need of the sort identified in each of those provisions.

j

Held – (1) The offence of public nuisance at common law, as defined in *Archbold*, continued to exist. A number of decisions of the Court of Appeal demonstrated its utility as providing a criminal sanction for the proper control of those who subjected their fellow citizens to intolerable behaviour. It followed that the indictments in the instant cases had been properly laid at common law (see [10],

a Article 7, so far as material, is set out at [13], below

b Article 8 is set out at [18], below

c Article 10 is set out at [19], below

[12], below); *R v Madden* [1975] 3 All ER 155, *R v Shorrock* [1993] 3 All ER 917 and *R v Johnson* [1996] 2 Cr App R 434 applied. a

(2) There had not been any breach of art 7 of the convention. The elements of the offence of causing a public nuisance were sufficiently clear to enable a person, with appropriate legal advice if necessary, to regulate his behaviour. All that was required was a reasonable degree of foreseeability of the consequences which action or conduct might entail. The indictments preferred in the instant cases sought no more than to apply elements of the offence to the particular facts and it was for the jury, appropriately directed, to determine whether or not the charges had been made out. A citizen, appropriately advised, could foresee that the conduct identified was capable of amounting to a public nuisance (see [17], below). b

(3) The offence of causing a public nuisance was not capable of amounting to a breach of arts 8 or 10 of the convention. It was a proper and proportionate response to the need to protect the public from acts or omissions which substantially interfered with the comfort and convenience of the public, as being taken in the interests of public safety, for the prevention of crime or disorder, for the protection of health and morals and, in particular, the need to protect the rights of others. The level of imprecision in the offence was necessary to enable it to be applied flexibly to meet new situations. There were no other sustainable grounds of appeal in either of the instant cases, and accordingly both appeals would be dismissed (see [25], [32], [41], below). c

Notes e

For the convention requirement that offences be clearly defined, the convention right to respect for private life and the convention right to freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 148–150, 158, and for the common law offence of public nuisance, see 34 *Halsbury's Laws* (4th edn reissue) para 6.

For the Human Rights Act 1998, Sch 1, Pt I, arts 7, 8, 10, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554, 555. f

Cases referred to in judgment

A-G (ex rel Glamorgan CC and Pontardawe RDC) v PYA Quarries Ltd [1957] 1 All ER 894, [1957] 2 QB 169, CA.

DPP v Withers [1974] 3 All ER 984, [1975] AC 842, [1974] 3 WLR 751, HL. g

Handyside v UK (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.

Müller v Switzerland (1991) 13 EHRR 212, [1988] ECHR 10737/84, ECt HR.

R v Johnson [1996] 2 Cr App R 434, CA.

R v Madden [1975] 3 All ER 155, [1975] 1 WLR 1379, CA.

R v Shorrock [1993] 3 All ER 917, [1994] QB 279, [1993] 3 WLR 698, CA. h

S v UK App No 17634/91 (2 September 1991, unreported), E Com HR.

Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

SW v UK, CR v UK (1995) 21 EHRR 363, [1995] ECHR 20166/92, ECt HR.

Wingrove v UK (1996) 1 BHRC 509, ECt HR.

X Ltd v UK (1982) 28 DR 77, E Com HR. j

Appeals

R v Goldstein

The defendant, Harry Chaim Goldstein, appealed against his conviction in the Crown Court at Southwark on 3 October 2002 following a trial before

- a Judge Fingret and a jury of an offence of causing a public nuisance by posting a letter containing salt. The facts are set out in the judgment of the court.

R v R

- b The defendant, R, appealed from the decision of Leveson J in the Central Criminal Court on 3 September 2002, made on a preparatory hearing under the Criminal Procedure and Investigations Act 1996, that the indictment he faced, of causing a nuisance to the public between 25 May 1992 and 13 June 2001 by sending 538 postal packages containing racially offensive material, charged him with an offence known to the common law and that its prosecution did not amount to an abuse of process. The facts are set out in the judgment of the court.

- c Jonathan Goldberg QC and Gary Grant (assigned by the Registrar of Criminal Appeals) for Goldstein.

David Perry and Tracy Ayling (instructed by the Crown Prosecution Service) for the Crown.

- d Bernard Eaton and Katherine Blackburn (instructed by Conninghams, Twickenham) for R.

David Perry and Mark Rainsford (instructed by the Crown Prosecution Service) for the Crown.

Cur adv vult

- e 28 November 2003. The following judgment of the court was delivered.

LATHAM LJ.

- f [1] These two appeals have been heard together because they both raise the question of the nature of the common law offence of causing a public nuisance and whether it has survived the coming into effect of the Human Rights Act 1998. The appellant R appeals under s 35 of the Criminal Procedure and Investigations Act 1996 against a preliminary ruling by Leveson J that the indictment that he faced of causing a nuisance to the public between 25 May 1992 and 13 June 2001 by sending 538 separate postal packages containing racially offensive material charged him with an offence known to the common law and that its prosecution did not amount to an abuse of process as being in breach of arts 7, 8 and/or 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). The appellant Goldstein appeals against his conviction of causing a public nuisance by sending an envelope through the post on 18 October 2001, at the height of the security alerts after the events of 11 September 2001, containing salt which leaked out at the sorting office at Wembley causing the evacuation of 110 postal workers and the attendance of specialist police officers to determine whether or not the salt was in fact anthrax.

- h [2] That short description of the nature of the two indictments suffices for the purposes of considering the main submission in both appeals, although it will be necessary to return to the facts in order to deal with arguments which are specific to each appellant.

j [3] Common law has long recognised the crime of causing a public nuisance. It is not necessary for the purposes of this judgment to trace its origins and its history. These have been set out in an article by JR Spencer 'Public nuisance—A

Critical Examination' (1989) 48 CLJ 55. The current definition of the offence in *Archbold's Criminal Pleading, Evidence and Practice* (2003 edn) p 2550 (para 31–40) is: a

'Public nuisance is an offence at common law. A person is guilty of a public nuisance (also known as a common nuisance), who (a) does an act not warranted by law, or (b) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects ...' b

[4] This definition is taken from *Stephen's Digest of the Criminal Law* (9th edn, 1950) p 179, art 235 which defined the offence in the following terms:

'A common nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects.' c

[5] This latter definition is the one adopted in *Smith and Hogan Criminal Law* (10th edn, 2002) p 772. It was also relied upon by the Court of Appeal in *A-G (ex rel Glamorgan CC and Pontardawe RDC) v PYA Quarries Ltd* [1957] 1 All ER 894, [1957] 2 QB 169, which was a relator action for an injunction to restrain a public nuisance caused by dust and vibration in a quarry. *Romer LJ* said ([1957] 1 All ER 894 at 902, [1957] 2 QB 169 at 184): d

'I do not propose to attempt a more precise definition of a public nuisance than those which emerge from the text-books and authorities to which I have referred. It is, however, clear, in my opinion, that any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects. The sphere of the nuisance may be described generally as "the neighbourhood"; but the question whether the local community within that sphere comprises a sufficient number of persons to constitute a class of the public is a question of fact in every case. It is not necessary, in my judgment, to prove that every member of the class has been injuriously affected; it is sufficient to show that a representative cross-section of the class has so been affected for an injunction to issue.' e

[6] *Denning LJ* said ([1957] 1 All ER 894 at 908, [1957] 2 QB 169 at 190–191): g

'What is the difference between a public nuisance and a private nuisance? [Counsel for the defendants] is right to raise it because it affects his clients greatly. The order against them restrains them from committing a public nuisance, not a private one. The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question: when do a number of individuals become Her Majesty's subjects generally? is as difficult to answer as the question: when does a group of people become a crowd? Everyone has his own views. Even the answer "Two's a company, three's a crowd" will not command the assent of those present unless they first agree on "which two". So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one h

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a person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.'

[7] As this court explained in *R v Shorrock* [1993] 3 All ER 917, [1994] QB 279, a public nuisance gives rise to a liability both in criminal and civil law. It can attract the sanction of a criminal charge or civil liability pursuant to a relator action or a claim for damages. But the definition of a public nuisance is the same.

b [8] It is submitted, however, on behalf of the appellants that this definition is so vague and uncertain in its scope that it should no longer be recognised at common law, and offends against the principle of legal certainty enshrined in arts 7(1), 8(2) and 10(2) of the convention.

c [9] Dealing first with the position at common law, we have been referred to *DPP v Withers* [1974] 3 All ER 984, [1975] AC 842 where the House of Lords considered the validity of an indictment charging the offence of conspiracy to effect a public mischief. It held that there was no such offence. We have been referred in particular to the speech of Viscount Dilhorne, where he said ([1974] 3 All ER 984 at 993, [1975] AC 842 at 861):

d 'The preferment of charges alleging public mischief appears to have become far more frequent in recent years. Why this is, I do not know. It may be that it is due to a feeling that the conduct of the accused has been so heinous that it ought to be dealt with as criminal and that the best way of bringing it within the criminal sphere is to allege public mischief and trust that the courts will fill the gap, if gap there be, in the law. But if gap there be, it must be left to the legislature to fill. I hope that in future such a vague expression as "public mischief" will not be included in criminal charges. It introduces a wide measure of uncertainty and should not be a vehicle for the enlargement of the criminal law or a device to secure its extension to cover acts not previously thought to be criminal.'

f [10] It is submitted that those words are equally applicable to a charge of causing a public nuisance. We are urged to accept the argument of Mr Spencer in the article to which we have referred, that the concept of public nuisance, which was a useful, if not the only, tool at one time available for controlling activities which affected the health and welfare of the community, has been extended to an extent that gives rise to the risk that it could be used for the purposes of prosecuting any persons whose actions are deemed to be unacceptable to the authorities. We disagree. A number of decisions of this court demonstrate its utility as providing a criminal sanction for the proper control of those who subject their fellow citizens to intolerable behaviour.

g [11] In *R v Shorrock* to which we have already referred, it was accepted that the use of land for an unauthorised 'acid party' causing substantial inconvenience and disruption to neighbours was capable of amounting to the crime of public nuisance; the only question was the requisite mens rea. In *R v Johnson* [1996] 2 Cr App R 434, this court upheld the appellant's conviction of causing a public nuisance for using the public telephone system over a period of about five-and-a-half years to cause nuisance, annoyance, harassment, alarm and distress. He had made hundreds of obscene telephone calls to at least 13 women. Tucker J, giving the judgment of the court said (at 438):

j 'In his submissions to us on behalf of the appellant, [counsel] made two points. First, that each of these telephone calls was a single isolated act to an individual person, which may have represented a private nuisance, but it is

wrong to lump them all together and to regard the cumulative effect as an offence of public nuisance. Secondly, that, in any event, the scale and width of the conduct complained of was insufficient to constitute a public nuisance. In our judgment it is permissible and necessary to look at the cumulative effect of these calls, made to numerous ladies on numerous occasions in the case of each lady, and to have regard to the cumulative affect of the calls in determining whether the appellant's conduct constituted a public nuisance. In our opinion it was conduct which materially affected the reasonable comfort and convenience of a class of Her Majesty's subjects ... It was a nuisance which was so widespread in its range, or so indiscriminate in its effect, that it would not be reasonable to expect one person to take proceedings on her own responsibility, but that it should be taken on the responsibility of the community at large ... It was proved by the Crown that the public, meaning a considerable number of persons or a section of the public, was affected, as distinct from individual persons ... The second point involves a question of fact, which was properly left to the jury. Here was an indiscriminate selection of members of the public with whom the appellant had come into contact. It was not a selection of a few individuals. It was a case in which ladies generally who lived in the South Cumbria area, and whose telephone numbers had become known to this appellant, were at risk from him of being harassed and caused annoyance, alarm and distress. Whether there was a sufficient number of complainants of calls to amount to a public nuisance was a question for the jury to decide following proper directions such as were given in this case.'

[12] In our view, these cases provide clear authority, by which this court is bound, for the continued existence of the offence of public nuisance at common law, as defined in the current edition of *Archbold*. Despite the attractive submissions made to us, in particular by Mr Eaton in his skeleton argument, we are therefore satisfied that these indictments are properly laid at common law. As this court said in *R v Madden* [1975] 3 All ER 155 at 157, [1975] 1 WLR 1379 at 1383: 'It is, in our view, still an offence known to the law of this country to commit a public nuisance.'

[13] The question then arises as to the effect of the 1998 Act, and the articles of the convention to which we have already referred. The first article which requires consideration is art 7(1) which provides:

'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.'

[14] The essential principle which the offence of public nuisance is said to infringe is that a law must be formulated with sufficient precision to enable a citizen to regulate his conduct. It is similar to the concept required in arts 8(2) and 10(2), to which we will return, that the derogation from the right protected by those articles can only be justified if it is 'in accordance with the law' (see art 8(2)) or 'prescribed by law' (see art 10(2)). The latter phrase was considered by the European Court of Human Rights in *Sunday Times v UK* (1979) 2 EHRR 245. It stated (at 271 (para 49)):

'... a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree which is

a reasonable in all the circumstances, the consequences that a given action
may entail. Those consequences need not be foreseeable with absolute
certainty: experience shows this to be unattainable. Again, whilst certainty
is highly desirable, it may bring in its train excessive rigidity and the law must
b be able to keep pace with changing circumstances. Accordingly, many laws
are inevitably couched in terms which, to a greater or lesser extent, are vague
and whose interpretation and application are questions of practice.'

[15] In the context of art 7, we have been referred to the decision of *X Ltd v UK* (1982) 28 DR 77 which was an application in which the European Commission of Human Rights (the Commission) considered the common law offence of blasphemous libel. The Commission stated (at 81 (para 9)):

c 'The Commission considers that the same principles also apply to the
interpretation and application of the common law. Whilst this branch of the law
presents certain particularities for the very reason that it is by definition law
developed by the courts, it is nevertheless subject to the rule that the
d law-making function of the courts must remain within reasonable limits. In
particular in the area of the criminal law it is excluded, by virtue of
Article 7(1) of the Convention, that any acts not previously punishable
should be held by the courts to entail criminal liability, or that existing
e offences should be extended to cover facts which previously clearly did not
constitute a criminal offence. This implies that constituent elements of an
offence such as e.g. the particular form of culpability required for its
completion may not be essentially changed, at least not to the detriment of
the accused, by the case law of the courts. On the other hand it is not
objectionable that the existing elements of the offence are clarified and
adapted to new circumstances which can reasonably be brought under the
original concept of the offence.'

f [16] The respondents submit that this decision is in fact helpful to them.
Mr Perry submits on their behalf that the elements of the offence are perfectly
clear, and their application to the present cases is merely an example of the way
in which the law can be utilised to deal with new factual situations. He has
referred us to *SW v UK*, *CR v UK* (1995) 21 EHHR 363 where the court considered
g and rejected complaints by two applicants who had been found guilty of raping
their wives which was an undoubted extension of the concept of rape as had been
previously understood. Although the Commission had declared the complaints
admissible, he relies on its opinion (at 375 (para 48)), in which the Commission
stated:

h 'It is however compatible with the requirements of Article 7(1) for the
existing elements of an offence to be clarified or adapted to new
circumstances or developments in society in so far as this can reasonably be
brought under the original concept of the offence. The constituent elements
j of an offence may not however be essentially changed to the detriment of an
accused and any progressive development by way of interpretation must be
reasonably foreseeable to him with the assistance of appropriate legal advice
if necessary.'

[17] We consider that Mr Perry's submissions are correct. If the law can be adapted to deal with new situations, it is clear that the law can be applied to new situations. The elements of the offence are sufficiently clear to enable a person,

with appropriate legal advice if necessary, to regulate his behaviour. All that is required is a reasonable degree of foreseeability of the consequences which action or conduct may entail. The indictments in the present cases do no more than seek to apply the elements of the offence to the particular facts; and it is for the jury, appropriately directed, to determine whether or not the charges are made out. A citizen, appropriately advised, could foresee that the conduct identified was capable of amounting to a public nuisance. We do not accordingly consider that there has been any breach of art 7. a

[18] We turn then to arts 8 and 10. They essentially raise the same issue of principle and can conveniently be considered together. Article 8 provides: b

‘(1) Everyone has the right to respect for his private and family life, his home and his correspondence. c

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others.’ d

[19] Article 10 provides:

‘(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. e

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’ f

[20] It is submitted on behalf of the appellants that a prosecution for committing a public nuisance is capable of resulting in a breach of arts 8(1) or 10(1), that it is not a law which is sufficiently certain to justify interference on the basis that it is either ‘in accordance with the law’ or ‘prescribed by law’ and that the interference is not ‘necessary in a democratic society’. g

[21] We recognise that the offence is capable of interfering with the rights protected by arts 8(1) and 10(1). In the R appeal, the latter is clearly exemplified. The question accordingly is whether or not the interference can be justified under arts 8(2) and 10(2). We consider that the question of whether or not the interference was ‘in accordance with the law’ or ‘prescribed by law’ has been answered by our conclusion that there has been no breach of art 7, and the reasons which we have given for that conclusion. The remaining question is, therefore, whether or not the offence can properly be described as ‘necessary’ in that it is intended to meet a pressing social need of the sort identified in each of those articles. In particular, in relation to art 10, we accept that the right to freedom of expression includes the right to ‘offend, shock or disturb’ as the court stated in *Handyside v UK* (1976) 1 EHRR 737 at 754 (para 49). The jurisprudence h
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a of the Commission and the Court of Human Rights has, however, consistently pointed out that in accordance with art 10(2) a state can legitimately impose limits to this freedom for the preservation of disorder or crime, the protection of morals and for the protection of the rights and freedoms of others. This includes the right of the public not to be outraged by the public behaviour of others.

b [22] In *S v UK* App No 17634/91 (2 September 1991, unreported), the Commission considered the common law offence of outraging public decency committed by an artist and art gallery curator who had exhibited a model with freeze-dried human foetuses as earrings. The Commission, while recognising that freedom of artistic expression fell within the ambit of art 10, declared the application inadmissible as being manifestly ill founded. It found that the offence of outraging public decency: (a) was prescribed by law, and (b) pursued the legitimate aim of protection of morals, and (c) was not disproportionate and could be regarded as necessary in a democratic society.

d [23] The court subsequently considered the problem in the context of the law of blasphemy. In *Wingrove v UK* (1996) 1 BHRC 509, the court held that the law of blasphemy, although imprecise, was none the less justified. The applicant had been refused a certification certificate for his video *Visions of Ecstasy* on the basis that it infringed the criminal law of blasphemy. The court found that the offence was prescribed by law and served the legitimate aim of protecting the rights of others. The court held (at 526–527 (para 60)) that the interference with the applicant's rights under art 10 was not disproportionate and could be regarded as necessary in a democratic society on the basis that—

e 'the English law of blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion. Nor can it be said that opinions which are offensive to Christians necessarily fall within its ambit. As the English courts have indicated ... it is the manner in which views are advocated rather than the views themselves which the law seeks to control.

f The extent of insult to religious feelings must be significant, as is clear from the use by the courts of the adjectives "contemptuous", "reviling", "scurrilous", "ludicrous" to depict material of a sufficient degree of offensiveness. The high degree of profanation that must be attained constitutes, in itself, a safeguard against arbitrariness. It is against this background that the asserted justification under art 10(2) in the decisions of

g the national authorities must be considered.'

[24] In *Müller v Switzerland* (1991) 13 EHRR 212, the court considered a complaint that art 10 had been infringed by the applicant's conviction of an offence of publishing obscene items, consisting of paintings which were said

h 'mostly to offend the sense of sexual propriety of persons of ordinary sensitivity'. In holding that there was no breach of art 10, the court said (at 228 (para 34)):

j 'Artists and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph (2) of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities"; their scope will depend on his situation and the means he uses. In considering whether the penalty was "necessary in a democratic society", the Court cannot overlook this aspect of the matter.'

[25] In our view, the offence of causing a public nuisance is a proper and proportionate response to the need to protect the public from acts, or omissions,

which substantially interfere with the comfort and convenience of the public as being taken in the interests of public safety, for the prevention of disorder, for the protection of health and morals, and in particular the need to protect the rights of others. The level of imprecision inherent in the offence is necessary to enable it to be applied flexibly to meet new situations. We therefore reject the argument that the offence is capable of amounting to a breach of arts 8 or 10. a

[26] We turn therefore to consider the individual appeals. b

R v R

[27] The indictment as finally amended, charged the appellant as follows:

‘Between 20 May 1992 and 13 June 2001 caused a nuisance to the public, namely by sending 538 separate postal packages as detailed in a schedule SQ28 containing racially offensive material to members of the public selected by reason of their perceived ethnicity or further support such group, or randomly selected in an attempt to gain support for his views, the effect of which was to cause annoyance, harassment, alarm and distress.’ c

[28] The prosecution case was that the letters identified in the indictment constituted a campaign of a racial nature consisting as it did of letters and packages containing seriously offensive remarks about racial minorities. According to the evidence, recipients felt intimidated and harassed. The material was clearly drafted to offend and to cause distress. When arrested and interviewed the appellant said that his campaign had been precipitated by a racially motivated assault upon him by a black male in 1992. He said that following this incident, he decided that because he had been caused physical anguish he was going to cause ‘them’ mental anguish. d

[29] The judge determined to hold a preliminary hearing under the provisions of the 1996 Act on the basis that the indictment revealed a case of such complexity or a case whose trial was likely to go to such length that substantial benefits were likely to accrue from a hearing before the jury was sworn. He referred to the fact that, although the authorship of the letters was not disputed, they filled seven lever arch files which the jury, depending on his ruling, would have to consider. There would be lengthy legal argument. As we understand it, neither the appellant nor the respondent objected to this course, indeed both welcomed it. e

[30] After hearing legal argument, the judge held, rightly as we have found, that the offence of public nuisance was an offence known to common law and its prosecution did not amount to a breach of any of the articles of the convention to which we have already referred. He concluded that the campaign was capable of going beyond the dissemination of material expressing views which might offend, shock or disturb, which a democratic society should permit, and was capable of amounting to a material interference with the comfort and convenience of a substantial section of the population. In other words he concluded that the evidence was capable, depending upon what view the jury took, of amounting to the offence of public nuisance. f

[31] Mr Eaton submits on behalf of the appellant that the judge was wrong to come to that conclusion. He was not entitled to treat the 538 packages sent over a period of nine years as one offence. Each document had to be considered separately and as such could not amount to a public nuisance even if it might have caused distress to the individual to whom it was sent. And, taken individually, each letter was merely an expression of opinion which was protected by art 10. He further submitted that the indictment was bad for duplicity. g

- a [32] We reject these submissions. The nuisance consisted of the campaign which the appellant himself admitted was intended, at least in part, to cause mental anguish. This court held in *R v Johnson* [1996] 2 Cr App R 434, to which we have already referred, that such a campaign could justifiably be described as one public nuisance. We see no reason for distinguishing the reasoning in that case. It follows that the single charge is appropriate and not bad for duplicity.
- b Further, the nature of the contents of the letters and packages was such that the jury, properly directed, could conclude that it went beyond the limits of what people in a democratic society can be expected to tolerate bearing in mind the importance of freedom of expression, but amounted to an unreasonable interference with the rights and comforts of others. This does not mean, however, that the jury is itself required to carry out a balancing exercise under
- c arts 8(2) and 10(2). As we have said, the offence is compatible with arts 8 and 10 if its ingredients are satisfied. We dismiss the appeal.

R v GOLDSTEIN

- d [33] This appellant was charged in the indictment with causing a public nuisance by posting a letter containing salt. The appellant, who was a supplier of kosher foods in Manchester, owed money to one of his suppliers which was owned by a friend called Abraham Erlich. He sent a cheque for the sum that he owed in an ordinary brown envelope addressed to 'Ibrahim Erlich' and put into the envelope a small quantity of salt which he described as about the size of half a smartie. It arrived at the sorting office at Wembley on 19 October 2001, some
- e five weeks or so after the events of 11 September, and at the height of the anthrax scare. At that time, it was thought, certainly by those working in the sorting office, that two United States postmen had died of anthrax poisoning.

- f [34] Mr Owen, the sorter, placed the envelope on its appropriate rack at which point some of the salt leaked out through the unsealed part of the envelope onto his hands. He was concerned that it might be anthrax or some other substance and immediately reported it to his line manager. The envelope was placed in a sealed bag and the building was evacuated. About 110 people worked there at the time. The special unit created by the Metropolitan Police to deal with such incidents was called. The officer in charge inspected the envelope and its contents and was satisfied that the substance was salt. The workers returned an
- g hour to an hour-and-a-half after they had first been evacuated. Sufficient disruption was caused to result in the second delivery being cancelled that day which resulted in a significant number of complaints, in particular from businesses.

- h [35] The appellant's explanation in interview was that it was intended as a joke, and he would have expected the recipient to have taken it as a joke. He accepted that he had deliberately addressed his friend as Ibrahim in order to highlight the point. He said that he had no idea that the salt would leak out, but accepted that the escape of the salt could have terrified the postal worker in the light of the climate at the time.

- j [36] There are three grounds of appeal which raise issues other than issues of principle with which we have already dealt. The first ground is that the judge wrongly rejected the submission of no case to answer. It is submitted on behalf of the appellant that the words in the definition requiring the act to be unwarranted means that for the offence to be committed, the act in question much be one in respect of which the court would be prepared to grant an injunction. We find this argument difficult to follow. It begs the question. If

posting an envelope as the appellant did amounts to a public nuisance, then we see no reason why an injunction would not lie. It merely brings the argument back to the question of whether it amounts to a nuisance. The phrase 'not warranted by law' (see [3], [4], above) is there to provide an answer to the charge wherever the act is done pursuant to a legal authority to do so.

[37] The second ground of appeal relates to the summing up. It is accepted that when directing the jury as to the actus reus of the offence, the judge correctly summarised the elements of the offence. He however elaborated that direction as follows:

'Of course putting salt into an envelope is not by itself an illegal act but if in doing that you create the pretence that it is anthrax then that is capable, it is a matter for you to decide whether it is or not, of creating a nuisance. Of course it would be an innocent act to send salt through the post for an innocuous reason. Using Mr Goldberg's example sending salt to somebody who had forgotten to take it for the next day's picnic or something of that nature, that would be a wholly innocuous act, an innocent act for an innocuous purpose. But that would not necessarily be the case if it was done as pretence that it was anthrax. That of course is the fundamental part, you may think, of the allegation made by the prosecution ... Now only if you are sure that his act created the pretence and led to the those consequences that I have mentioned would you go onto the next question. That is the first question you have to answer. Are you sure that his act created the pretence and led to the consequences that occurred? If you decide his act in posting the letter containing the salt did not have those results or if you are not sure, then he is not guilty. I should make it clear at this point whether it is done as a private joke or to shock Mr Erlich is only relevant in the context of you deciding whether the salt was used to simulate the appearance of anthrax. To put it this way, if Mr Erlich had received it, however shocked he may have been by it, it would not have been a public nuisance at all. It may have been some other offence but it would not have been a public nuisance.'

[38] It is submitted that this direction was confusing in that it added an unnecessary and unwarranted ingredient to the offence. We agree that these passages are capable of being confusing. They come in the part of the summing up in which the judge was seeking to direct the jury as to the actus reus of the offence. In doing so he appears to have conflated the actus reus and the mens rea. But the fact of the matter is that the confusion was to the benefit of the appellant. In fact all the jury had to be satisfied about in relation to the actus reus was that the act had to be one whose effect 'is to endanger the comfort of the public, or obstructs the public in the exercise or enjoyment of its rights which are common to all Her Majesty's subjects' which was the direction given to the jury in the first instance. It follows that the jury could not have been confused in a way which was to the disadvantage of the appellant, so as to undermine the safety of the conviction.

[39] The third ground of appeal was in the following terms:

'We submit that the jury should indeed have been directed in clear terms only to convict if they were sure the Crown had proved D intended to simulate anthrax in the sense that the recipient Erlich should fear it really was anthrax, albeit only for a short time. They were not so directed.'

- a [40] Mr Goldberg however, did not pursue this ground as drafted, but sought to argue that the judge was wrong to direct the jury as he did that they could convict on the basis that the appellant ought to have known that there was a real risk that the consequences of his act would be to create a nuisance. He accepts that the direction by the judge was in accordance with the decision of this court in *R v Shorrock* [1993] 3 All ER 917, [1994] QB 279. But he submits that we should
- b depart from that decision on the grounds that it was wrongly decided. He did not develop this argument with any reasoned submissions. And, not surprisingly, in the light of the way in which the grounds of appeal were drafted, and in the absence of any indication that the point was to be taken in the skeleton argument, Mr Perry for the respondent had not himself appreciated that the point was going to be taken. Suffice it to say that we do not consider that is any justification for this court departing from the decision in *R v Shorrock*. In those circumstances this
- c ground must also fail.

[41] It follows that the appeal is dismissed.

- d *Appeals dismissed. Leave to appeal refused, but court certifying that the following questions of law of general public importance were involved in its decision. ‘(1) Is the mens rea requirement of the common law offence of causing a public nuisance satisfied by proving that the defendant either knew or ought to have known, in the sense that the means of knowledge were available to him, that there was a real risk that the consequence of his actions would be to create the sort of nuisance that in fact occurred (as per R v Shorrock [1993] 3 All ER 917)? (2) If not, what is the mens rea? (3) Is the offence of*
- e *causing a public nuisance as currently defined compatible with arts 7, 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 or does the question of compatibility fall to be decided on the facts of the particular public nuisance alleged to have been caused? And (4) if the latter, is it for the jury or the judge alone to decide the issues of compatibility?’*

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Stephen Leake Barrister.

1 April 2004. The Appeal Committee of the House of Lords gave leave to appeal.

Shirazi v Secretary of State for the Home Department

[2003] EWCA Civ 1562

COURT OF APPEAL, CIVIL DIVISION

MUMMERY, SEDLEY LJ AND MUNBY J

13 OCTOBER, 6 NOVEMBER 2003

Immigration – Asylum seeker – Appeal – Abandonment of appeal – Deemed abandonment of pending appeal – Asylum-seeker leaving United Kingdom while appeal to Court of Appeal pending – Whether appeal to Court of Appeal deemed abandoned – Immigration and Asylum Act 1999, s 58(8).

Immigration – Appeal – Immigration Appeal Tribunal – Approach to be taken by tribunal in considering political and legal situation in foreign country in recurrent classes of applications for asylum.

The claimant was an Iranian whose family was Muslim. He claimed asylum on the ground that he had a well-founded fear of persecution by reason of his political opinions. While awaiting a decision on his claim, he made a sincere conversion to Christianity and became a member of the Church of England. His claim for asylum was refused and he appealed. The adjudicator treated his claim as based on both political and religious grounds, and concluded that on neither ground was there a well-founded fear of persecution within the meaning of the Geneva Convention relating to the Status of Refugees, but that on both grounds there was a real risk of torture or inhuman treatment contrary to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act) (the convention). The Secretary of State appealed. The Immigration Appeal Tribunal (the IAT), allowing the appeal, adopted a previous decision of the IAT to the effect that prison conditions and trials in Iran did not in themselves violate the convention and concluded, in the light of the material before it relating to the religious and political climate in Iran (in-country data), that the claimant would be able to practise his new religion in Iran without running any risk of persecution or ill-treatment either by the authorities or by individuals. The claimant appealed, referring to a series of decisions of the IAT and to decisions from other jurisdictions, which had not been considered by the tribunal, and which took a markedly different view of the factual position of Christian converts in Iran from that taken by the tribunal. The Secretary of State contended: (i) that the effect of s 58(8)^a of the Immigration and Asylum Act 1999, under which a pending appeal was to be treated as abandoned if the appellant left the United Kingdom was that the claimant's appeal had been aborted by operation of law as he had left the United Kingdom for 24 hours; and in the alternative (ii) that precedent related to principle rather than to factual analogy, and that it was not to the point that other constitutions of the IAT had reached different conclusions on similar facts.

^a Section 58 is set out at [12], below

Held – (1) The 1999 Act distinguished between appeals under Pt IV of the Act, which contained s 58, and ‘further appeals’, which included appeals to the Court of Appeal, and nothing the 1999 Act said in terms that deemed abandonment touched such appeals. Since the Court of Appeal had always had its own system and principles for dealing with appeals which were either abandoned or became moot it was contrary to principle, except in obedience to an unequivocal statutory requirement, to introduce a rule which arbitrarily truncated access to justice in the Court of Appeal. Accordingly, the instant appeal was not to be treated as abandoned by reason of the claimant’s brief absence from the United Kingdom (see [14], [18], [34], [41], below).

(2) Whilst it was not a ground of appeal that another tribunal had reached a different conclusion on very similar facts, it was a matter of concern that the same political and legal situation, attested by much the same in-country data from case to case, was being evaluated differently by different tribunals. In any one period a judicial policy (with the flexibility that the word implied) had to be adopted on the effect of the in-country data in recurrent classes of case. In the circumstances of the instant case, where there was no consistent line of factual decisions, the issue of the consequences of religious apostasy had not been adequately addressed by the tribunal, and the matter would accordingly be remitted for rehearing (see [29]–[34], [40], below).

Notes

For appellate authorities and rules of procedure and for determination by adjudicators and the Immigration Appeal Tribunal, see 4(2) *Halsbury’s Laws* (4th edn) (2002 reissue) paras 173, 188.

Section 58 of the Immigration and Asylum Act 1999 was repealed, with effect from 1 April 2003, by the Nationality, Immigration and Asylum Act 2002, ss 114(1), (2), 161, Sch 9. The replacement provisions for immigration and asylum appeals are contained in ss 81–117 of the 2002 Act.

For ss 81–117 of the 2002 Act, see 31 *Halsbury’s Statutes* (4th edn reissue) (2003 reissue) 498–523.

Cases referred to in judgment

- A v Minister for Immigration and Multicultural Affairs* [2002] FCA 148, Aust Fed Ct.
Ahmadi v Secretary of State for the Home Dept [2002] UKIAT 05079, IAT.
Bastanipour v INS (1992) 980 F 2d 1129, US Ct of Apps (7th Cir).
Djuretic v Secretary of State for the Home Dept (4 July 2000, unreported), IAT.
Dorodian v Secretary of State for the Home Dept (23 August 2001, unreported), IAT.
Dupovac v Secretary of State for the Home Dept [2000] Imm AR 265, CA; *affg* (6 August 1998, unreported), IAT.
Ghassemian and Mirza v Home Office [1989] Imm AR 42, CA.
Ghodratzadeh v Secretary of State for the Home Dept [2002] UKIAT 01867, IAT.
Gurung v Secretary of State for the Home Dept [2003] EWCA Civ 654, CA.
J (Iran) v Secretary of State for the Home Dept [2003] UKIAT 00158, IAT.
J (Poland) v Secretary of State for the Home Dept [2003] UKIAT 00090, IAT.
Khoshkam v Secretary of State for the Home Dept [2002] UKIAT 00876, IAT.
Nongpar v Secretary of State for the Home Dept (26 November 1998, unreported), IAT.

- R v Immigration Appeal Tribunal, ex p Shah* (UN High Comr for Refugees intervening),
Islam v Secretary of State for the Home Dept (UN High Comr for Refugees intervening) a
 [1999] 2 All ER 545, [1999] 2 AC 629, [1999] 2 WLR 1015, HL.
- S v Secretary of State for the Home Dept* [2002] EWCA Civ 539, [2002] INLR 416, CA.
- Secretary of State for the Home Dept v Abdi and Dahir* [1995] Imm AR 570, CA.
- Secretary of State for the Home Dept v Fazilat* [2002] UKIAT 00973, IAT.
- Secretary of State for the Home Dept v Sarkohaki* [2002] UKIAT 05659, IAT. b
- Secretary of State for the Home Dept v Szalacha* (17 July 1998, unreported), IAT.
- Y v Refugee Status Appeals Authority* (19 August 1999, unreported), NZ HC.

Appeal

The claimant, Farshid Shirazi, appealed with permission of the Court of Appeal (Ward and Buxton LJ), from the decision of the Immigration Appeal Tribunal (S Batiste and AJF Cross de Chavannes) allowing the appeal of the Secretary of State for the Home Department from the decision of the adjudicator, NA Baird, allowing the claimant's appeal from the decision of the Secretary of State refusing the claimant's application for asylum. The facts are set out in the judgment of Sedley LJ. d

Frances Webber (instructed by *Switalski's*, Wakefield) for the appellant
Steven Kovats (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult e

6 November 2003. The following judgments were delivered.

SEDLEY LJ (delivering the first judgment at the invitation of Mummery LJ).

[1] The appellant is an Iranian who belongs to a Muslim family. He reached this country on 25 July 2001 and claimed asylum nine days later. The single ground on which he claimed asylum was a well-founded fear of persecution by reason of his actual or perceived political opinions. f

[2] The factual basis of the claim was, in summary, this. The appellant's father had spent five years in the early 1980s as a political prisoner. His brother-in-law who, with the appellant's sister, has been a member of the Mujahidin, had spent six years in prison. His own home had been searched several times by the security or intelligence service, with whom his activities in a radical theatre group had earned him a file. He had been injured and arrested in a student demonstration in 1999. Released after a day, he was rearrested and menacingly interrogated for four days, and was made to sign a document professing repentance. On release he went into hiding. On learning that the authorities were again looking for him and had a warrant out for him, he fled the country. g h

[3] While awaiting a decision on his claim the appellant became a member of the Church of England and on 30 December 2001 was baptised at Pontefract parish church. There was evidence which satisfied the Immigration Appeal Tribunal that his conversion was sincere. j

[4] The Home Office turned down his claim to be a political refugee. On appeal the adjudicator, Mrs NA Baird, treated the asylum and associated human rights claims as based both on political and on religious grounds. She concluded that on neither ground was there a well-founded fear of persecution within the

a meaning of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171) (as amended by the 1967 Protocol (New York, 31 January 1967; TS 15 (1969); Cmnd 3906), but that on both grounds there was a real risk of torture or inhuman treatment contrary to art 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

b [5] The Immigration Appeal Tribunal (Mr Spencer Batiste and Mrs AJF Cross de Chavannes) allowed the Home Secretary's appeal. They pointed out, correctly, that the conclusions on asylum and on human rights were inconsistent with one another, at least in the absence of some sound explanation for the discrepancy. They adopted the IAT's decision in *Secretary of State for the Home Dept v Fazilat* [2002] UKIAT 00973 to the effect that prison conditions and trials in
c Iran do not in themselves at present violate art 3. This left the asylum claims. As the IAT pointed out, 'if [Mr Shirazi] faced a real risk of breach of his art 3 rights in respect of his religious conversion this would also be sufficient to establish an asylum claim'. This was true, but it did not of course follow that the failure of the human rights claim in relation to the religious conversion meant that the asylum
d claim based on it must also fail.

[6] As to this, however, the IAT held that the adjudicator had made unwarranted assumptions. They set aside her decision and went on to make their own findings. These were that Mr Shirazi's conversion was genuine, but that as a non-evangelical he would not be at risk by reason of overt activity. On the
e therefore critical question whether he would be at risk as an apostate they concluded:

[14] The issue which then arises is whether a convert from Islam to Christianity, who is not an evangelical or driven to proselytise, would be at any real risk on return to Iran and in living thereafter. This matter has been
f considered by the Tribunal in the cases of *Ahmadi* [2002] UKIAT 05079 and *Khoshkam* [2002] UKIAT 00876. In both decisions the Tribunal considered similar objective material to that which is before us and concluded that non-evangelical converts from Islam to Christianity do not per se face a real risk of persecution and/or breach of their human rights in Iran. Another
g report submitted to us by Mr Jones relates to a New Zealand case from 1999, which reaches a similar conclusion, though may now be somewhat out of date in terms of the material taken into account. We of course have to reach our own conclusions of the evidence before us.

[15] We conclude, in the light of the objective material placed before us, that the problems in Iran are for evangelicals and others who seek to
h proselytise. The Respondent, who is not an evangelical or likely to proselytise, will be able to practice his new religion in Iran without running any real risk of persecution or ill-treatment either by the authorities or by individuals in that country. We agree with the conclusions of Tribunals in *Ahmadi* and *Khoshkam*. We also conclude that the existence of the arrest warrant referred to above,
j even taken into cumulative consideration with the Respondent's conversion, would not lead us to a different conclusion. We find that the Respondent's conversion to Christianity in the UK does not therefore create for him the right to international protection under either the 1950 or the 1951 Conventions.'

[7] The IAT's decision is impressive in its brevity and cogency. But it has been subjected by Ms Webber to a powerful critique, resisted by Mr Kovats for the

Home Secretary on the ground that the decision is one of fact and discloses no issue of law. a

[8] But Mr Kovats first submits that this appeal has aborted by operation of law. On 30 March 2003 the appellant travelled (apparently on a false Iranian passport) from the United Kingdom to the Netherlands. He was refused entry and returned here the next day. Section 58(8) of the Immigration and Asylum Act 1999 provides: b

‘A pending appeal under this Part is to be treated as abandoned if the appellant leaves the United Kingdom.’

[9] The episode hardly suggests migration or abandonment. But (subject to one issue of meaning) there is no doubt that, the appellant having ventured for 24 hours outside the jurisdiction, we are obliged to treat this appeal as abandoned if, but only if, it is in law an appeal under Pt IV of the 1999 Act. c

[10] Pill LJ having adjourned the application for permission to appeal into open court so that the Home Secretary might be represented, Ward and Buxton LJ granted permission, acknowledging that the question under s 58(8) would have to be dealt with. On the substantive issue, Ward LJ noted that there were apparently two contradictory lines of authority, or at least of decision-making, in the IAT on the question of the risk of persecution faced by what is elliptically referred to as an innate apostate—that is, a person born into the Muslim faith and abandoning it by choice. He and Buxton LJ considered that this court ought to consider the resulting problem. d

HAS THE APPEAL TO BE TREATED AS ABANDONED?

[11] Logically this question comes first. It arises out of s 58 of the 1999 Act, which has now been repealed and replaced with effect from 1 April 2003 by similar provisions in the Nationality, Immigration and Asylum Act 2002 (s 161 and Sch 9; ss 81–117). e

[12] Section 58 in full provided: f

‘(1) The right of appeal given by a particular provision of this Part is to be read with any other provision of this Part which restricts or otherwise affects that right.

(2) Part I of Sch 4 makes provision with respect to the procedure applicable in relation to appeals under this Part. g

(3) Part II of Sch 4 makes provision as to the effect of appeals.

(4) Part III of Sch 4 makes provision—(a) with respect to the determination of appeals under this Part; and (b) for the further appeals. h

(5) For the purposes of the Immigration Acts, an appeal under this Part is to be treated as pending during the period beginning when notice of appeal is given and ending when the appeal is finally determined, withdrawn or abandoned.

(6) An appeal is not to be treated as finally determined while a further appeal may be brought. j

(7) If such further appeal is brought, the original appeal is not to be treated as finally determined until the further appeal is determined, withdrawn or abandoned.

(8) A pending appeal under this Part is to be treated as abandoned if the appellant leaves the United Kingdom.

a (9) A pending appeal under any provision of this Part other than s 69(3) is to be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom.

(10) A pending appeal under s 61 is to be treated as abandoned if a deportation order is made against the appellant.'

b [13] The true meaning of 'leaves' in s 58(8) is an open question: see the concluding remarks of Waller and Chadwick LJ in *Dupovac v Secretary of State for the Home Dept* [2000] Imm AR 265. I will assume for the purpose of this judgment, as Ms Webber has assumed for the purpose of her argument, that departure from the UK, provided it is voluntary, does not have to be with the intention of giving up residence here. But it is to be noted that s 3(4) of the Immigration Act 1971
c causes leave to enter or remain to lapse 'on ... going' to another country. The contrasting use of the verb 'leave' in the 1999 Act may be significant, notwithstanding that in *Ghassemian and Mirza v Home Office* [1989] Imm AR 42, to which Mr Kovats has rightly drawn our attention, it was assumed without argument to be synonymous with 'going.'

d [14] Mr Kovats accepts that the legislation on the face of it distinguishes between appeals under the part of the 1999 Act, Pt IV, which contains s 58 and 'further appeals'. Ms Webber draws our attention to the origin of the concept of a 'further appeal'—namely to this court or the Court of Session—in s 9(1) of the Asylum and Immigration Appeals Act 1993. Nothing in the legislation says in
e terms that deemed abandonment touches such appeals. The Court of Appeal has always had its own system and its own principles for dealing with appeals which are either abandoned or become moot. It is in my judgment contrary to principle, except in obedience to an unequivocal statutory requirement, to introduce a rule which arbitrarily truncates access to justice in this court.

[15] This is especially so when:

f • all pending appeals to this court have been the subject of a judicial grant of permission, cannot be struck out without a compelling reason (see now CPR 52.9), and have for long carried an automatic stay in immigration cases (RSC Ord 59, rr 24(5), 13(1)(a); CPR 52.7);

• the s 58(8) provision only operates one way—it cannot cause an appeal by the Secretary of State or the IAT to abort;

g • on no view can the provision apply to judicial review proceedings or to appeals to this court from the Administrative Court, which would create an odd asymmetry since this court has power (see *Secretary of State for the Home Dept v Abdi and Dahir* [1995] Imm AR 570) to treat an appeal as an application for judicial review;

h • the Home Secretary's case that the statute does not mean what it appears to say is an argument not from clear words but from equivocation, and so erodes its own foundation.

j [16] In this situation Mr Kovats's ingenious endeavour to assimilate 'further appeals' to appeals within the immigration appellate system faces great difficulties. He suggests that the cumulative effect of s 58(1), (5), (6) and (7) is that a further appeal becomes or is treated as part of the original appeal, at least for the purpose of deciding whether it is pending within the meaning of s 58(8). The explicit distinction in s 58(4) between 'appeals under this Part' and 'further appeals' he explains as designed to recognise that different procedural and substantive rules apply before adjudicators, the IAT and the Court of Appeal or the Court of Session. But the submission that this recognition 'does not impact

on s 58(5)–(8)' is in my view unsustainable when s 58(4) goes to the trouble of asserting the very distinction which Mr Kovats is trying to collapse. a

[17] The one argument which gives pause, and which Ms Webber has therefore addressed in detail, is Mr Kovats's parting shot: if the distinction between appeals is to be maintained in this context, the provisions of Pt II of Sch 4 to the 1999 Act would mean that asylum-seekers were at risk of removal even though they had succeeded before the IAT. Ms Webber first argues for a differential meaning of 'further appeal', so that for Sch 4 purposes an appeal to this court is a pending appeal which prevents removal. This is not an easy or an attractive submission; nor is it necessary. Her better argument is that the extension of Sch 4 protection to parties before this court is not needed because either the appeal will operate as a stay by virtue of CPR 52.7 or the court's own powers will afford the necessary protection. The CPR came into force while Sch 4 was waiting to be brought into effect; but the RSC had already made analogous provision. That seems to me to answer Mr Kovats's final point. b
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[18] It follows in my judgment that this appeal is not to be treated under statute as abandoned by reason of the appellant's brief absence from the United Kingdom. No separate submission to the same effect has been, or could possibly have been, made on the merits. d

IS THE APPELLANT A REFUGEE BY REASON OF HIS CONVERSION?

[19] As the IAT noted, if the appellant has become entitled to protection because of his conversion, it is as a refugee sur place. This is a status known to international law, but it has to fall within the 1951 Convention if it is to found an asylum claim. This requires it to be established that it is owing to a well-founded fear of persecution by reason of his religious beliefs that the applicant is outside the country of his nationality—in other words, in most cases, that this is why he has fled and cannot go back. But it can happen that a person who has not fled and is abroad for quite unrelated reasons finds that he cannot now go back for a convention reason. That reason must, however, have become the reason (or at least a reason) why he is outside the country of his nationality. If it has not—if he is here solely for other reasons—his case falls outside the convention and he is not a refugee sur place. His claim to stay must succeed as a human rights claim or fail altogether. e
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[20] The appellant applied for asylum, and appealed to the adjudicator, on grounds unconnected with his religious conversion. It was in the course of his evidence to the adjudicator that the latter emerged and became a ground of his claim. Neither the adjudicator nor the IAT seems to have considered whether his conversion has become—what initially it was not—a reason why he is outside Iran. g

[21] The in-country evidence originating with the Home Office established that, while religious minorities are given constitutional recognition, the Sharia law prescribes the death penalty for a Muslim man who becomes an apostate by conversion. There is no evidence as to the frequency with which the penalty is in practice imposed or carried out, if it is imposed or carried out at all. h

[22] Of the three IAT decisions referred to by the IAT in the present case, one (*Ahmadi v Secretary of State for the Home Dept* [2002] UKIAT 05079) concluded in general terms that the appellant was not at risk of persecution as a convert since the authorities' particular concern was with 'the evangelical churches'. In *Dorodian v Secretary of State for the Home Dept* (23 August 2001, unreported), by contrast, it was accepted that 'converts to evangelical churches who are actively i

- a involved even in internal church life' might face a risk amounting to persecution. The decision in *Khoshkam v Secretary of State for the Home Dept* [2002] UKIAT 00876 afforded no more than an obiter comment that the evidence did not support a bare assertion that the fact of conversion to Christianity meant that the appellant would be killed by the state authorities. That might have been right, but it was hardly the whole picture.
- b [23] Ms Webber has now drawn our attention to a series of other IAT decisions, and to two significant appellate decisions from other jurisdictions, which take a markedly different view of the position of Christian converts in Iran. Two of the former deserve mention. In *Secretary of State for the Home Dept v Sarkohaki* [2002] UKIAT 05659 the tribunal concluded:
- c 'The US State Department report makes it quite clear that religious activity is monitored closely by the Ministry of Intelligence and Security. It says: "Apostasy, specifically conversion from Islam, may be punishable by death."'
- d And in *Ghodratzadeh v Secretary of State for the Home Dept* [2002] UKIAT 01867 the tribunal held:
- e '... it is not entirely clear whether the full rigour of the law against apostasy has been imposed. Be that as it may, the law is there, there is undoubted antipathy, to put it no higher, to those who reject Islam and convert to Christianity, and in those circumstances there is clearly a real risk that if the authorities discovered that a person was an apostate, he might find himself being persecuted.'
- f [24] Ms Webber reminds us [of Lord Hoffmann's speech in *R v Immigration Appeal Tribunal, ex p Shah* (UN High Comr for Refugees intervening), *Islam v Secretary of State for the Home Dept* (UN High Comr for Refugees intervening) [1999] 2 All ER 545 at 562, [1999] 2 AC 629 at 650–651 and of Hathaway *The Law of Refugee Status* (1991) (p 105) which instances] 'an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear' as characterising a well-founded fear of persecution. She argues that the appellant's
- g history of unwelcome attention on the part of the security police because of his and his family's political dissidence, although it has been held not to go the necessary distance to establish the original asylum claim, significantly enhances the risk that, if he is returned, his apostasy will come to the authorities' attention.
- h [25] The United States 7th Circuit Court of Appeals in *Bastanipour v INS* (1992) 980 F 2d 1129 at 113 per Posner J, said:
- j 'We do not know what Iran does to ordinary apostates. [The appellant] is not quite an ordinary apostate. Apart from his drug conviction, which will not endear him to Iranian authorities but is not a relevant factor in deciding whether he has a well-founded fear of persecution, his brother has been active in the U.S. in opposition to the Iranian regime. Nor is the death penalty the only sanction grave enough to be deemed persecution ...' (Emphasis in original.)


So here, Ms Webber submits, the risks attending the appellant's conversion have to be gauged within his overall relationship with the Iranian state.

[26] Even where the risks attending conversion are taken in isolation, the recent view expressed by the Federal Court of Australia (Lee J) in *A v Minister for Immigration and Multicultural Affairs* [2002] FCA 148 is persuasive: a

‘... [F]or an apostate, the risk of extreme punishment will always exist ... Perhaps a person who has committed a capital offence of apostasy under Iranian law may be fortunate enough to escape the consequence of that conduct if returned to Iran, but ... the risk of discovery, apprehension and punishment would continue and it may be sufficient to ground a well-founded fear of persecution. Furthermore, the persecution feared, of course, is not restricted to execution and may include the suffering of substantial harm or interference with life by way of deprivation of liberty, assaults and continuing harassment on account of the perceived apostasy.’ b
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[27] This stands, however, in marked contrast to the decision of the Swedish Aliens Appeal Board, cited by the High Court of New Zealand in *Y v Refugee Status Appeals Authority* (19 August 1999, unreported) at para 20:

‘According to the Shari’a Law, applicable in Iran, conversion from Islam to Christianity is officially punishable by death. In one case during the 1990s has the conversion—beyond other criminal accusations—been the basis for the execution of the death penalty in accordance with Shari’a Law. In this case the death penalty was later revoked by the Supreme Court. In a few cases converts have been killed under unknown circumstances. All such cases concerned proselytising priests. It is rare that Iranian asylum seekers convert to Christianity in other countries but the Netherlands and Sweden. According to concerted information from Christian Churches in Iran, there is no real chance of persecution upon return to Iran of persons who have claimed conversion as ground for asylum in Sweden. Some 3–4 years ago converts would probably have been exposed to various kinds of punishment, in case the conversions had become to the knowledge of the authorities in Iran ... Today there are persons in Iran who have converted from Islam to Christianity there, and who participate in Christian activities there without the interference of Iranian authorities. Conversion from Islam to Christianity is according to Iranian authorities not possible, and a conversion abroad is considered by the authorities as a “technical” act, in the purpose of obtaining asylum, which therefore does not mean that the person in question risks any serious harassment on return. The concept of “Taqieth”, which is widely accepted in Iran, makes it legitimate to lie in order to achieve certain purposes. This means that there is a high level of acceptance in Iran of the lie as a means to obtain a purpose, such as seeking asylum in the west. Iranian nationals who have converted from Islam to another religion, and who keeps the conversion a personal matter, does not attract the attention of the authorities ... An Iranian national, who converts from Islam to another religion, normally does not risk the kind of prosecution prescribed in the Shari’a Law, whether the conversion takes place in the home country or abroad. There is also no significant chance that he or she would be the target of any actions from the authorities or of any serious harassment. This assessment is based on the assumption that the conversion has come to the knowledge of the Iranian authorities.’ d
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a The passage is cited by the IAT in its decision in *J (Iran) v Secretary of State for the Home Dept* [2003] UKIAT 00158; but the IAT goes on to differ, on well-reasoned grounds, from the Swedish appraisal.

b [28] For the Home Secretary, Mr Kovats stresses that no two cases are the same, and that precedent relates to principle rather than to factual analogy. The present decision, he submits, asks and answers the right question. That is all that is required. It is not to the point that other constitutions of the IAT have reached different conclusions on similar facts. That is in the nature of adjudication.

c [29] I accept readily that it is not a ground of appeal that a different conclusion was open to the tribunal below on the same facts, nor therefore that another tribunal *has* reached a different conclusion on very similar facts. But it has to be a matter of concern that the same political and legal situation, attested by much the same in-country data from case to case, is being evaluated differently by different tribunals. The latter seems to me to be the case in relation to religious apostasy in Iran. The differentials we have seen are related less to the differences between individual asylum-seekers than to differences in the tribunal's reading of the situation on the ground in Iran. This is understandable, but it is not satisfactory. In a system which is as much inquisitorial as it is adversarial, inconsistency on such questions works against legal certainty. That does not mean that the situation cannot change, or that an individual's relationship to it does not have to be distinctly gauged in each case. It means that in any one period a judicial policy (with the flexibility that the word implies) needs to be adopted on the effect of the in-country data in recurrent classes of case.

e [30] The jurisprudential implications of such an approach were considered in the judgment of the court delivered by Laws LJ in *S v Secretary of State for the Home Dept* [2002] EWCA Civ 539, [2002] INLR 416:

f '[26] However, we have reached the view that the S determination cannot stand. We have so concluded because of its special nature, as it appears from the passages from para [2] and [3] which we have cited (para [3], above). The IAT intended this decision to be determinative: that is, it should thereafter be followed by special adjudicators, and the tribunal itself, absent evidence of a deterioration in the conditions in Croatia relevant to the circumstances of Serb asylum-seekers. Now, the notion of a judicial decision which is binding as to *fact* is foreign to the common law, save for the limited range of circumstances where the principle of *res judicata* (and its variant, issue estoppel) applies. (There is also, of course, provision in Civil Procedure Rules 1998, rr 19.10–19.15 for the case management of group litigation, but we need not take time with that.) This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party have the opportunity to put his case: he is not to be bound by what others might have made of a like, or even identical, case.

j [27] The stance taken by the IAT here, to lay out a determination intended in effect to be binding upon the appellate authorities as to the factual state of affairs in Croatia absent a demonstrable change for the worse

vis-à-vis the plight of Serbs, to an extent sacrifices the second principle to the first. By no means entirely: an applicant will of course be heard on any facts particular to his case, and (as the IAT made clear) evidence as to any deterioration in the state of affairs in Croatia would be listened to. Otherwise, however, the debate about the conditions in Croatia generally affecting Serbian returnees or potential returnees has been had and is not for the present to be had again.

[28] While in our general law this notion of a factual precedent is exotic, in the context of the IAT's responsibilities it seems to us in principle to be benign and practical. Refugee claims vis-à-vis any particular State are inevitably made against a political backdrop which over a period of time, however long or short, is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.

[29] But if the conception of a factual precedent has utility in the context of the IAT's duty, there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. We do not mean to say that the IAT will have to deal literally with every point canvassed in evidence or argument; that would be artificial and disproportionate. But when it determines to produce an authoritative ruling upon the state of affairs in any given territory, it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real, as opposed to fanciful, bearing on the result, and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists. We recognise of course that the IAT will often be faced with testimony which is trivial or repetitive. Plainly it is not only unnecessary but positively undesirable that it should plough through material of that kind on the face of its determination.

[30] It may be thought that this approach is not far distant from the way in which the IAT generally discharges its duty to give reasons and not only in cases where it resolves to produce an authoritative determination as to the position in a particular country. Indeed we do not mean to suggest that in this latter class of case the IAT's duty is of an altogether different quality. The experienced members of the IAT, not least if we may say so its President and Deputy President, will we are sure have no difficulty in gauging the quality of the reasons given so as to ensure that these authoritative determinations will be, and will be seen to be, effectively comprehensive.' (Emphasis in original.)

[31] The undesirability of such factual disparities was recently reiterated by this court in *Gurung v Secretary of State for the Home Dept* [2003] EWCA Civ 654: see

- a especially the judgment of Buxton LJ at [12]. Mr Kovats has argued that, while it may be proper to insist that good reasons be given for departing from an otherwise consistent line of factual decisions of the present kind, there can be no such requirement where, as here, there is no consistent line. But this does not answer Ms Webber's point that it is the very inconsistency of the decisions which is inimical to justice.
- b [32] I am conscious of the ever-present risk of creating a back door to asylum by allowing claims to apostasy on the part of nationals of theocratic states to establish without more a well-founded fear of persecution. It is especially so when many religious bodies in this country are very ready to welcome converts and may even be seeking them out. That, no doubt, makes great caution appropriate in deciding both on the genuineness of conversions (see the apposite guidance given by the IAT in this regard in *Dorodian v Secretary of State for the Home Dept* (23 August 2001, unreported) at para 8; and in *J (Iran) v Secretary of State for the Home Dept* [2003] UKIAT 00158 at para 22), and on the question of causation which can arise in the case of refugees *sur place*. But it cannot properly affect the judicial reading of the data about the situation in the country of the applicant's
- d nationality.

CONCLUSION

- e [33] I would allow this appeal on the ground that the issues canvassed above have not been adequately addressed by the IAT. That this is so is, I hope, evident from a comparison of the passage of their reasons cited earlier in this judgment with the sometimes complex matters to which the argument has now drawn attention. I would remit the case to the IAT with an indication that the President should give directions for its rehearing in the light of this court's decision.

MUNBY J.

- f [34] I agree entirely with my Lord.

- g [35] I only add a few words on the meaning of the phrase 'leaves the United Kingdom' in s 58(8) of the Asylum and Immigration Act 1999. This phrase, which appears also in s 33(4) of the Immigration Act 1971 and in the provisions of the Nationality, Immigration and Asylum Act 2002 which, as my Lord has observed, have since replaced s 58, is to be contrasted with the phrase 'on his going to a country or territory outside the common travel area (whether or not he lands there)' in s 3(4) of the Immigration Act 1971. It is not obvious to me that the word 'leave' is here being used in the same sense as the word 'going' even if, as my Lord has noted, in *Ghasseman and Mirza v Home Office* [1989] Imm AR 42 this court without argument assumed the words to be synonymous.

- h [36] Mr Kovats submits that 'leaves' here means 'physically departs from (of his own volition)'. In support of this proposition he has referred us to the decisions of the Immigration Appeal Tribunal in *Secretary of State for the Home Dept v Szalacha* (17 July 1998, unreported), *Dupovac v Secretary of State for the Home Dept* (6 August 1998, unreported) and *Nongpar v Secretary of State for the Home Dept* (26 November 1998, unreported), in each of which the tribunal treated 'leave' as meaning simply 'going' or 'travelling' 'beyond the common travel area'. That may be so, but as my Lord has already mentioned, this court expressly left the question open in its later decision in *Dupovac v Secretary of State for the Home Dept* [2000] Imm AR 265. The subsequent decisions of the tribunal in *Djuretic v Secretary of State for the Home Dept* (4 July 2000, unreported) and *J (Poland) v*

Secretary of State for the Home Dept [2003] UKIAT 00090] to which Mr Kovats also helpfully took us do not seem to me to take the matter any further. a

[37] As was pointed out during the course of argument, the word 'leave' takes its meaning from the context. The barrister's clerk who, in answer to a solicitor's inquiry, says that 'Mr Smith has left chambers' means one thing if the solicitor is worried because Mr Smith has not yet arrived at court; he means something very different if he is having to tell the solicitor that he cannot accept instructions because Mr Smith has moved to other chambers. The father who says to his child 'Look! We are now leaving England' means one thing if they are looking back at the white cliffs of Dover as the cross-channel ferry sets out to take them on a day-trip to Calais; he means something very different if they are looking back at Tilbury as the P & O liner sets out to take them to a new life as emigrants to Australia. b
c

[38] It is by no means obvious to me that someone 'leaves' the United Kingdom within the meaning of s 58(8) merely because in the course of an afternoon's yachting or fishing he briefly leaves territorial waters. (And if Mr Kovats is correct in his submission that this is a leaving, assuming only that it is volitional, what of knowledge and intention? Does it make a difference that our sailor knows that he has left territorial waters, because his plan was to go fishing 25 miles out, or that he has left territorial waters, albeit having steered to where he has got, only because of a navigational error?) Nor, coming closer to the facts of the present case, is it by any means obvious to me that someone 'leaves' the United Kingdom if his plan to go to another country outside the common travel area is thwarted by that country's refusal to admit him and he is immediately put on the next plane back. d
e

[39] I express no concluded views on any of these questions. Mr Kovats may be right. But it may be that he is not. I draw attention to these matters only to emphasise, so far as I am concerned, that these are all still open questions, that they did not arise for decision in the present case because Ms Webber was content to assume for the purposes of her argument, although without conceding, that her client had indeed left the United Kingdom, and that nothing we have said should be taken as a determination, one way or the other, as to whether her client, in circumstances that were not fully explored before us, had indeed left the United Kingdom. f
g

MUMMERY LJ.

[40] I agree with Sedley LJ that this appeal should be allowed.

[41] I wish to add two comments on the abandonment argument raised by Mr Kovats on behalf of the Home Secretary. (1) Both sides assume that the appellant 'leaves the United Kingdom' for the purposes of s 58(8) by travelling from the United Kingdom to the Netherlands on 30 March 2003 for a short holiday, but is refused entry and returns to the United Kingdom on the following day. I doubt whether that assumption is correct. 'Leaves' in relation to a country is capable of covering a wide range of situations ranging, at one end, from the mere fact of physical departure from a country, to, at the other end, emigration to another country. In the context of a stipulated consequence of being treated as abandoning a pending appeal, I seriously question whether the appellant 'leaves the United Kingdom' within s 58(8) by travelling out one day for a short holiday and having to return the next day. In the absence of full argument it would not be right to express a concluded view on the point. (2) Like Sedley LJ I h
j

- a* conclude that the appeal of the appellant to this court, which was pending at the date of his journey to the Netherlands, is not a 'pending appeal under this Part [ie Pt IV]' within 58(8). It is true that Pt IV relates to appeals and that this is an appeal which was pending at the relevant time. An appeal to the Court of Appeal is not, however, an appeal 'under Part IV'. The appellate authorities who hear appeals under Pt IV are the IAT and the adjudicators, as mentioned in ss 56 and
- b* 57. Section 58, which contains general provisions in relation to appeals, expressly recognises, in its reference to the provisions of Pt III of Sch 4, a distinction between '... appeals under this Part' (s 58(4)(a)) and 'further appeals' (s 58(4)(b)). It is clear from para 23 of Pt III of Sch 4 (Determination of Appeals) that whereas an appeal to the IAT is 'an appeal brought under Part IV', an appeal from the final determination of the IAT to the Court of Appeal on a question of law material to
- c* that determination is a 'further appeal' by a party. It is not an appeal under Pt IV. The argument advanced by Mr Kovats fails on the clear language of s 58 and Pt III of Sch 4, when construed in the context of the appellate structure to which the provisions refer.

Appeal allowed.

Kate O'Hanlon Barrister.

Williams v Fanshaw Porter & Hazelhurst (a firm)

[2004] EWCA Civ 157

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MANCE LJ AND PARK J

14 JANUARY, 18 FEBRUARY 2004

Limitation of action – Concealment of right of action – Defendant solicitors raising limitation defence in action for negligence – Claimant relying on statutory provision postponing limitation period where defendant had concealed from claimant any fact relevant to his right of action – Whether mistaken belief of defendant that consequences of its negligent act could be cured together with its wish to avoid embarrassment by revealing negligent act constituting deliberate concealment – Limitation Act 1980, s 32(1)(b).

The claimant instructed the defendant firm of solicitors to act for her in a claim for professional negligence against her doctor. Her case was conducted by B, an employee of the firm, who commenced an action by the claimant against the doctor. The doctor's solicitors then served notice of application for a hearing. B agreed with the doctor's solicitors, on behalf of the claimant, that he would consent to an order by which the doctor ceased to be a party to the action. He had not obtained instructions from the claimant to do so and did not inform her after he had done it. On 25 August 1994, the court made the consent order and the claim against the doctor was dismissed. B wrongly believed that he would be able to rejoin the doctor to the action if he wished. He applied to do so in October 1994 and his application was dismissed. B did not tell the claimant of the failed application to rejoin the doctor, and did not tell her about the consent order. In November 1995 the defendant, still acting by B, commenced a new action against the original doctor and another doctor. The original doctor's solicitors applied for an order striking out the new claim as an abuse of process and the new claim against the original doctor was struck out. (The claim against the other doctor was later discontinued.) Acting on the claimant's behalf, B appealed, unsuccessfully, against the decision to strike out. On 10 June 1996 B advised the claimant to consult other solicitors, then telling her about the consent order. On 14 December 2000, the claimant, acting by new solicitors, commenced an action for professional negligence against the defendant. It was common ground that the cause of action had arisen on 25 August 1994. The question of limitation was tried as a preliminary issue. The judge had to consider, whether, in the terms of s 32(1)(b)^a of the Limitation Act 1980, under which, inter alia, where any fact relevant to a claimant's right of action had been deliberately concealed from him by the defendant the period of limitation would not begin to run until the claimant had discovered the concealment, B had deliberately concealed from the claimant any fact relevant to her right of action against the defendant. The judge found that B's motive in not telling the claimant about the consent order was to avoid embarrassment for himself. He held that B had not deliberately concealed anything from the claimant, so that s 32(1)(b) of the 1980 Act did not apply, with

^a Section 32, so far as material, is set out at [7], below

a the result that the limitation period had expired on 24 August 2000 and the limitation defence pleaded by the defendant succeeded. The claimant appealed.

Held – After the dismissal of the application to rejoin the doctor to the action there has been a realisation by B that he had been negligent, in the sense that agreeing to the consent order had been a bad mistake for which he had been responsible, and deliberate concealment from the claimant by him as her solicitor of the fact of that negligence. Accordingly, the claimant was entitled to invoke s 32(1)(b) of the 1980 Act and the appeal would therefore be allowed (see [14]–[16], [21], [25], [26], [29], [36], [45], [48], [49], [51], [52], below).

Notes

c For postponement of the limitation period by deliberate concealment, see 28 *Halsbury's Laws* (4th edn reissue) paras 1125–1127.

For the Limitation Act 1980, s 32, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 972.

d Cases referred to in judgments

Beaman v ARTS Ltd [1949] 1 All ER 465, [1949] 1 KB 550, CA.

Brocklesby v Armitage & Guest (a firm) [2001] 1 All ER 172, [2002] 1 WLR 598n, CA.

Bulli Coal Mining Co v Osborne [1899] AC 351, [1895–99] All ER Rep 506, PC.

Cave v Robinson Jarvis & Rolf (a firm) [2002] UKHL 18, [2002] 2 All ER 641, [2003] 1 AC 384, [2002] 2 WLR 1107.

e *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1995] 2 All ER 558, [1996] AC 102, [1995] 2 WLR 570, HL.

Appeal

f The claimant, Elaine Williams, appealed with permission of Mance LJ, from the decision of Recorder Brunnen in the Manchester County Court on 3 March 2003, declaring, on the determination of a preliminary issue, that s 32(1)(b) of the Limitation Act 1980 did not apply, in respect of an action for professional negligence commenced by the claimant against the defendant firm of solicitors, Fanshaw Porter & Hazlehurst (FP & H), on 14 December 2000, and that in consequence the limitation period had expired by that date and the claimant's
g action was statute barred. The facts are set out in the judgment of Park J.

Edward Bartley Jones QC and *Simon Earlam* (instructed by *Cheryl Lewis & Co*, Birkenhead) for Mrs Williams.

Andrew Sander (instructed by *Weightman Vizards*, Liverpool) for FP & H.

h *Cur adv vult*

18 February 2004. The following judgments were delivered.

PARK J.

j OVERVIEW

[1] The claimant, Ms Elaine Williams, commenced an action in the Manchester County Court for professional negligence against the defendants, Fanshaw Porter & Hazlehurst, a firm of solicitors. I will refer to them as FP & H. I will describe the factual background later. FP & H admitted (or at least did not seriously deny) negligence and breach of duty, but pleaded that the action was

time-barred by the Limitation Act 1980. It is common ground that the cause of action arose on 25 August 1994. If the normal limitation period of six years from the accrual of the cause of action applied Ms Williams needed to commence her action not later than 24 August 2000. In fact she did not commence it until 14 December 2000. Thus a limitation defence was to be expected, and such a defence duly materialised. Ms Williams's reply to the defence was and is that on the particular facts of the case, which I will describe below, the six-year limitation period did not start to run until a date which was less than six years before she commenced her action. She said that that was the result of s 32(1)(b) of the 1980 Act, or alternatively of s 32(2) of the same Act.

[2] The district judge directed that whether the action was in any event barred by limitation should be determined as a preliminary issue. The hearing to determine that issue took place before Recorder Brunnen in the Manchester County Court on 30 and 31 January 2003. The recorder reserved judgment and delivered it on 3 March 2003. He decided that s 32(1)(b) did not apply, and that s 32(2) did not apply either. The result was that the limitation period had expired before Ms Williams commenced her action. Therefore the action was statute-barred. Ms Williams now appeals to this court by the permission of Mance LJ.

[3] Mr Bartley Jones QC and Mr Earlam, counsel for Ms Williams, have submitted that the decision of the recorder was wrong so far as it related to s 32(1)(b). They say that that paragraph did apply, with the result that the limitation period did not start to run until a date which was less than six years before the commencement of the action on 14 December 2000. They do not challenge the recorder's decision so far as it concerned s 32(2). On behalf of FP & H Mr Sander supports the recorder's conclusion that s 32(1)(b) did not apply. He accepts, however, that, if it did, the time at which the limitation period would have commenced to run would have been too late for a limitation defence to succeed.

[4] In my judgment, for the reasons which I will explain, the recorder was wrong on the critical issue. I consider that on a proper view of the facts s 32(1)(b) did apply. The limitation period did not start to run at the time of the breach of duty (25 August 1994) but only at a later date, which, as I will describe later, may have been either 15 July 1995 or, possibly, 10 June 1996. Either date was less than six years before Ms Williams's action was commenced. Therefore the action is not statute-barred.

THE LAW

[5] The general rules for limitation of actions in tort and contract are contained in ss 2 and 5 of the 1980 Act:

'2. An action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued ...

5. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.'

[6] Ms Williams's claim against FP & H may sound in tort or in contract or in both. If the general rules apply the limitation period began to run when the cause of action accrued. In some cases there can be difficult questions about when a cause of action accrued, but not in this case. As I have already said, it is agreed that Ms Williams's cause of action accrued on 25 August 1994.

[7] There are exceptions to the general rules. The exceptions which matter in this case are contained in s 32. I will set out most of sub-s (1) and the whole of sub-s (2). As regards s 32(1) it will be seen that it contains three paragraphs. I reproduce all three of them, but it should be noted that the one which is specifically in point in this case is para (b):

‘... where in the case of any action for which a period of limitation is prescribed by this Act, either—(a) the action is based upon the fraud of the defendant; or (b) any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it ...

(2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.’

[8] So far as s 32(1)(b) is concerned the critical question is whether any fact relevant to Ms Williams’s right of action against FP & H was deliberately concealed from her by FP & H.

[9] There have been a number of decided cases which concerned s 32. None of them was concerned with the specific point which arises in this case. I will briefly mention two House of Lords cases. In *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1995] 2 All ER 558, [1996] AC 102 their Lordships decided that s 32(1)(b) applies where the concealment of a relevant fact occurs after the cause of action has accrued as well as at the time when it accrues. I note Lord Browne-Wilkinson’s encapsulation ([1995] 2 All ER 558 at 565, [1996] AC 102 at 142) of the mischief aimed at: ‘to ensure that the Act does not operate to bar the claim of a plaintiff whose ignorance of the relevant facts is due to the improper actions of the defendant.’ *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2002] 2 All ER 641, [2003] 1 AC 384 was concerned with whether the words in s 32(2) ‘deliberate commission of a breach of duty’ were satisfied if the defendant deliberately did something which has been found later to have been a breach of duty, but at the time when he did it he did not realise that it was a breach of duty. The House of Lords, overruling (much to the relief of professional advisers of all kinds) the earlier decision of the Court of Appeal in *Brocklesby v Armitage & Guest (a firm)* [2001] 1 All ER 172, [2002] 1 WLR 598n, held that the words of s 32(2) were not satisfied. The subsection required the defendant, not just to know what he was doing, but also to know that it was a breach of duty. It did not apply to a negligent breach of duty which the defendant did not realise he was committing.

[10] Mr Bartley Jones submits, and I agree, that his argument in the present case does not amount to a reintroduction of the overruled decision in *Brocklesby’s* case. He says, and again I agree, that both *Brocklesby’s* case and *Cave’s* case were cases about s 32(2), whereas this case is exclusively about s 32(1)(b). There are, however, two passages in the speeches in *Cave’s* case—one in the speech of Lord Millett and the other in the speech of Lord Scott—to which reference has been made in this case. I will not set them out here, but I will come to them at a later point.

THE FACTS

[11] In the following subparagraphs I will outline the relevant facts, occasionally commenting on the significance of some of them. a

(i) In January 1990 Ms Williams attended at the medical practice of which she was a patient. She says that a doctor gave to her a repeat prescription for six months' supply of a birth control drug known as Femodene. One of the doctors at the practice was Dr Salahuddin.

(ii) In May 1990 Ms Williams had a stroke, the consequences of which have been serious and enduring. She says that the stroke was caused by her having taken the Femodene. Because she had fluctuating blood pressure that drug was unsuitable and dangerous for her in that it exposed her to the risk of strokes. She also says that before the Femodene was prescribed for her the doctor ought to have checked her blood pressure, but he did not do so. b

(iii) Ms Williams obtained legal aid to consider whether she could bring a claim for professional negligence against the doctor. In October 1991 she instructed FP & H to act for her. From an early time her case was conducted by Mr Brown. He is now a fully qualified solicitor and the managing partner of FP & H, but in 1991 he was an employee of the firm, and was still qualifying as a legal executive. c

(iv) Ms Williams's initial instructions to Mr Brown were that it was Dr Salahuddin who had prescribed the Femodene for her and who had omitted to check her blood pressure. d

(v) On 17 May 1994 FP & H, acting by Mr Brown, commenced an action by Ms Williams in the Birkenhead County Court against Dr Salahuddin. This was case BI 423528. It should be noted that the claim was brought against Dr Salahuddin alone, not for example against a partnership of which he was a member. e

(vi) Dr Salahuddin, no doubt supported by the Medical Defence Union or some similar body, instructed Hempsons to act as solicitors for him to defend the claim. On 15 July 1994 they wrote to FP & H: Dr Salahuddin denied that he had seen Ms Williams or that he had prescribed the Femodene; he should be 'struck out of the proceedings'. This was supported by an affidavit of a solicitor at Hempsons. f

(vii) On 22 July 1994 Mr Brown had a meeting with Ms Williams. She apparently said that she was now not sure whether it was Dr Salahuddin or another doctor who had prescribed the Femodene for her. g

(viii) On 10 August 1994 Hempsons served a notice of application for a hearing in the Birkenhead County Court on 25 August 1994. They were obviously going to apply for the action against Dr Salahuddin to be struck out.

(ix) On or before 25 August 1994 Mr Brown agreed with Hempsons that on behalf of Ms Williams he would consent to the court making an order of the kind which Hempsons were applying for. It is important for the purposes of this case that he did not obtain instructions from Ms Williams to do this, and it is even more important that he did not inform her about it after he had done it. On 25 August 1994 the court made the consent order. Dr Salahuddin was to cease to be a party, and the claim against him was dismissed. h

(x) Mr Brown says that he agreed to the making of the consent order in order to get some relief from pressure from Hempsons while he investigated whether it had or had not been Dr Salahuddin who had issued the prescription. He believed that he would be able to rejoin Dr Salahuddin to the action if he wished. However, he was wrong in that belief, and the actual effect of the consent order j

a was to extinguish the possibility of Ms Williams pursuing a case for professional negligence against Dr Salahuddin—as subsequent events were to show. It is now agreed (at least for the purposes of this preliminary issue) that Mr Brown was negligent in consenting to the order, and that a cause of action against FP & H then accrued to Ms Williams. The action would have been one for the loss of a chance of recovering damages from Dr Salahuddin. If the limitation period for such an action commenced when the cause of action accrued, then the action had to be commenced before 25 August 2000.

b (xi) On 15 September 1994 Mr Brown met Ms Williams again. It appears that on this occasion Ms Williams had a firmer recollection that it had indeed been Dr Salahuddin who had prescribed the Femodene. In evidence Mr Brown said that he thought that he told Ms Williams something about Dr Salahuddin having been ‘dropped out of the action’. However, the recorder found that he did not.

c (xii) On 3 October 1994 Mr Brown wrote a letter to Ms Williams, telling her that he had not been able to trace a record of the prescription, and that whether it had been Dr Salahuddin who prescribed it would be a matter of evidence, with her evidence to be evaluated against the doctor’s. He said he ‘could see no reason d why we should not at this stage proceed with the claim’. He concluded: ‘There are a number of procedural matters which I now have to attend to, but I shall revert to you as soon as I have any news.’ This invites the comment that the consent order which had been made six or seven weeks earlier was a major item of news, but Mr Brown had not told his client about it yet, and he did not tell her about it in this letter of 3 October 1994 either.

e (xiii) On the same date, 3 October 1994, Mr Brown wrote to Hempsons asking them to agree to Dr Salahuddin being rejoined to case BI 423528.

(xiv) On 17 October 1994 Hempsons replied, refusing to consent.

(xv) On 26 October 1994 Mr Brown served an application to the court to rejoin Dr Salahuddin as a party to case BI 423528.

f (xvi) 15 December 1994: nothing specific happened on this date, but it was six years before the date when the present action by Ms Williams against FP & H was commenced. Therefore, if the limitation period had not yet started to run and only ran from some time after this date, the action is not statute-barred.

g (xvii) On 16 December 1994 the district judge at Birkenhead considered Mr Brown’s application for Dr Salahuddin to be rejoined to action BI 423528. The district judge dismissed the application. He pointed out, unanswerably, that, because Dr Salahuddin had been the only defendant to the action and because the action against him had been dismissed (by the consent order of 25 August 1994), the action did not exist any more. It was impossible for Dr Salahuddin to be rejoined to a non-existent action. The district judge ordered FP & H to pay the defendant’s costs of the application, thereby indicating, as it seems to me, his opinion of the ineptness of how FP & H, through Mr Brown, had conducted the case. FP & H did not appeal from the decision, but instead (as I will explain below) Mr Brown applied his mind to starting a new action against Dr Salahuddin.

h (xviii) Mr Brown did not tell Ms Williams of the failed application to rejoin Dr Salahuddin. Indeed, he still did not tell her of the consent order of four months earlier which was the source of all the problems. With reference to the application and the district judge’s dismissal of it Mr Brown says in his witness statement: ‘I was embarrassed by the result of the application and for that reason alone did not tell the claimant of the same but sought advice from counsel.’ I can sympathise with Mr Brown’s predicament. He was at an early stage in his legal career and was not yet qualified, and he had got out of his depth. Nevertheless

there is no doubt that his professional duty was to inform his client of what had happened. He did not comply with that duty. a

(xix) There is a finding by the recorder 'that Mr Brown was not aware at this stage that he had been negligent'. I accept that the facts are primarily to be found by the first instance judge, not by the Court of Appeal, but I must nevertheless comment on this finding. Given what had happened before the district judge, including the order that FP & H should pay the defendant's costs and the absence of any appeal from the decision, it seems to me that Mr Brown must have known that he had been negligent in the sense that agreeing to the consent order had been a bad mistake for which he was responsible. The recorder's real point must surely be that Mr Brown still thought that the negligence could be cured by the commencement of a new action. On that basis Mr Brown believed that a claim in negligence against FP & H could be averted. b

(xx) In March 1995 counsel advised that 'the only way forward might be the issue of fresh proceedings against him [Dr Salahuddin] or any other party'. This was tentatively expressed and there was in fact no way forward at all. c

(xxi) There is no evidence that Mr Brown did anything about it until he received a telephone call from Ms Williams asking him to watch a television programme about Femodene. This led to another meeting with her on 18 July 1995 (the first time he had met her since September 1994). His attendance note merely says: 'We discussed the position as regards her claim and I advised her what was going on.' The recorder finds that Mr Brown 'explained the then current position to the claimant'. This probably carries the implication that at this meeting on 18 July 1995 Mr Brown finally told Ms Williams about the consent order, whether or not he also told her about the effect that it had had on the now defunct case BI 423528. Mr Bartley Jones says that that was a distinctly charitable finding to Mr Brown. That may be so, but in this respect I would be very slow to go behind the recorder's finding. d

(xxii) On 14 November 1995 FP & H, acting by Mr Brown, commenced a new action against Dr Salahuddin and another doctor: case BI 509333. I mention at this point that the claim against the other doctor was later discontinued, and nothing turns on her having at one stage been a party to this new action. e

(xxiii) On 1 December 1995 Hempsons applied for an order striking out the new claim against Dr Salahuddin as an abuse of process: Ms Williams, having sued Dr Salahuddin once and having consented to the action being dismissed, could not thereafter turn round and try to sue Dr Salahuddin again for exactly the same thing as before. There is a file note of Mr Brown of 6 December 1995 in which he wrote that he could 'see no justification for Hempsons's application'. The recorder's comment is that 'Mr Brown still did not realise his breach of duty'. I make a similar comment to one which I have made earlier. Despite the way that the recorder expresses it, what he must mean is that Mr Brown still thought that, by the procedural technique of commencing a new action, Ms Williams's claim against Dr Salahuddin could be pursued notwithstanding the consequences of the consent order. f

(xxiv) On 26 February 1996 the district judge heard Hempsons' application for the new claim against Dr Salahuddin to be struck out. He acceded to the application and struck out the claim. g

(xxv) Mr Brown, on behalf of Ms Williams, appealed against the district judge's decision. On 13 May 1996 the appeal was dismissed by Judge Bernstein. It seems that at that point Mr Brown recognised the fact that there was no prospect of Ms Williams maintaining an action against Dr Salahuddin. h

a (xxvi) On 10 June 1996 Mr Brown and Ms Williams met. He advised her to consult other solicitors. If he had not told her about the consent order at the meeting on 18 July 1995, he must have told her about it on this occasion.

(xxvii) On 3 July 1996 she did consult other solicitors, who are the firm now acting for her.

b (xxviii) 24 August 2000: nothing specific happened on this date, but it was the last day to commence an action against FP & H which would have been in time if the limitation period had started to run when the cause of action accrued, that is on 25 August 1994. No action had been begun by this date.

(xxix) On 14 December 2000 Ms Williams, acting by her present solicitors, commenced this action against FP & H in the Manchester County Court.

c (xxx) On 13 September 2002 the district judge directed that limitation be tried as a preliminary issue.

(xxxi) On 3 March 2003, after a trial of that issue, Recorder Brunnen held that s 32(1)(b) did not apply, with the result that the limitation period had run from 25 August 1994 to 24 August 2000. Accordingly the limitation defence pleaded by FP & H succeeded.

d THE RECORDER'S JUDGMENT

[12] The questions before the recorder were whether, in terms of s 32(1)(b), Mr Brown deliberately concealed from Ms Williams any fact relevant to her right of action against FP & H, and, if so, whether Ms Williams discovered the concealment (or could with reasonable diligence have discovered it) by e 15 December 1994 (six years before the commencement of the present action). The recorder held that, until the dismissal of the appeal by Judge Bernstein on 13 May 1996, Mr Brown did not deliberately conceal anything from Ms Williams. Nor was there any concealment after the dismissal of the appeal. Within a month of the dismissal Mr Brown told her about the position and very properly advised f her to consult other solicitors.

[13] I will explain why I do not agree with the recorder under the next heading, but I wish now to identify three factors which seem to me to have influenced him towards the decision which he reached. (i) Mr Brown gave evidence, and clearly impressed the recorder as a totally sincere and frank witness:

g 'I considered him to be an open and frank witness, who was ashamed of the way he had handled the claimant's case but was doing his best to give a truthful account of what had been in his mind at the time.'

h (ii) Although Mr Brown did not tell Ms Williams about the consent order until considerably later than he should have done, his motive in not telling her was not that he wished to conceal from her the existence of a possible negligence action against FP & H. His motive was to avoid embarrassment for himself. That did not make what he did right, but it was something which might be viewed with a degree of sympathy given the way that he, an unqualified legal executive, had been put in charge of a quite tricky matter and had found that he could not cope.

j (iii) At all times at least until the decision of the district judge on 26 February 1996 (striking out the second claim against Dr Salahuddin), and possibly until the dismissal of the appeal by Judge Bernstein on 13 May 1996, Mr Brown honestly and genuinely believed that the situation created by the consent order could be cured, and that Ms Williams would still be able to bring her action against the doctor.

ANALYSIS AND DISCUSSION

[14] I begin with the specific terms of s 32(1)(b): '... any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant.' Those words describe the condition which must exist before the operative part of s 32(1) takes effect. There are four points on the wording of the paragraph which should be noted. (i) The paragraph does not say that the right of action must have been concealed from the claimant: it says only that a fact relevant to the right of action should have been concealed from the claimant. (ii) Although the concealed fact must have been relevant to the right of action, the paragraph does not say, and in my judgment does not require, that the defendant must have known that the fact was relevant to the right of action. In most cases where s 32(1)(b) applies the defendant probably will have known that the fact or facts which he concealed were relevant, but that is not essential. All that is essential is that the fact must actually have been relevant, whether the defendant knew that or not. The paragraph does of course require that the fact was one which the defendant knew, because otherwise he could not have concealed it. But it is not necessary in addition that the defendant knew that the fact was relevant to the claimant's right of action. (iii) The paragraph requires only that *any* fact relevant to the right of action is concealed. It does not require that *all* facts relevant to the right of action are concealed. (iv) The requirement is that the fact must be 'deliberately concealed'. It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to. I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it.

[15] Applying s 32(1)(b) to this case with the foregoing points in mind, I observe that two facts were the following: that Mr Brown agreed to the consent order, and that the consent order was made. Those two facts are indisputably relevant to Ms Williams's right of action against FP & H. They are the central elements of the negligent breach of duty which she alleges. Ms Williams did not know of those two facts until (on the recorder's tentative finding) 18 July 1995 or, (on an alternative view of the evidence which Mr Bartley Jones would favour) 10 June 1996. The reason why she did not know about them until one or other of those dates was because Mr Brown had not previously told her about them.

[16] In my judgment Mr Brown, by not telling her about the two relevant facts, deliberately concealed them. It was the professional duty of the firm of solicitors by which he was employed to disclose the facts to the firm's client. It fell to Mr Brown to comply with that duty on behalf of the firm, but he did not comply with it. It is possible, though I have to say that it would be surprising, that at the time of the consent order Mr Brown thought that the order was just a routine procedural matter which he did not need to tell his client about. If that is so, then for a time the non-disclosure of the order to Ms Williams was not deliberate concealment. But that cannot have continued to be the position after the decision of the district judge on 16 December 1994, which refused to rejoin Dr Salahuddin to case BI 423528 and ordered FP & H to pay the defendant's costs of the failed application. I repeat the following sentence from Mr Brown's witness statement: 'I was embarrassed by this application and for that reason alone did not tell the claimant of the same but sought advice from counsel.' It is

a implicit in that sentence that Mr Brown thought about whether he would tell Ms Williams about the application and decided that he would not. It is also implicit that in the normal course of his relationship with a client of the firm he would have told her about the application: if telling her about it would not have embarrassed him he would have told her. Telling her about the application would necessarily have included telling her about the consent order. In my judgment the only possible conclusion is that, after the failed application of b 16 December 1994 if not before, Mr Brown concealed the fact of the consent order from Ms Williams. Further, he did so deliberately: not to tell her was not just something which he did without thinking about it: it was a conscious decision on his part to refrain from doing something which he normally would have done and which he ought to have done. It is true that a desire to conceal c from Ms Williams the possibility that she might have a claim in negligence against FP & H was not the reason why Mr Brown decided not to tell her what had happened: the reason was to avoid embarrassment. But in my view that makes no difference, and the recorder was in error if (as I believe) he thought that it did make a difference. What is relevant to s 32(1)(b) is the fact of concealment, d not the reason or motive for it. In Mr Sander's skeleton argument for FP & H he writes: 'An honest desire on the part of a solicitor to avoid embarrassment to himself or his firm is wholly different from an intention to conceal.' I respectfully disagree: it is simply one possible motive for concealment—a motive which differs from the more common motive of not wanting the potential claimant to realise that he may have a claim against the solicitor's firm.

e [17] Moreover, nor does it in my judgment make any difference that, at the times when Mr Brown was concealing the fact of the consent order from Ms Williams, he believed that the adverse consequences of that order upon Ms Williams's ability to pursue a claim for damages against Dr Salahuddin could be cured. Notwithstanding Mr Brown's belief in that respect (a belief which f the recorder considered, and which I accept, to have been honestly held, misguided though it was), it remains the case that Mr Brown did conceal the fact of the consent order from Ms Williams, and that he did so deliberately.

g [18] In my judgment the recorder wrongly conflates (i) realisation by Mr Brown that he had made a mistake by agreeing to the consent order, and (ii) realisation by Mr Brown that his mistake had fatal consequences for Ms Williams's potential claim against Dr Salahuddin and that the consequences could not be cured. In the concluding part of the recorder's judgment, after his detailed account of the facts, he writes:

h 'This review of the history leads me to find that it was only on the dismissal of the appeal [by Judge Bernstein on 13 May 1996] that it became clear to Mr Brown that by consenting to the order of 25 August 1994 he had committed a blunder which made the claimant's position in relation to Dr Salahuddin irretrievable and amounted to a breach of duty on his part.'

j I can accept that it was only on the dismissal of the appeal in May 1996 that it became clear to Mr Brown that the consequences of his earlier 'blunder' could not be averted, but I do not accept that it was only at that late stage that it became clear to Mr Brown that agreeing to the consent order had been a blunder. That must have become clear to him not later than 16 December 1994, when the district judge refused to rejoin Dr Salahuddin to the original action. It is a commonplace of human experience that someone who has made a mistake may realise it in time to take steps which prevent the mistake having harmful

consequences. If he can do that it does not change the fact that he made a mistake in the first instance. The recorder erroneously proceeds on the basis that, if the consequences are successfully averted, there never was a mistake (or a blunder) to begin with. a

[19] With reference to the situation after 16 December 1994 the recorder writes:

‘I find that at that stage he did not appreciate that he had done anything wrong, both because he did not consider that what had happened was his fault and because he believed that the situation could be rectified.’ b

I cannot agree with the thinking behind that sentence. The stage to which the recorder was referring was when, although Mr Brown had agreed to the consent order in the belief that, if he later wished to resuscitate the claim against Dr Salahuddin, it would be a straightforward matter to get Dr Salahuddin rejoined as a defendant to case BI 423528, the decision of the district judge had shown that Mr Brown’s belief was entirely wrong, and the district judge had ordered Mr Brown’s firm to pay the costs. How can Mr Brown possibly have not appreciated that he had done something wrong? c

[20] The recorder gives two reasons, neither of which stands up to analysis. The first is that ‘he did not consider that what had happened was his fault’. That is a reference to Ms Williams’s vacillations about whether it was or was not Dr Salahuddin who had prescribed the Femodene for her. But, as the recorder himself observed at an earlier point in the judgment— d

‘if there was doubt as to who the correct defendant was, the prudent course would be to join in all possible defendants rather than letting out the only existing defendant.’ e

Mr Brown cannot have failed to realise that after the December 1994 decision of the district judge. In any case, when Ms Williams was unsure in the meeting on 22 July 1994 whether it was Dr Salahuddin who had prescribed the Femodene, Mr Brown’s reason for his decision to agree to the consent order was that he thought that it would be possible to rejoin Dr Salahuddin to the action later. He was mistaken about that, and it is irrelevant for him to say that he would not have been in the position where he made the mistake if Ms Williams had been more definite in what she told him on 22 July. The recorder’s second reason for his finding that, after the district judge’s decision, Mr Brown did not appreciate that he had done anything wrong was that ‘he believed that the situation could be rectified’. I have already dealt with that. People not infrequently do things which were wrong, but are able to put the matter right before any adverse consequences follow. It is still the case that their original action was wrong. f

[21] For the foregoing reasons I cannot agree with the decision of the recorder. In my judgment the conditions prescribed in s 32(1)(b) are present in this case: facts relevant to Ms Williams’s right of action against FP & H (namely the fact that Mr Brown agreed to the consent order and the fact that the order was made) were deliberately concealed from her by FP & H, acting by Mr Brown. I must however, consider whether there is anything to the contrary in the passages in the speeches of Lord Millett and Lord Scott of Foscote in the House of Lords in *Cave v Robinson Jarvis & Rolf (a firm)* [2002] 2 All ER 641, [2003] 1 AC 384. In my judgment there is not. I make the preliminary observation that their Lordships were not in any event considering a case which raised the issue raised by this one: they were concerned with an argument that, although s 32(1)(b) read alone did g

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- a not apply to the facts with which the House of Lords was concerned, s 32(2) did apply and caused the circumstances to be treated as being within s 32(1)(b) after all. In this case there is no longer any argument that s 32(2) applies. The argument for Ms Williams (with which I agree) is that the conditions of s 32(1)(b) by themselves and without the expansion to them effected by s 32(2) are satisfied. It would be a misuse of the precedent system to allow this case to be determined
- b by the way in which Lord Millett or Lord Scott explained s 32 for the purposes of *Cave's* case and not for the purposes of a case such as the present one.

[22] Having said that, I begin with Lord Scott, with whose speech Lord Slynn of Hadley, Lord Mackay of Clashfern and Lord Hobhouse of Woodborough concurred. The relevant passage is as follows (at [60]):

- c 'A claimant who proposes to invoke s 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case,
- d with the intention of concealing the fact or facts in question.'

In my judgment the analysis of s 32(1)(b) which I have adopted in the foregoing discussion is consistent in all respects with that passage. Further, the conditions which Lord Scott identifies are fulfilled. The fact of the consent order is relevant

e to Ms Williams's right of action against FP & H; it was concealed from her by Mr Brown's withholding of information about it, and that was done with the intention of concealing the facts about the order (albeit with a motive of avoiding embarrassment rather than with a motive of reducing the risk of being sued for negligence).

- f [23] Lord Millett (with whom Lord Mackay and Lord Hobhouse concurred) put the matter slightly differently, though I very much doubt that he and Lord Scott intended there to be any practical difference between what each of them said. He says (at [25]):

- g 'In my opinion, s 32 of the 1980 Act deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time.'

- h In my view (i) in that passage has in mind s 32(1)(b) by itself, and (ii) has in mind s 32(2). If that is right Lord Millett's summary of s 32(1)(b) (on which this case depends) is that it applies where a defendant 'takes active steps to conceal his own breach of duty after he has become aware of it'. I would accept that if those words were the words of the statute itself the question of whether they covered this case would be marginal. But they are not the words of the statute. I do not
- j think that Lord Millett intended to do more than to give a condensed summary of the normal case to which para (b) applies. Lord Scott's analysis tracks the statutory words more fully and closely, and, as I have said, exactly fits the circumstances of the present case. I believe that my own conclusion is based with precision on a close analysis of the entire wording of the statute. Lord Millett's brief summary does not persuade me to depart from it.

[24] There is one other matter to cover. If I am right so far, and the conditions of s 32(1)(b) are present, what is the result? This is not contentious, but I ought to explain what the position is. The final part of s 32(1) provides: a

‘... the period of limitation shall not begin to run until the plaintiff has discovered the ... concealment ... or could with reasonable diligence have discovered it.’ b

Ms Williams did not discover the concealment from her of the consent order until Mr Brown told her about it, and it has not been suggested that with reasonable diligence she could have discovered it any earlier. It must be remembered that she was a legally-aided litigant, and would be totally dependent on her solicitors (which meant in practice Mr Brown) for all information about her case. Therefore the six-year limitation period began to run when Mr Brown told her about the consent order. On the recorder’s findings that appears to have been on 15 July 1995, although Mr Bartley Jones did not give up on his contention that a more appropriate inference from the primary facts would have been that it was on 10 June 1996. Assuming that 15 July 1995 was the date, the six-year period ran until 14 July 2001. If the date had been 10 June 1996 it would have run until 9 June 2002. The present action against FP & H was commenced on 14 December 2000, within the limitation period on either view. c
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CONCLUSION

[25] For the foregoing reasons I would allow this appeal and declare that Ms Williams’s claim against FP & H is not time-barred under the 1980 Act. e

MANCE LJ.

[26] I have had the benefit of reading in draft the judgment given by Park J, and I agree with his account of and conclusions on the facts.

[27] The wording of s 32(1)(b) of the Limitation Act 1980 refers to a situation in which ‘any fact relevant to the plaintiff’s right of action has been deliberately concealed from him by the defendant’. f

[28] This wording is open to differing interpretations. We have to consider what the words ‘deliberately concealed’ require by way of (a) mental element and (b) conduct. The wording requires the defendant to know some fact, and the fact must be relevant to the plaintiff’s cause of action. The wording clearly also requires a conscious decision by the defendant not to communicate that fact to the plaintiff. But those factors cannot be enough. A defendant may know a fact and may consciously decide not to communicate it for innocent reasons, e g because he fails to realise that it has any relevance whatever to the plaintiff. Must the defendant therefore realise that the fact is ‘relevant to the plaintiff’s cause of action’ against himself or herself? If so, this would seem to mean that the defendant must at least have in mind the possibility of an actual or potential cause of action against him, realise that there was a fact relevant to it and then conceal that. Or is the sole additional element to be found in the nature of the conduct, or of the context, implicit in the word ‘concealment’? g
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[29] As to the present context, the parties here were solicitor and client, and there is no doubt that a solicitor owes a duty to keep his client informed about the general conduct of a matter he is handling as well as about any error in the handling of the client’s affairs which may give the client cause for complaint against the solicitor. A solicitor who intentionally withholds from his client a fact about which he knows he ought to inform him or her can readily be said to j

a 'conceal' it. But in many cases there may be no running relationship, and, even where there is, it may not involve any general legal duty to inform the other party of relevant facts. On the face of it, 'concealment' in such a context might seem to require active conduct, rather than a mere decision to remain silent—even in circumstances where it would be normal or moral to speak. I return to this aspect below.

b [30] Subsection (1)(b) was described in differing terms in *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2002] 2 All ER 641, [2003] 1 AC 384 by Lord Millett (with whom Lord Mackay of Clashfern and Lord Hobhouse of Woodborough agreed) and Lord Scott of Foscote (with whom Lord Slynn of Hadley, Lord Mackay and Lord Hobhouse agreed). The overlapping support for Lord Millett's and Lord Scott's speeches may not mean that their different descriptions of the subsection have the same effect. It was unnecessary to explore all aspects of sub-s (1)(b) in that case. However, both speeches set the scene for the issues before us.

c [31] *Cave's* case decided that the wording of s 32(2) of the 1980 Act—'deliberate commission of a breach of duty'—requires a defendant not merely to have intended to do an act which constituted a breach of duty, but also to realise that the act involved a breach of duty. In such a situation, if the circumstances make it unlikely that that breach of duty will be discovered for some time, the subsection (by its words 'amounts to') introduces a 'legal fiction' that there has been 'deliberate concealment of the facts involved in that breach of duty': cf *Cave's* case [2002] 2 All ER 641 at [14] per Lord Millett. The fiction extends to all the facts involved in the breach of duty, although in most cases the plaintiff is likely already to know some of them, so that the beginning of the limitation period will under s 32(1)(b) depend upon when he or she discovers or could with reasonable diligence have discovered the others.

d [32] In order to place s 32(2) in context, there was discussion in *Cave's* case of the general role and effect of s 32(1)(b). Lord Millett (at [23]) viewed s 32(1)(b) as aimed at situations of 'active' concealment, and s 32(2) as 'enacted to cover cases where active concealment should not be required', viz cases where there was both a deliberate commission of a breach of duty and the circumstances were such that the breach of duty was unlikely to be discovered for some time. On that basis he expressed the opinion (at [25]) that—

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g 's 32 of the 1980 Act deprives a defendant of a limitation defence in two situations: (i) where he takes active steps to conceal his own breach of duty after he has become aware of it; and (ii) where he is guilty of deliberate wrongdoing and conceals or fails to disclose it in circumstances where it is unlikely to be discovered for some time.'

h [33] Lord Scott on the other hand said (at [60]):

j '... deliberate concealment ... may be brought about by an act or an omission and that, in either case, the result of the act or omission, ie the concealment, must be an intended result. But I do not agree that that renders sub-s (2) otiose. A claimant who proposes to invoke s 32(1)(b) ... must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question. In many cases the requisite proof

of intention might be quite difficult to provide ... Subsection (2), however, provides an alternative route. The claimant need not concentrate on the allegedly concealed facts but can instead concentrate on the commission of the breach of duty. If the claimant can show that the defendant knew he was committing a breach of duty, or intended to commit the breach of duty—I can discern no difference between the two formulations; each would constitute, in my opinion, a deliberate commission of the breach—then, if the circumstances are such that the claimant is unlikely to discover for some time that the breach of duty has been committed, the facts involved in the breach are taken to have been deliberately concealed for sub-s (1)(b) purposes. I do not agree ... that the subsection [ie sub-s (2)], thus construed, adds nothing.’

[34] I return to the structure of s 32 with this assistance. Deliberate commission of a breach of duty involves knowledge of wrongdoing. Where it is likely to be some time before the commission of a deliberate breach of duty is discovered, there is deemed to have been ‘deliberate concealment of the facts involved in the breach of duty’. These words in s 32(2) are a paraphrase referring to s 32(1)(b). Both under them and under the language of s 32(1)(b) itself, the legislature must have had in mind (at least as the typical concern) situations where a defendant deliberately concealed facts knowing that they were relevant to an actual or potential breach of duty. So read, s 32(1)(b) deals (at least typically) with deliberate concealment of facts known to be relevant to wrongdoing, while s 32(2) deals with deliberate wrongdoing, which is (in the specified circumstances) equated with deliberate concealment of wrongdoing. In each, the wrongdoing is the wrongdoing in respect of which the plaintiff is claiming. I leave for a moment the question whether this typical concern is the only concern of s 32(1)(b).

[35] First, I say something more about the nature of ‘concealment’. Lord Millett underlined his view that s 32(1)(b) is concerned with what he described as ‘active concealment’, while s 32(2) was ‘enacted to cover cases where active concealment should not be required’. Lord Millett (at [22]) roots this distinction historically in Lord Greene MR’s powerful judgment in *Beaman v ARTS Ltd* [1949] 1 All ER 465, [1949] 1 KB 550, which in turn refers to the Privy Council’s advice in *Bulli Coal Mining Co v Osborne* [1899] AC 351, [1895–99] All ER Rep 506. The underlying thinking would seem to be that mere non-disclosure, in the absence of any duty to speak, may be deliberate, but cannot constitute ‘concealment’. In contrast, Lord Scott speaks of a positive act of concealment and of withholding of relevant information apparently as simple alternatives. As at present advised, I would question whether they can be (although if they are it might reinforce the argument for requiring awareness on the defendant’s part of the relevance of the fact concealed to some actual or potential cause of action against him or her).

[36] The existence of the solicitor-client relationship in the present case means that we do not have directly to confront the apparent difference between Lords Millett and Scott regarding the nature of concealment. Where, as here, there is a duty to speak, then the intentional suppression of information which it is known should be communicated pursuant to that duty can readily be regarded as ‘concealment’ of that information. Here, the defendant solicitor’s duty to speak extended not merely to (i) any fact known by him to be relevant to a potential claim against him, but also to (ii) any fact known by him to be relevant to the ongoing conduct of the claim against a third party which he was (or was supposed

a to be) conducting on behalf of his client. If a solicitor decides not to disclose any fact falling within either (i) or (ii) to his client, knowing that it is his duty to do so (or, what amounts in law to the same, being reckless as to whether or not it is his duty to do so), then he can in each case be described as having 'deliberately concealed' that fact from his client. The deliberateness derives from his knowledge that he ought to disclose and his intentional disregard of his duty to do so. But whether this is sufficient in the particular statutory context of s 32(1)(b) is a different matter. Case (i) falls on any view within the scope of s 32(1)(b). But whether case (ii) does so depends upon what precisely needs to be known and intended for there to be 'deliberateness' within s 32(1)(b).

[37] There are, as I have already indicated, two possible interpretations of the mental element required under s 32(1)(b). On the (slightly) more limited reading, s 32(1)(b) is confined to the typical situation; it therefore requires deliberate concealment of a fact in circumstances where the defendant realises that the fact has some relevance to an actual or potential claim against him (or is reckless as to whether or not it does). So read, s 32(1)(b) and s 32(2) can be said to present a more coherent scheme; and the running of a limitation period would not be
d postponed by a deliberate concealment of a fact by a defendant, which was in breach of a duty unrelated to the wrongdoing in respect of which the claimant later claims and which occurred in circumstances where the defendant did not realise that the fact suppressed had relevance to any such wrongdoing (and was not reckless in not realising this). The wider reading is that any deliberate concealment should carry the consequence attributed by s 32(1)(b), even though
e the defendant did not (and it may be could not) realise that the fact concealed had any relevance to any actual or potential wrongdoing. Deliberate concealment, at least if that means active misleading or knowing breach of a duty to speak, is a particularly serious matter; if a person is as a result kept in ignorance of a fact which later proves to be relevant to a cause of action against the person
f concealing the fact, it may be thought just that the limitation period should not run against that defendant, even though he or she did not realise the relevance of the fact to any cause of action. On the other hand, that conclusion could lead to cases where, for example, a solicitor's deliberate decision out of, for example, laziness to delay communication of information about the general conduct of a matter for a month while he went on holiday would, if the information later
g proved relevant to some wholly unsuspected cause of action for negligence involving him or indeed some other member of the same firm, have the effect of restarting a limitation period as against his firm.

[38] I would at this point make three observations about the position as it would be on the more limited reading of s 32(1)(b). First, the circumstances in
h which there could be deliberate concealment in breach of an unrelated duty without appreciating the relevance to some other wrongdoing of the fact concealed must in practice be limited. The present case happens to concern a solicitor-client relationship which involves a general or running duty to keep informed. But most relationships giving rise to causes of action do not fall into
j that category. And, even when they do, deliberate concealment is in practice more likely to occur because of consciousness of the likelihood of the relevance of the fact concealed to a potential cause of complaint, than for some other reason. Second, any requirement that a defendant must realise the relevance of the fact to the plaintiff's right of action could not and should not be read narrowly. The plaintiff could not have to show that the defendant knew that there was a right of action which would succeed. The subsection refers to a fact

'relevant' to the plaintiff's cause of action. I consider that there could, even on the more limited reading, be 'deliberate concealment' within the subsection in any case where the defendant deliberately concealed a fact realising that it was relevant (or reckless as to whether or not it was relevant) to an actual or a potential claim against him, even though he might himself believe that any claim would, if pursued, prove to be ill-founded. Third, the relevance of recklessness—and the irrelevance of motives—in the present discussion follow as a matter of general principle, although both are reinforced by vigorous remarks by Lord Greene MR in *Beaman's* case [1949] 1 All ER 465 at 468–469, [1949] 1 KB 550 at 560–561 to which I already referred.

[39] I see the force of the argument that any intentional concealment should be sufficient, at least if concealment involves active misconduct or breach of a duty to speak. However it is also possible to argue that the rationale and wording of the statute tend to point to the (slightly) more limited reading that I have mentioned. Whether the wider or the more limited reading should be preferred may perhaps also be influenced by the proper resolution of the potential difference between Lord Millett's and Lord Scott's formulation of the nature of the conduct involved in concealment—that is, by whether mere silent withholding suffices or whether there must be active concealment or breach of a duty to speak. This latter aspect was not explored before us. In these circumstances, and since I consider that it is unnecessary on this appeal to arrive at any final view as to whether the wider or narrower meaning should be preferred, I prefer not to do so.

[40] Here, there was concealment of the consent order of 25 August 1994 dismissing the claim against Dr Salahuddin (and of the failed application before the district judge on 16 December 1994 to 'rejoin' Dr Salahuddin, disclosure of which would have revealed the consent order). The consent order was a fact relevant to Mrs Williams's cause of action against the defendant. The defendant should have informed Mrs Williams of these matters in the ordinary performance of his duty as her solicitor to keep her informed about the course of her ongoing claim. On his case, he refrained from telling her out of 'embarrassment', rather than because he had any appreciation that there was or could be any claim against him. If these were the facts, with nothing more, then the difficult questions which I have identified above would squarely arise. But they are not.

[41] Taking events in order, Mr Brown must have decided deliberately not to tell Mrs Williams about the consent order, both during their meeting on 15 September 1994 and when writing his letter dated 3 October 1994. He could not have written 'I see no reason at this stage why we should not proceed with the claim' without being conscious of the consent order whereby the claim had been withdrawn (even if he believed that it could be revived) and without having taken a deliberate decision not to mention the withdrawal. He said in this own witness statement that he appreciated that 'it might not be quite straightforward' to 'rejoin' Dr Salahuddin, but that he did not tell Mrs Williams—

'in part because I did not appreciate quite what those difficulties were and in part because I did not believe that telling the claimant that there might be problems would be of any help to her.'

[42] That quotation simply underlines the deliberate nature of the concealment (active as well as passive and in breach of duty) in the letter of 3 October 1994, although it does not admit that he had any perception of

a wrongdoing on his own in relation to the consent order. On the contrary, the witness statement goes on to say:

‘I did not then believe that I was responsible for the “procedural mess”. I had consented to the order in August 1994 in good faith and now the claimant was giving me more specific and clear instructions compared to the position in July 1994.’

b [43] Against this background, what happened before the district judge on 16 December 1994 and subsequently is critical. Prior to 16 December 1994 the defendant was under the illusion that Dr Salahuddin could be ‘rejoined’ and the claim revived, even if ‘it might not be quite straightforward’. The district judge exploded any such illusion. As Park J has said at [11](xix), above, given what

c happened on 16 December 1994:

‘... Mr Brown must have known that he had been negligent in the sense that agreeing to the consent order had been a bad mistake for which he was responsible.’

d [44] Thereafter, he was on his evidence ‘embarrassed by the result of the application and for that reason alone did not tell the claimant of the same but sought advice from counsel’.

e [45] However, he deliberately omitted from his instructions to counsel any reference to the abortive application. He admitted in his witness statement that this too was ‘out of embarrassment’. Moreover, as Mr Sander accepted before us, even on 18 July 1995 when (so the judge found) Mr Brown told Mrs Williams that the first action was at an end and a second was necessary, he did *not* tell her that the first action had been dismissed by a consent order. Mr Brown could not have kept quiet as he did after the abortive application on 16 December 1994 without being conscious that it was his mistake and negligence that had brought about its

f failure and led to a situation in which he was resorting (on a false basis) to counsel, and that the client would have cause to complain against him if he told her. Embarrassment caused Mr Brown to act as he did. But he cannot credibly have been embarrassed and have acted as he did, unless, as Park J says, he realised that he had been negligent in the sense that agreeing to the consent order had been a bad mistake for which he was responsible. Mr Sander’s submission before us that ‘an honest desire ... to avoid embarrassment to himself or his firm is wholly different from an intention to conceal’ also involves the fallacy, exposed by Lord Greene MR in *Beaman v ARTS Ltd* [1949] 1 All ER 465, [1949] 1 KB 550, of confusing the motive for with the existence of deliberate concealment. Here, out of embarrassment at his own obvious negligent mistake, Mr Brown deliberately

g concealed relevant facts from Mrs Williams.

h [46] Although the judge referred to Mr Brown’s explanation that it was out of embarrassment that he had omitted from his instructions to counsel any reference to the order of 16 December 1994, the judge went on, somewhat curiously, to comment that the counsel ‘did not advert to any difficulty posed by the dismissal of the claim’. The judge also summarised counsel’s advice by saying: ‘He considered that the way forward was by way of fresh proceedings.’ This was inaccurate. Even without knowing about the dismissal order or the order for indemnity costs, counsel’s cautious advice was: ‘In my view the only way forward might be the issue of fresh proceedings against [Dr Salahuddin] or any other party’ and: ‘If fresh proceedings are to be taken, and in my view this may be the only way around the procedural difficulties ...’ The judge’s next

j

finding was that, after receiving counsel's advice, Mr Brown 'did not think that there was any difficulty with that course' [ie commencing fresh proceedings]. I consider that remarkable and improbable. Even before the abortive dismissal of 'rejoinder' on 16 December 1994, Mr Brown's state of mind was that 'it might not be quite straightforward' to 'rejoin' Dr Salahuddin. It is hard to understand how the disastrous events of 16 December 1994 and counsel's qualified advice (on the basis of misleading instructions) can have led to the misconceived optimism which he asserted and with which the judge credited him. If Mr Brown did share it, he must have been shutting his eyes to the dismissal order (which he had suppressed from counsel and his client) as well as to counsel's advice and to realities, and to have been at least reckless.

[47] However, even assuming, as the judge found, that Mr Brown continued to believe, misguidedly and not even recklessly, that the situation would eventually be retrieved up to the time when the second proceedings against Dr Salahuddin were dismissed on 26 February 1996, still that is no basis on which he can have thought that he had not committed a bad mistake or been negligent in 1994 in a way which gave his client a potential cause of complaint. It is no answer to the application of s 32(1)(b) that Mr Brown may have believed that, if the situation could be recouped by fresh proceedings, then Mrs Williams would be unlikely to suffer any substantial loss or need or be minded to pursue that potential cause of action. Section 32(1)(b) does not require a defendant to think that any potential cause of action would actually be pursued, or that it would, if pursued, involve substantial loss, still less the same loss as that in respect of which it is in the event later pursued. Here any cause of action which Mrs Williams had arising out of the consent order sounded in both breach of contract and tort; in contract (and I would think also in tort) it arose at the time of the consent order in 1994. Mr Brown's embarrassment regarding and concealment of the events of 1994 is to my mind only sensibly to be explained on the basis that he was aware that these events would, if known to Mrs Williams, give her considerable cause to complain—even if he could hope to assure her that the set-back that his negligent mistake had inflicted on her could (or rather, in counsel's word, 'might') in some way be recouped.

[48] In my judgment, therefore, all the ingredients required under s 32(1)(b) are, even on its more limited reading, satisfied: there was here on and after the hearing and order of 16 December 1994 a realisation by Mr Brown that he had been negligent, in the sense that agreeing to the consent order had been a bad mistake for which he was responsible, and deliberate concealment from her by him as her solicitor of the fact of that negligence—or more specifically of the fact of the consent order (as well as the dismissal consequent on it, which would have revealed the existence of the consent order).

[49] For these reasons, I agree that Mrs Williams is entitled to invoke s 32(1)(b) and that this appeal succeeds.

BROOKE LJ.

[50] The recorder had the opportunity, denied to us, of seeing and hearing Mr Brown give evidence. He made an express finding that even after the debacle in December 1994, when a wasted costs order was made against his employers' firm, Mr Brown was not aware that he had been negligent when he had agreed to the consent order dismissing his client's action the previous August. I do not consider that we can or should disturb that finding of fact about Mr Brown's state of mind, particularly as the recorder would in the normal course of things have a

a better insight into matters concerned with the legal prowess of unsupervised legal executives handling personal injuries litigation in Birkenhead than the members of this court.

b [51] I agree, however, with Park J that although Mr Brown seems to have attributed his client's plight to causes of her own making (because her instructions to him changed in September 1994) he knew after December 1994 that the consent order had seriously prejudiced her position in the litigation and he deliberately concealed its existence from her although he was under a duty to tell her about it. The fact that he believed that he could retrieve the situation is neither here nor there, and this is where, in my judgment, the recorder's careful analysis went wrong. The claimant did not know a fact relevant to her cause of action until a date less than six years before this action was brought, and the reason why she did not know it was that Mr Brown intentionally concealed it from her when he was under a duty to tell her about it. These facts appear to me to fall within the compass of Lord Scott of Foscote's exposition of the effect of s 32(1)(b) of the Limitation Act 1980 in his speech in *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18 at [60], [2002] 2 All ER 641 at [60], [2003] 1 AC 384.

d [52] For these reasons I agree that the appeal should be allowed.

Appeal allowed.

Melanie Martyn Barrister.

Hounslow London Borough Council v Adjei

[2004] EWHC 207 (Ch)

CHANCERY DIVISION

PUMFREY J

18, 19 JUNE 2003, 10 FEBRUARY 2004

Housing – Local authority – Possession – Local authority bringing automatic possession proceedings after secure tenancy terminated by operation of law – Whether automatic possession proceedings in breach of right to respect for home – Whether challenge to general policy of local authority capable of forming defence to possession proceedings – Human Rights Act 1998, Sch 1, Pt I, art 8.

The defendant tenant and his wife occupied a house with two bedrooms owned by the claimant housing authority under a secure tenancy as joint tenants. The wife left the house and served a notice to quit on the authority, automatically determining the secure tenancy. The authority informed the defendant of the termination of the tenancy. He was advised to vacate the house and to approach the authority's homeless persons unit for assistance and advice. However, the defendant continued to occupy the premises with his son, then aged 13, without the authority's licence or consent. The authority operated a general policy of seeking a possession order in cases where a secure tenancy had been determined by a joint tenant's notice to quit and the other former tenant remained in occupation of the property. It commenced proceedings for possession and obtained a possession order. The defendant appealed, contending: (i) that since he and his son would be in priority housing need, if evicted, and since they were not over occupying the house, the authority would inevitably allocate the same or similar premises to him, and therefore that the following of the authority's general policy would interfere with his rights to respect for his private and family life under art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) in a way that was disproportionate to the purposes to be achieved by it and contrary to art 8(2) of the convention which provided that there should be no interference by a public authority with the exercise of the right except such as was in accordance with the law and necessary in a democratic society; and in the alternative, (ii) that the operation of an automatic policy was unlawful and the authority had to consider in every case whether to seek a possession order. The issue before the court was whether either a challenge to the overall policy of the Housing Acts and the authority's general housing policy or the individual treatment of the defendant could form a defence to a possession action in the county court.

Held – The requirements of art 8(2) of the convention were met where the law afforded an unqualified right to possession on proof that a secure tenancy had terminated. Accordingly, considerations such as the treatment of the tenant in the instant case could not arise. The provisions which related to him as, potentially, a person threatened with homelessness were part of the statutory scheme, the reasonableness of which fell to be considered but the provisions that

- a palliated the effects of the housing authority's decision to obtain possession meant that the scheme of the legislation satisfied the requirements of art 8(2). While it might be open to a tenant, in a wholly exceptional case, to raise public law issues in the county court where proceedings for possession were being taken following the service of a notice to quit by the housing authority, bearing in mind that the decision to serve the notice to quit would be judicially reviewable, there was nothing in the instant case that was exceptional. Moreover, there was no duty on the authority to consider whether it wanted a tenant in the defendant's position to remain in his present accommodation, once it was established that the authority was following the statutory scheme; it was implicit that the authority would consider the tenant's position as a homeless person, having regard to the relevant factors, and that he could apply for a secure tenancy. In that way he was treated equally with every other person with a call on accommodation in the authority's area. Accordingly, the appeal would be dismissed (see [11], [12], [33], [36]–[39], below).

Dicta of Moses J in *R (on the application of Gangera) v Hounslow London BC* [2003] HLR 1028 at [48]–[54] applied.

- d Dicta of Lord Hope of Craighead in *Harrow London BC v Qazi* [2003] 4 All ER 461 at [70], [71], [78], [79] applied.

Notes

- e For the right to respect for private and family life, home and correspondence generally, for respect for home in particular, and for what constitutes respect and interference, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 152, 154, 155.

For the Human Rights Act 1998, Sch 1 Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue).

Cases referred to in judgment

- f *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.
Avon CC v Buscott [1988] 1 All ER 841, [1988] QB 656, [1988] 2 WLR 788, CA.
Hammersmith and Fulham London BC v Monk [1992] 1 All ER 1, [1992] 1 AC 478, [1991] 3 WLR 1144, HL.
- g *Haniff v Robinson* [1993] 1 All ER 185, [1993] QB 419, [1992] 3 WLR 875, CA.
Harrow London BC v Qazi [2003] UKHL 43, [2003] 4 All ER 461, [2003] 3 WLR 792.
Jones v Savery [1951] 1 All ER 820, CA.
Kensington and Chelsea Royal London BC v O 'Sullivan [2003] EWCA Civ 371, [2003] 1 FCR 687.
- h *Lambeth London BC v Howard* [2001] EWCA Civ 468, (2001) 33 HLR 636.
Marckx v Belgium (1979) 2 EHRR 330, ECt HR.
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
R v Barnet London BC, ex p Grumbridge (1992) 24 HLR 433.
- j *R (on the application of Gangera) v Hounslow London BC* [2003] EWHC 794 (Admin), [2003] HLR 1028.
R (on the application of McLellan) v Bracknell Forest BC, Reigate v Banstead BC v Benfield [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129.
R (Sacupima) v Newham London BC [2001] 1 WLR 563, CA.
Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson [2002] EWCA Civ 4, [2002] LGR 467.

- Sheffield Corp v Luxford, Sheffield Corp v Morrell* [1929] 2 KB 180, [1929] All ER Rep 581, CA. a
- Ure v UK App No 28027/95* (27 November 1996, unreported), E Com HR.
- Wandsworth London BC v A* [2000] LGR 81, [2000] 1 WLR 1246, CA.
- Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.
- Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461, [1984] 3 WLR 1254, HL. b

Cases referred to in skeleton arguments

- Bater v Greenwich London BC* [1999] 4 All ER 944, CA.
- Bristol DC v Clark* [1975] 3 All ER 976, [1975] 1 WLR 1443, CA. c
- Cannock Chase DC v Kelly* [1978] 1 All ER 152, [1978] 1 WLR 1, CA.
- Chapman v UK* (2001) 10 BHRC 48, ECt HR.
- Hackney London BC v Lambourne* (1992) 25 HLR 172, CA.
- Harrow London BC v Johnstone* [1997] 1 All ER 929, [1997] 1 WLR 459, HL.
- Leek & Moorlands Building Society v Clark* [1952] 2 All ER 492, [1952] 2 QB 788, CA.
- Mellacher v Austria* (1990) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR. d
- O'Rourke v Camden London BC* [1997] 3 All ER 23, [1998] AC 188, [1997] 3 WLR 86, HL.
- R (Begum) v Tower Hamlets London BC* [2003] HLR 8, QBD.
- R (on the application of Fuller) v Chief Constable of Dorset Police* [2001] EWHC Admin 1057, [2002] 3 All ER 57, [2003] QB 480, [2002] 3 WLR 1133. e
- R (on the application of Prolife Alliance) v British Broadcasting Corp* [2003] UKHL 23, [2003] 2 All ER 977, [2003] 2 WLR 1403.
- R (on the application of Samaroo) v Secretary of State for the Home Dept, R (on the application of Sezek) v Secretary of State for the Home Dept* [2001] EWCA Civ 1139, [2001] 34 LS Gaz R 40, [2001] All ER (D) 215 (Jul).
- Shelley v London CC* [1948] 2 All ER 898, [1949] AC 56, HL. f
- South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry* [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 AC 558, [2003] 2 WLR 1547.

Appeal

Alex Adjei appealed with permission of Judge Hull QC from his decision in the Staines County Court on 14 August 2002 making an order for possession of premises at 156 Swan Road, Hanworth, Feltham, Middlesex in favour of the respondent, Hounslow London Borough Council. The facts are set out in the judgment. g

Alastair Panton (instructed by Lovell Chohan, Hounslow) for Mr Adjei. h

Matthew Hutchings (instructed by Mike J Smith, Hounslow) for Hounslow.

Cur adv vult

28 January 2003. The following judgment was delivered. j

PUMFREY J.

INTRODUCTION

[1] This is an appeal with the leave of the judge from the judgment of Judge Hull QC sitting at the Staines County Court whereby he resolved certain

a preliminary issues and, in consequence of his decision on the preliminary issues, made an order for possession against the appellant, Mr Adjei.

[2] The case raises a point of difficulty and some importance relating to the rights of one of two joint tenants when the other has brought a secure tenancy to an end by giving notice to quit. Judge Hull directed that the case be heard by the Court of Appeal, but the matter was remitted to the Chancery Division so that b the ordinary course of an appeal should be followed.

[3] After the draft judgment had been handed down and very shortly before the day on which judgment was to be delivered the House of Lords gave judgment in *Harrow London BC v Qazi* [2003] UKHL 43, [2003] 4 All ER 461, [2003] 3 WLR 792. That was a case in which one of two joint tenants gave notice to quit c and the House considered in great detail the consequences of such a notice for the other tenant, and that case is highly material to this one. It has accordingly proved necessary substantially to reconsider this judgment.

[4] The agreed facts upon which Judge Hull came to his conclusions are these:

d '1. By an agreement dated 14 April 2000, the claimant (C) granted Mr Adjei (D) and his wife Mrs R Adjei a joint weekly tenancy of premises at 156 Swan Road, Hanworth, Feltham, Middlesex (the premises), which was a secure tenancy within the meaning of the Housing Act 1985. 2. The premises comprise a two-bedroom house. D and his wife lived there with their son, Frederick (date of birth 19 May 1988). 3. D's wife approached C e and made allegations of domestic violence against D. 4. On 30 August 2001, having left the premises, D's wife served on C a notice to quit which determined the secure tenancy with effect from 1 October 2001. 5. D's wife was subsequently rehoused by C pursuant to the provisions of Pt VII of the Housing Act 1996. 6. By a letter dated 3 September 2001 C informed D of f the termination of the joint tenancy with effect from 1 October 2001 and advised him to vacate the premises. 7. On 14 September 2001 D was interviewed by C's estate manager and its equalities adviser. D's son Frederick (date of birth 19 May 1988) was also present. They were aware of the above facts 1-6. C explained to D that its policy was to seek possession following determination of a secure tenancy by tenant's notice to quit. C g advised D to obtain legal advice. Frederick stated that he wished to continue to live with D. C asked D whether there was any social services involvement with the family and was told there was none. C advised D to approach C's homeless persons unit and social services department for assistance and advice. 8. D and Frederick continued to live at the premises without C's h licence or consent. 9. On 18 October 2001 C brought these possession proceedings. 10. C did not put to D the allegations of domestic violence against D or rely on them as a reason for seeking possession. D denies the allegations of domestic violence, and for the purpose of the preliminary issues, C adduces no evidence to the contrary. 11. C operates a general j policy of seeking a possession order in cases where a secure tenancy has been determined by a joint tenant's notice to quit and the other former tenant remains in occupation. C considers that general policy to be in accordance with the objectives of the statutory scheme for secure tenancies, protection from eviction, homelessness and housing allocation. 12. C does not consider that the facts of D's case, namely that D and Frederick, his 14-year-old son, are residing in a two-bedroom house which is their home

following determination of the secure tenancy, amount to exceptional circumstances justifying a departure from the above general policy.'

[5] Mr Adjei's pleaded case is for present purposes set out in his defence:

'4. The claimant is attempting to evict the defendant from his home. This, prima facie, is a breach of art 8(1) (see *Lambeth London BC v Howard* [2001] EWCA Civ 468, (2001) 33 HLR 636). This applies on the particular facts of this case where the council is relying on the notice to quit of one joint tenant to evict the other joint tenant (see *Ure v UK App No 28027/95* (27 November 1996, unreported)). Thus the question is, is the action justified on the facts of this case under art 8(2) as being "necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ...

7. The defendant was never asked by the council if the allegations [of violence made by his wife] were true, but he was automatically given a notice to quit, without the council making any inquiries as to the allegations of the defendant and his son's need for accommodation. It is thus averred that this AUTOMATIC eviction of the defendant and his son without making any inquiries at all, cannot be said in any way to be necessary in a democratic society.'

[6] Hounslow operates a policy that it contends is consistent with the provisions of the Housing Acts to seek possession in all cases where a secure tenancy is brought to an end by notice to quit. It assesses the person or persons thereby made homeless and allocates them accommodation in accordance with their need. Mr Panton says that if Mr Adjei and his 15-year-old son are evicted, they will be in priority housing need, and that since they are not 'over-occupying' the premises, the assessment will inevitably result in the same or similar premises being allocated to Mr Adjei, and the whole operation will be wasteful of time and costs. Thus, he contends that to follow Hounslow's declared policy will in this case result in an interference with the rights enjoyed by Mr Adjei that are protected by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). That interference will, in this case, be disproportionate to the purposes achieved by it, and accordingly possession should not be ordered until after the assessment. Alternatively (this is para 7 of the defence) it is contended (and this may have different jurisdictional implications) that the operation of an automatic policy like that operated by Hounslow is unlawful, and the authority must consider in every case whether to seek a possession order having regard to all the relevant circumstances of the case before such an order is sought.

[7] The challenge to Hounslow's treatment of Mr Adjei thus traverses 'macro' considerations (the overall policy of the legislation and Hounslow's general housing policy) and 'micro' considerations (the treatment of Mr Adjei in the present case). The case raises directly the question whether either class of objection can form a defence to a possession action in the county court.

THE RULE OF DOMESTIC LAW: NOTICE TO QUIT BY ONE OF A NUMBER OF JOINT TENANTS

[8] It is an implied term of every periodic joint tenancy that the tenancy is determinable by notice to quit given by one joint tenant without the concurrence of the other joint tenant: see *Hammersmith and Fulham London BC v Monk* [1992] 1 All ER 1, [1992] 1 AC 478. To hold otherwise would presuppose that each joint

a tenant had assumed a potentially irrevocable obligation for the duration of their joint lives. While para 4 of his defence is perhaps ambiguous, at the hearing before me Mr Adjei did not challenge this doctrine of the common law, accepting that it is, in itself, compatible with art 8 of the convention.

[9] There can therefore be no serious doubt that Mr Adjei's secure tenancy was determined by his wife's notice. He is a trespasser. If his contentions are correct, and if he will in fact be in priority need if he is evicted, the effect of his contentions is that he is entitled to priority over all others in the priority needs queue.

ARTICLE 8 OF THE CONVENTION

[10] Article 8 of the convention provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

[11] In his speech in *Qazi's* case, Lord Hope of Craighead said:

'[70] I mention this question merely to say that I consider that it can receive only one answer in the circumstances. The effect of an order for possession will be to require the respondent to leave the premises which are his "home" for the purposes of art 8(1). Regarding the question of respect for his home as one which is directed in essence to his right to be respected by the public authorities in the enjoyment of his privacy, his removal from his home is bound to interfere with his enjoyment of that right at least to some extent. As Sedley LJ said in *Lambeth London BC v Howard* [2001] EWCA Civ 468 at [30], (2001) 33 HLR 636 at [30], any attempt to evict a person, whether directly or indirectly or by process of law, from his or her home is on the face of it a derogation from the respect to which the home is *prima facie* entitled. In *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595 at [67], [2001] 4 All ER 604 at [67], [2002] QB 48 Lord Woolf CJ observed that to evict the defendant from her home would impact on her family life. The same might be said of the impact on the respondent in this case, although I am conscious of the fact that this was not how Mr Luba QC for the respondent has presented his argument.

[71] It follows, to adopt the language of Sir Gerald Fitzmaurice in *Marckx v Belgium* (1979) 2 EHRR 330 at 364, that art 8 is "applicable". The issue which the respondent has raised is within the scope of that article. It is not irrelevant to his case. In that sense the article is "engaged". But in my opinion it does not follow that, on the facts of this case, there is an issue which must be decided within the domestic legal order by remitting the question whether any interference is permitted by art 8(2) for decision by the county court.'

[12] This approach, with which Lord Millett agreed, indicates that the 'micro' considerations do not arise, and the point is put beyond doubt by Lord Hope:

[78] In *Lambeth London BC v Howard* (2001) 33 HLR 636 at [32] where possession was sought against a secure tenant on the grounds of nuisance under ground 2 of Pt I of Sch 2 to the Housing Act 1985, Sedley LJ said: a

“A legal threat to a secure home will, in the ordinary way, engage article 8(1). In situations where the law affords an unqualified right to possession on proof of entitlement, it may be that article 8(2) is met, but that is not the present class of case and nothing in this judgment should be taken as impinging on it.” b

As I have already indicated, I respectfully agree with the opinion which he has expressed in the first sentence of this quotation. But I think that the point which he makes at the outset of the second sentence can be expressed more strongly. My understanding of the European jurisprudence leads me to the conclusion that art 8(2) is met where the law affords an unqualified right to possession on proof that the tenancy has been terminated.’ c

THE LEGAL CONTEXT

[13] I was provided by Mr Hutchings, for Hounslow, with an excellent summary of the effect of the provisions of the Housing Act 1985, the Protection from Eviction Act 1977 and the other relevant statutes. It was not criticised by Mr Panton. What follows is heavily indebted to Mr Hutchings’ summary, albeit somewhat reordered and condensed. d

SECURITY OF TENURE FOR SECURE TENANTS

[14] The root of the law of landlord and tenant is still the common law. Secure tenants enjoy security of tenure by virtue of Pt IV of the 1985 Act, which makes provision for secure tenancies and the rights of secure tenants. Section 79(1) provides that a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the landlord condition and the tenant condition are satisfied. The provisions of Pt IV do not apply to a licence granted as a temporary expedient to a person who entered the dwelling-house or any other land as a trespasser: see s 79(4). Thus, a former tenant who becomes a trespasser and whose continued occupation is tolerated by the landlord does not have security. e

[15] The landlord condition is satisfied when the interest of the landlord belongs to a local authority or another body specified which provides housing to meet public needs, often referred to as a social landlord. The tenant condition is satisfied when the tenant is an individual and occupies the dwelling-house as his only or principal home. Where the tenancy is a joint tenancy, the tenant condition is satisfied when each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home: see generally s 81 of the 1985 Act. f

[16] A secure tenancy cannot be brought to an end by the landlord except by obtaining an order of the court for the possession of the dwelling-house: see s 82(1). Unless the court considers that it is just and equitable to dispense with the requirement, it may not entertain proceedings for such an order unless a prescribed notice specifying the grounds upon which the court will be asked to make the order has been served: see s 83. g

[17] The court shall not make an order for the possession of a dwelling-house let under a secure tenancy except on one or more of the grounds set out in Sch 2: see s 84(1). The court shall not make an order for possession (a) on the grounds set out in Pt I of that schedule (grounds 1–8) unless it considers it reasonable to h

a make the order, (b) on the grounds set out in Pt II of that schedule (grounds 9–11) unless it is satisfied that suitable accommodation will be available for the tenant when the order takes effect, (e) on the grounds set out in Pt III of that schedule (grounds 12–16) unless it both considers it reasonable to make the order and is satisfied that suitable accommodation will be available for the tenant when the order takes effect: see s 84(2).

b [18] On the making of an order for possession of a dwelling-house let under a secure tenancy on any of the grounds set out in Pts I or II of Sch 2, or at any time before the execution of the order, the court may (a) stay or suspend the execution of the order, or (b) postpone the date of possession, for such period or periods as the court thinks fit: see s 85(2).

c [19] A tenancy is not a secure tenancy if it is an introductory tenancy: see Sch 1, para 1A. A tenancy granted in pursuance of any function under Pt VII of the 1996 Act (homelessness) is not a secure tenancy unless the local housing authority concerned have notified the tenant that the tenancy is to be regarded as a secure tenancy: see Sch 1, para 4.

d [20] The scheme regulating the position of secure tenants is thus comparatively complex. Examination of the Sch 2 grounds shows that the legislature has collected the likely specific breaches of the express and implied terms of a tenancy held of a social landlord into Pt I and has provided that only in the case where a Pt I ground is relied on may the order for possession be granted even though no alternative accommodation is available. Parts II and III of the schedule may be loosely classified as grounds necessary for good management of the stock of accommodation as a whole. Even where a Pt I ground is relied on, e the court must be satisfied that the order is reasonable.

THE DETERMINATION OF A SECURE TENANCY BY TENANT'S NOTICE TO QUIT

f [21] A tenant is able to determine the secure tenancy by service of notice to quit and the landlord is thereafter able to recover possession without inhibition under Pt IV of the 1985 Act. In such a case, however, the Protection from Eviction Act 1977 requires the landlord to enforce his right of possession by proceedings in the county court. Where any premises have been let as a dwelling under a tenancy which is neither a statutorily protected tenancy nor an excluded tenancy and (a) the tenancy has come to an end, but (b) the occupier continues to reside in the premises or part of them, it shall not be lawful for the owner to enforce against the occupier, otherwise than by proceedings in the court, his right to recover possession of the premises: see s 3(1). As to excluded tenancies: see s 3A. A secure tenancy is not a 'statutorily protected tenancy': see s 8(1). In this context 'the court' means the county court: see s 9(1)(a) of the 1977 Act and s 21 h of the County Courts Act 1984.

[22] Section 3 of the 1977 Act continues to provide protection until there has been execution by the court's bailiff in accordance with the requirement of the County Court Rules: see *Haniff v Robinson* [1993] 1 All ER 185 at 191, [1993] QB 419 at 427.

j [23] At common law the court is under a duty to make an order for possession to enforce the landlord's right of possession, but may fix a future date on which possession is to be recovered: see *Sheffield Corp v Luxford*, *Sheffield Corp v Morrell* [1929] 2 KB 180 at 184, [1929] All ER Rep 581 at 583; *Jones v Savery* [1951] 1 All ER 820 at 822. The court's common law power is restricted by the provisions in s 89 of the Housing Act 1980, which severely limit the court's discretion to set long periods for the recovery of possession. Section 89(1) of the 1980 Act provides that

where the court makes an order for the possession of any land in a case not falling within the exceptions mentioned in sub-s (2), the giving up of possession shall not be postponed to a date later than 14 days after the making of the order, unless it appears to the court that exceptional hardship would be caused by requiring possession to be given up by that date; and shall not in any event be postponed to a date later than six weeks after the making of the order. The restrictions do not apply, inter alia, where the court had power to make the order only if it considered it reasonable to make it: see s 89(2).

[24] Thus, trespassers previously in lawful occupation under a secure tenancy that has come to an end have merely a modest degree of protection under the 1977 Act which, when read with s 89(1) of the 1980 Act, will necessarily involve their eviction within six weeks. It might be thought that Mr Adjei's position is anomalous, but Parliament must be taken to be aware to the position when one of two joint tenants gives notice to quit. *Monk's* case (above) is not a new departure but the culmination of a century and a half of consistent authority. The scheme of the legislation is therefore that Mr Adjei does not have the protection of Pt IV of the 1985 Act, but is instead subjected to a regime in which the social landlord's interest in recovering its property with vacant possession is paramount.

OTHER RELEVANT ASPECTS OF THE PROVISION OF ACCOMMODATION BY LOCAL AUTHORITIES

[25] By virtue of s 21(1) of the 1985 Act, local authorities have a general power to manage their housing stock subject to significant restrictions placed upon them in particular in relation to persons to whom accommodation may be granted. There is a statutory discretion whether to grant a tenancy to, and whether to seek to evict, any particular person, but most important for present purposes are the provisions of Pt VI of the 1996 Act regulating the granting of tenancies to particular persons. In outline, Pt VI requires housing accommodation to be allocated only to persons who are qualified and only in accordance with the authority's published allocation scheme. The scheme will determine the priorities and procedures to be followed when allocation decisions are made, but there is a statutory obligation imposed by s 167 of the Act to ensure that reasonable preference is to be given to (a) people occupying insanitary or overcrowded housing or otherwise living in unsatisfactory housing conditions, (b) people occupying housing accommodation which is temporary or occupied on insecure terms, (c) families with dependent children, (d) households consisting of or including someone with a particular need for settled accommodation on medical or welfare grounds, and (f) households whose social or economic circumstances are such that they have difficulty in securing settled accommodation.

HOMELESSNESS

[26] The homelessness provisions are of relevance as the decisions on them indicate the time at which a local authority is bound to consider any request for accommodation or assistance in obtaining accommodation.

[27] Part VII of the 1996 Act (as amended by the Homelessness Act 2002) makes provision for housing assistance to homeless persons. A person is homeless if he has no accommodation available for his occupation, in the United Kingdom or elsewhere, which he (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of the court, (b) has an express or implied licence to occupy, or (c) occupies as a residence by virtue of any enactment or rule of law

a giving him the right to remain in occupation or restricting the right of another person to recover possession: see s 175(1). A person shall not be treated as having accommodation available for his occupation unless it is accommodation which it is reasonable for him to continue to occupy: see s 175(3). A person is threatened with homelessness if it is likely that he will become homeless within 28 days: see s 175(4).

b [28] The time at which a person becomes homeless as a result of possession proceedings required by s 3 of the 1977 Act is the time of execution of the warrant: see *R (Sacupima) v Newham London BC* [2001] 1 WLR 563 at 577–578.

c [29] The provisions as to assistance in case of homelessness or threatened homelessness apply where a person applies to a local housing authority for accommodation, or for assistance in obtaining accommodation, and the authority have reason to believe that he is or may be threatened with homelessness: see s 183(1). In effect, therefore, the application must be made within 28 days or less before execution of the warrant, and if they have reason to believe that an applicant may be homeless or threatened with homelessness, they shall make such inquiries as are necessary to satisfy themselves (a) whether he is eligible for assistance, and (b) if so, whether any duty, and if so what duty, is owed to him under those provisions: see s 184(1).

d [30] The main housing duties (ss 188(1), 190(2), 193(2) and 195(2) of the 1996 Act) are owed to persons who have a priority need for accommodation. These are: (a) a pregnant woman or a person with whom she resides or might reasonably be expected to reside; (b) a person with whom dependent children reside or might reasonably be expected to reside; (c) a person who is vulnerable as a result of old age, mental illness or handicap or physical disability or other special reason, or with whom such a person resides or might reasonably be expected to reside; (d) a person who is homeless or threatened with homelessness as a result of an emergency such as flood, fire or other disaster: see s 189(1). The Secretary of State may by order specify further descriptions of persons as having a priority need for accommodation: s 189(2)(a) and has done so: see the Homelessness (Priority Need for Accommodation) (England) Order 2002, SI 2002/2051.

[31] Section 195 provides, so far as relevant, as follows:

g ‘Duties in case of threatened homelessness.—(1) This section applies where the local housing authority are satisfied that an applicant is threatened with homelessness and is eligible for assistance.

h (2) if the authority—(a) are satisfied that he has a priority need, and (b) are not satisfied that he became threatened with homelessness intentionally, they shall take reasonable steps to secure that accommodation does not cease to be available for his occupation.

j (3) Subsection (2) does not affect any right of the authority, whether by virtue of a contract, enactment or rule of law, to secure vacant possession of any accommodation.’

Plainly sub-s (3) has direct application to cases such as the present in which there is a potential conflict between the duty to take reasonable steps to secure accommodation on the one hand and the power to obtain possession of premises occupied by a trespasser on the other. The subsection appears to make the exercise of the power independent of the existence of the duty, and the effect appears to be to ensure that like cases are treated alike, and no person threatened

with homelessness obtains an advantage by reason of his occupation of accommodation from which the authority has the power to evict him. a

[32] Mr Hutchings contends that there is no obligation on a local housing authority to determine whether a person has a priority need before deciding to institute possession proceedings against a trespasser, relying on *R v Barnet London BC, ex p Grumbridge* (1992) 24 HLR 433 at 440. *Ex p Grumbridge* was an admitted trespasser in respect of whom the local authority would if it obtained possession, have the duties imposed in respect of homeless persons, but it was held not to be perverse to obtain possession of the premises (thereby discharging the authority's duty to keep accommodation at its disposal) and then consider the assessment of the needs of the trespasser when he became homeless. b

[33] The provisions which relate to Mr Adjei as (potentially) a person threatened with homelessness are also a part of the statutory scheme the reasonableness of which falls to be considered. I am bound to hold that art 8(1) is engaged by the authority's decision to seek possession, and it seems to me that it follows from the conclusions in *Qazi's* case that the provisions that palliate the effects of the local authority's decision to obtain possession mean that the scheme of the legislation satisfies the requirements of art 8(2). c

THE DECISION TO SEEK POSSESSION IN THE PARTICULAR CASE d

[34] I can turn to Hounslow's decision to seek possession. It should be remembered that Hounslow did not terminate the tenancy. The only decision that it took was to seek a possession order against Mr Adjei, a trespasser. If one assumes that this decision was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), its illegality cannot affect the legal validity of the proceedings (including the obtaining of a warrant of possession) and at first sight the only manner of proceeding must be by way of review. There is no public law element in the county court's adjudication of the private property rights. Mr Adjei is a pure trespasser, and no decision by Hounslow purports to affect any private property right of his. He therefore does not have a private law defence to Hounslow's claim, but a public law challenge to the correctness of the decision to sue him is in principle available, if the decision is irrational. e

[35] In support of the contention that the public law point may be raised in possession proceedings, Mr Adjei might rely on the dictum of Laws LJ in *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 4, [2002] LGR 467, which concerned the right of a local authority to evict a homeless person, housed by the local authority, on the grounds of nuisance. This dictum was not applied by Moses J in *R (on the application of Gangera) v Hounslow London BC* [2003] EWHC 794 (Admin), [2003] HLR 1028 for what I would respectfully consider are compelling reasons: f

[48] It is important to note that Laws L.J. was considering the propriety of the actions of a local authority and not the role of the court itself as a public authority. Further, as Laws L.J. made clear he was considering only those cases where something wholly exceptional had happened after service of the notice to quit (see [40]). He himself recognized that his observations were obiter. *Smart*, accordingly, stands as a further authority as to the compatibility with Art. 8 of a legislative scheme which removes any discretion from the court as to the making of a possession order. g

[49] Moreover, I accept, as the First Secretary of State contended, that if the court in cases such as these, was bound to adjudicate on the compatibility h

a of an order for possession it would be bound to do so in every case, even those in which the landlord was a private person. In short, the claimant's argument would fundamentally transform our law as to enforcement of property rights into one where such rights could only be enforced when the court thinks it justifiable to seek possession and proportionate to make an order. I conclude that a court is not required to adjudicate on compatibility in each case.

b [50] But that stills leaves open the question whether the public law argument may be raised as a defence in possession proceedings when the local authority's decision is impugned.

c [51] The claimant relies upon the decision of the House of Lords in (*Wandsworth London BC v Winder* [1984] 3 All ER 976, [1985] AC 461) and of the Court of Appeal in (*Wandsworth London BC v A* [2000] LGR 81, [2000] 1 WLR 1246) in contending that his arguments under Art. 8 and as to rationality can be raised as a defence in possession proceedings. In (*Wandsworth London BC v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617) the Court of Appeal left open the question as to whether those decisions affected Laws L.J.'s view that the local authority's decision to serve a notice to quit was amenable to judicial review but would not be a defence to the local authorities claim for possession (see [50] and [79]). However the Court of Appeal was clear that in the case of Mr Michalak the Council could always rely upon the statutory framework of the scheme for secure tenancies as a reason for deciding to seek possession (see the passage I have already cited in the judgment of Brooke L.J. at [50] and Mance L.J. at [80]). In (*Kensington and Chelsea Royal London BC v O 'Sullivan* [2003] EWCA Civ 371, [2003] 1 FCR 687) Arden L.J. stated:

e "The effect of *Michalak's* case is that, provided that the respondent acts fairly and reasonably, the court must, save in exceptional circumstances, proceed on the basis that the balance required to be struck by art 8(2) is struck by the scheme which the legislature has provided for possession orders to be made against trespassers in these circumstances. Laws LJ in *Smart's* case recognised that in rare cases the county court judge might have to consider an argument under art 8(2). When such an argument does arise, it will often be more convenient for the county court judge to deal with it rather than to adjourn the matter so that new proceedings can be issued in the Administrative Court. I would accept that one such rare case would be where the defendant shows that there is a real prospect of success in his or her argument that to grant possession would violate his or her right under art 8 taken in conjunction with art 14. That threshold test was satisfied in this case and so the judge was right to proceed to consider whether the argument was soundly based."

f But it is to be noted that neither Waller L.J. nor Aldous L.J. adopted that passage and took, in the passage at [82] I have already cited, a more restricted view.

g [52] As the Court of Appeal pointed out in (*Michalak's* case), (*A's* case) was not cited to Laws L.J. In that case the Court of Appeal emphasized that the defendant had a right in private and not in public law by reasons of her licence. The effect of the public law decision to ban the parent from the school premises was to take away that private law right. It was not abusive for the parent to defend her private law right by arguing the invalidity of the school's decision in public law ([2000] LGR 81 at 92, [2000] 1 WLR 1246 at

1258 per Buxton LJ). He recorded that the case was distinguishable from those cases where private law proceedings were being used to challenge a public law decision. Such a case fell within the category explained in (*Avon CC v Buscott* [1988] 1 All ER 841, [1988] QB 656) in which the gypsies were pure trespassers and were not seeking to challenge the local authority's decision in support of any private law right. a

[53] In the instant case the claimant is not seeking to invoke either Art. 8 or the arguments as to rationality in support of any private law right at all. He seems to me to fall within the same category as *Michalak* and can, accordingly, only rely upon his rights enshrined in Art. 8 and arguments as to rationality by challenging the Council's decision in judicial review proceedings following service of the notice to quit. In any event there is nothing in his case which brings it within the rare or exceptional category to which Laws LJ. referred. This claimant is in no different position to that of *Michalak*. It would be wholly inconsistent with the Court of Appeal's conclusions in *Michalak* and *O'Sullivan* if, in a case such as this, the county court had to consider whether the case was rare or exceptional. b

[54] For these reasons I conclude that the claimant's true challenge is a public law challenge to the Council's decision to seek an order for possession. c

[36] In *Qazi's* case, Lord Hope left open the question whether it might in some cases be permissible to raise such grounds in the county court by way of defence to possession proceedings: d

[79] In *Sheffield City Council v Smart, Central Sunderland Housing Co Ltd v Wilson* [2002] EWCA Civ 04, [2002] LGR 467 the defendant had been granted a non-secure tenancy of a residential property as a homeless person under s 193 of the Housing Act 1996. Complaints that she was causing a nuisance were received from neighbours, so the housing authority served her with a notice to quit. When it had taken effect the authority applied for a possession order. The Court of Appeal held that there was a *prima facie* violation of art 8(1) but, after examining of the scheme laid down by Parliament, that there had been no breach of the defendant's art 8(1) right in that case. It was also held, following *R (on the application of McLellan) v Bracknell Forest BC, Reigate v Banstead BC v Benfield* [2001] EWCA Civ 1510, [2002] 1 All ER 899, [2002] QB 1129 that a challenge to the decision to serve a notice to quit could be made in judicial review within the appropriate time limits, and that in the rare situation where something wholly exceptional happened after service of the notice to quit which fundamentally altered the rights and wrongs of the proposed eviction the judge in the county court who was hearing the claim for possession might be obliged to address it in deciding whether the making of a possession order could be justified: see [2002] LGR 467 at [40] and [44]–[45] per Laws LJ. I wish to reserve my opinion as to whether it would be open to the tenant, in a wholly exceptional case, to raise these issues in the county court where proceedings for possession were being taken following the service of a notice to quit by the housing authority, bearing in mind as Lord Millett points out that its decision to serve the notice to quit would be judicially reviewable in the High Court so long as the application was made within the relevant time limit. The situation in the present case is different, as it was a notice to quit served by one of the joint tenants that terminated the tenancy. e

a [37] As this paragraph in Lord Hope's speech suggests, Lord Millett specifically indorsed the remarks of Moses J in *Gangera's* case. Lord Scott agreed with both Lord Hope and Lord Millett. I consider that *Gangera's* case is right on this point, and it cannot be said that anything exceptional has happened in this case, so that even were the narrow opening afforded by Lord Hope available in principle it is not available on the facts of this case.

b WAS THE DECISION TO SEEK POSSESSION LAWFUL?

[38] On the assumption that this point is open to Mr Adjei in this appeal from Judge Hull's decision, it is contended that in any event Hounslow's decision is not open to challenge if it follows the statutory scheme. This is merely the counterpart of the contentions that I have discussed above. Mr Panton suggests
c that Hounslow did not consider whether they wanted Mr Adjei to stay in his present accommodation. He says that they did not consider the issue. I doubt that this contention is open to Mr Panton on the agreed facts, and in particular fact 12, but there is, in my view, no such duty once it is established that the authority are following the statutory scheme. It is implicit in a decision to follow
d the scheme that the authority will consider Mr Adjei's position as a homeless person having regard to the relevant factors and that he can apply under Pt VI of the 1996 Act for a secure tenancy, according to Hounslow's published points system. In this way, he is treated equally with every other person with a call on accommodation in Hounslow.

[39] In the result, I am satisfied that the judge was right to make the possession
e order. If Mr Adjei is right, he will be entitled to security as a trespasser, and priority over others with equal or greater priority need. The appeal must be dismissed.

COSTS

f [40] Judge Hull granted permission to the respondent to appeal his order that there should be no order as to costs save for a detailed assessment of Mr Adjei's costs for the purposes of public funding. The only ground for departing from the presumption that the unsuccessful party pay the successful party's costs (CPR 44.3(2)(a)) was that an inaccurate estimate had been provided for the hearing (two hours against a hearing time of over one day). Judge Hull said in a
g letter to counsel:

'I think I said that cases were frequently being slipped into my list with time estimates which turned out to be obviously or ridiculously short, thus
h gaining unfair priority over cases where realistic estimates were given; that I thought it right to discourage the practice; and that I proposed to exercise the only sanction conveniently available to use.'

[41] It is a truism that the appellate court will not lightly interfere with the judge's discretion as to costs. However, two points are made. First, the bad estimate was not the respondent's fault. It was an estimate included in the order
j for a preliminary issue by the court itself. Second, the order was made as a sanction against the respondent, and there was no connection between the respondent's action (or lack of it) and the course the hearing took.

[42] There is no doubt that costs sanctions may well be appropriate for inaccurate estimates of duration, in particular where an inaccurate estimate requires a hearing to be adjourned. Here that is not the case, as the order for costs did not reflect any costs occasioned by an adjournment. Rather, the successful

party is being deprived of its costs because of the harm caused to others. As the judge said, the sanction is imposed to discourage the practice to which he refers. Where the sanction is imposed by way of example, it must be imposed on a party who is indeed guilty of the conduct sought to be sanctioned, or its imposition is unjust. There is no evidence that counsel or his client provided an improper estimate. It was the duty of both parties to keep the position under review, and I consider that a joint failure to appreciate the need for a longer hearing is incapable of supporting a sanction against one of the parties. In my judgment, this sanction was wrong in principle, and I shall substitute an award of costs of the hearing before Judge Hull in favour of the respondent, in a form appropriate to Mr Adjei's receipt of public funding. a
b

Appeal dismissed.

Victoria Parkin Barrister.

Orange PCS Ltd v Bradford

[2004] EWCA Civ 155

COURT OF APPEAL, CIVIL DIVISION

AULD, THOMAS AND JACOB LJJ

27 NOVEMBER 2003, 17 FEBRUARY 2004

Rates – Rateable occupation – Rateable hereditament – Mobile telephone operator erecting aerial mast on hereditament located on highway – Operator occupying hereditament free of charge pursuant to statutory right — Whether any value to be attributed to the land for rating purposes – Telecommunications Act 1984, Sch 2, para 9(1).

The appellant ratepayer, a mobile telecommunications operator, held a licence under the Telecommunications Act 1984, and was accordingly subject to the code contained in Sch 2 to the Act. Paragraph 9(1)^a of the code conferred powers on operators to install and maintain telecommunication apparatus on a highway. Under the code, no payment or compensation was made either to the highway authority or to the owner of land within the lateral limits of the highway which was not vested in the highway authority. Because of those provisions, the ratepayer and other mobile telecommunications operators had sought to locate certain aerial masts on highway land wherever possible. When located on private land, such masts were normally subject to rental payments. The ratepayer erected such a mast on a hereditament located on the grass verge of a publicly-maintained highway. The hereditament was listed in the local non-domestic rating list at a rateable value of £2,200. The ratepayer disputed that valuation. Before the local valuation tribunal, the respondent valuation officer contended for a rateable value of £1,100 in place of the listed valuation. The ratepayer contended for a value of £100—the agreed value of the mast, but with a nil value for the land. In so contending, the ratepayer argued that no valuation should be attributed to the land as it was entitled to free occupation under the code. The valuation tribunal rejected that contention and accepted the valuation officer's valuation. In arriving at the value for the occupation of the land, the tribunal took into consideration a site used for the same purposes on private land. The tribunal's decision was affirmed by the Lands Tribunal, and the ratepayer appealed to the Court of Appeal.

Held – Where a mobile telephone operator installed a mobile telephone mast on a hereditament located on a highway, the occupation of the land had a value for rating purposes notwithstanding that the occupation was free of charge pursuant to the code in Sch 2 to the 1984 Act. The beneficial occupation of the hereditament had a value, and the right of free occupation under the code was not to be brought into account in determining that value. The occupation of the land on which a mast was erected was a right that would ordinarily be of value to the occupier. The value of the right was illustrated by the fact that telecommunication operators had to pay for the right to occupy land in private ownership on which they erected masts. For the purpose of determining the

^a Paragraph 2(1), prior to amendment by the Communications Act 2003, is set out at [4], below

value of the occupation under the rating hypothesis, the rent payable by the tenant should be that value. The statutory right to occupy that land was not determinative of that value in the same way as an actual rent was not determinative. The code operated to determine that the price paid for the occupancy was nil. It did not operate to determine the value of the occupation. It followed in the instant case that the hereditament had a value to the ratepayer as the occupier which, if the right to occupy free of charge under the statutory rights was disregarded, had been agreed at £1,000, that value having been derived from comparables where masts had been erected on private land. Accordingly, the appeal would be dismissed (see [21]–[23], [25], [31]–[34], below).

Poplar Metropolitan Borough Assessment Committee v Roberts [1922] All ER Rep 191 applied.

Notes

For actual conditions affecting property when the rating valuation is made and for the statutory right of operators to install and maintain telecommunications equipment on a street, see respectively 39(1) *Halsbury's Laws* (4th edn reissue) para 687 and 45(1) *Halsbury's Laws* (4th edn reissue) para 95.

For the Telecommunications Act 1984, Sch 2, para 9, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 165.

Cases referred to in judgments

Dawkins (Valuation Officer) v Ash Bros & Heaton Ltd [1969] 2 All ER 246, [1969] 2 AC 366, [1969] 2 WLR 1024, HL.

Hoare (Valuation Officer) v National Trust, National Trust v Spratling (Valuation Officer) [1998] RA 391.

Poplar Metropolitan Borough Assessment Committee v Roberts [1922] 2 AC 93, [1922] All ER Rep 191, HL.

Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee [1937] 2 All ER 298, [1937] 2 KB 445, CA; *aff'd* [1938] 2 All ER 79, sub nom *Robinson Bros (Brewers) Ltd v Durham County Assessment Committee (Area No 7)* [1938] AC 321, HL.

Townley Mill Co (1919) Ltd v Oldham Assessment Committee [1937] 1 All ER 11, [1937] AC 419, HL.

Cases referred to in skeleton arguments

Garton v Hunter (Valuation Officer) [1969] 1 All ER 451, [1969] 2 QB 37, [1969] 2 WLR 86, CA.

Gidlow-Jackson v Middlegate Properties Ltd [1974] 1 All ER 830, [1974] QB 361, [1974] 2 WLR 116, CA.

Jones v Tudge (Valuation Officer) (1952) 45 R & IT 523, LT.

MacNamara v Dyer (Valuation Officer) (1952) 45 R & IT 294, LT.

Oster v Gladwin (Valuation Officer) (1957) 2 RRC 135, LT.

Port of London Authority v Orsett Union Assessment Committee [1920] AC 273, [1920] All ER Rep 545, HL.

Rawlence v Croydon Corp [1952] 2 All ER 535, [1952] 2 QB 803, CA.

- a *Scottish & Newcastle Retail Ltd v Williams (Valuation Officer)* [2001] EWCA Civ 185, [2001] 1 EGLR 157.
St James' and Pall Mall Electric Light Co Ltd v Westminster Assessment Committee [1933] 1 KB 605, CA; *affd* [1934] AC 33, HL.
Trocette Property Co Ltd v Greater London Council and Southwark London BC [1974] RVR 306, CA.

b **Appeal**

Orange PCS Ltd appealed with permission of Mance LJ granted on 22 May 2003 from the decision of the Lands Tribunal (George Bartlett QC, President) on 8 April 2003 ([2003] RA 141) dismissing its appeal from the decision of a valuation tribunal sitting at Nottingham on 16 November 2001 whereby it accepted a rateable valuation by the respondent valuation officer, Alan Roy Bradford, of £1,100 for a hereditament occupied by Orange on the grass verge of Rotherham Baulk, a publicly-maintained highway in Carlton-in-Lindrick, Worksop, Nottinghamshire. The facts are set out in the judgment of Thomas LJ.

- d *Richard Glover* (instructed by *Stephenson Harwood*) for Orange.
Timothy Morshead (instructed by the *Solicitor of Inland Revenue*) for the valuation officer.

Cur adv vult

- e 17 February 2004. The following judgments were delivered.

THOMAS LJ (giving the first judgment at the invitation of Auld LJ).

- f [1] The issue in this appeal is the correct approach for the purposes of rating to the valuation of a hereditament comprising a very small piece of land within the limits of the public highway on which a mobile phone aerial mast had been sited together with its associated equipment and cabling. The matter is of some importance to telecommunications operators such as the appellants (Orange) who have constructed networks which include similar sites across England and Wales.

g **BACKGROUND**

- h [2] Orange and other companies who hold telecommunications licences, such as Vodafone, mmO₂ and T-Mobile, have constructed large networks to enable their mobile phone services to be provided nationwide. The network comprises, essentially, two types of aerials attached to masts—macrocells and microcells. Macrocell aerials are sited on masts which vary in size from 15 m to 200 m and, depending upon local conditions, can transmit signals up to a distance of 8 km. Microcell aerials, with which the present appeal is concerned, are sited on smaller masts and in contradistinction have a much smaller range of up to 500–800 m; their purpose is to provide services to areas which would otherwise be blind spots and enhance the service during busy periods.

- j [3] The siting of microcell aerials depends on a number of factors, including the layout of the land, buildings and trees and the availability of power connections. The planning regime is liberal; prior to 3 June 1995 masts and poles less than 15 m in height were permitted development under Pt 24 of Sch 2 to the Town and Country Planning General Development Order 1988,

SI 1988/1813, subject to what is commonly known as the 28-day prior approval procedure. From 3 June 1995 the erection of masts was permitted development under the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, as amended, and subject to certain exceptions and provided prior notice was given to the local planning authority which did not object within a stipulated period.

[4] Orange as an operator with a licence under the Telecommunications Act 1984 was subject to the code contained in Sch 2 to that Act. The one important provision relevant to the way in which mobile operators have sited microcells and to the particular microcell with which this case is concerned is para 9(1) of the code. This paragraph (as amended by the New Roads and Street Works Act 1991) confers powers to install and maintain telecommunication apparatus on a highway:

‘The operator shall, for the statutory purposes, have the right to do any of the following things, that is to say—(a) install telecommunication apparatus, or keep telecommunication apparatus installed, under, over, in, on, along or across a street ... (b) inspect, maintain, adjust, repair or alter any telecommunication apparatus so installed; and (c) execute any works requisite for or incidental to the purposes of any works falling within paragraph (a) or (b) above, including for those purposes the following kinds of works, that is to say—(i) breaking up or opening a street ... (ii) tunnelling or boring under a street ... (iii) breaking up or opening a sewer, drain or tunnel ...’

Under the code no payment or compensation is made either to the highway authority or to the owner of the land within the lateral limits of the highway which is not vested in the highway authority.

[5] It is because of these provisions that Orange and other mobile telecommunications operators sought to locate microcells on highway land wherever possible. As at 1 November 1999, 211 out of 259 such installations were on highway land. Of the 48 which were on private land these were normally subject to rental payments made either under a lease or licence agreement negotiated with the owner of the land.

THE APPROACH TO VALUATION

[6] The assessment of the rateable value of the hereditament was carried out in accordance with the provisions set out in Sch 6 to the Local Government Finance Act 1988. Paragraph 2(1) of Sch 6 provides for what is known as the statutory or rating hypothesis:

‘The rateable value of a non-domestic hereditament ... shall be taken to be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year on these three assumptions—(a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made; (b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic; (c) the third assumption is that the tenant undertakes to pay

a all usual tenant's rates and taxes and to bear the cost of the repairs and insurance ...'

It was common ground that the specific assumptions were not material to the dispute in the present appeal. The valuation is to be made at a given date.

b [7] There are many descriptions of the rating hypothesis; Lord Maugham's in *Townley Mill Co (1919) Ltd v Oldham Assessment Committee* [1937] 1 All ER 11 at 19, [1937] AC 419 at 436 was: '... a hypothetical tenant and a hypothetical rent, but ... a real and concrete hereditament.'

c [8] However, although the valuation has to be made on this hypothesis, there are many other principles that have developed in case law over the centuries since rates were first imposed as a form of taxation; it is necessary to refer briefly to one of these which, it was common ground, was relevant—'the principle of reality'. This was recently considered in *Hoare (Valuation Officer) v National Trust, National Trust v Spratling (Valuation Officer)* [1998] RA 391 where Peter Gibson LJ described it (at 415):

d 'In particular I would emphasise the necessity to adhere to reality subject only to giving full effect to the statutory hypothesis, so that the hypothetical lessor and lessee act as a prudent lessor and lessee. I would call this the principle of reality ...'

e Schiemann LJ made clear the importance of this (at 408):

'The statutory hypothesis is only a mechanism for enabling one to arrive at a value for a particular hereditament for rating purposes. It does not entitle the valuer to depart from the real world further than the hypothesis compels.'

f

THE DISPUTE IN THIS APPEAL

g [9] The hereditament under appeal was located on the grass verge of Rotherham Baulk, a publicly maintained highway in Carlton-in-Lindrick, Worksop, Nottinghamshire; it comprised a piece of land on which there had been erected a hollow mast pole 11.5 m high with telecommunications aerials and a steel cabinet 1.5 m wide by 0.65 m deep and 1.30 m high standing on a concrete base; the aerials and equipment were not rateable. The hereditament was entered in the 1995 non-domestic rating list for Bassetlaw District under the description 'communications station and premises' at a rateable value of £2,200 with effect from 1 November 1999. After notice had duly been given to h Orange, Orange disputed this.

j [10] In essence Orange's contention was that no value should be attributed to the land on which the equipment was sited as they were entitled to free occupation under the statutory telecommunications code referred to at [4], above; however, they accepted that the mast itself was rateable for a small amount under class 3(f) of the Valuation for Rating (Plant and Machinery) Regulations 1994, SI 1994/2680.

[11] The dispute was heard by the Nottinghamshire Valuation Tribunal before whom the valuation officer contended for a rateable value of £1,100 in place of the rateable value of £2,200; Orange contended for a value of £100—that being the agreed value for the mast—but with a nil value for the

land. In a written decision of 16 November 2001 the valuation tribunal rejected Orange's contention that a nil value should be attributed to the land on account of Orange's right under the code to occupy free of charge; they accepted the valuation officer's valuation of the value of the occupation of the land. It is of interest to note that the tribunal took into consideration in arriving at the value for the occupation of the land a site used for the same purposes on private land. An appeal was made to the Lands Tribunal.

[12] It was agreed between the parties before the Lands Tribunal and before this court that, if Orange were correct in their contention, then the valuation should be £100; this was comprised of a nil value being attributed to the land and £100 for the decapitalised cost of the mast. If the valuation officer was correct, then the valuation should be £1,100; the difference was the value of £1000 attributable to the land which the Nottinghamshire Valuation Tribunal had determined. In these circumstances it is not therefore necessary to refer to the different methods of valuation, such as the comparative method, the profits basis or the contractors basis, that could have been employed if the actual value of the occupation of the land, ignoring the free right under the code, had been in issue.

[13] The decision of the valuation tribunal was upheld by the Lands Tribunal ([2003] RA 141) (George Bartlett QC, President); the President concluded that the fact that the telecommunications code did not provide for payment for the occupation of the land did not mean that the occupation had no value in terms of the rating hypothesis, any more than a provision in the telecommunications code for payment would have done; he considered that this was the approach to be taken in the light of the decision of the House of Lords in *Poplar Metropolitan Borough Assessment Committee v Roberts* [1922] 2 AC 93, [1922] All ER Rep 191 which he summarised (at 149 (para 17)):

'The essence of the decision in *Poplar v Roberts* in my judgment is that the statutory hypothesis is the means of establishing the value of the occupier's occupation and that the amount that the occupier actually pays in the real world in order to occupy the hereditament, whether that amount arises from an agreement or by force of statute, will not be evidence of this value unless it accords, or can be adjusted to accord, with the statutory hypothesis.'

He concluded (at 151 (para 22)):

'The fact that under the code the operator makes no payment for the right to locate his equipment in the highway and could thus locate it in any suitable position free of charge is no evidence that on the rating hypothesis the hypothetical tenant (who would be such an operator) and the hypothetical landlord would agree that the tenant's occupation was valueless. On the contrary the fact that, where similar equipment performing a similar function is located on private land, rental payments are normally made suggests very strongly that the land, as well as the equipment on it, is of value to the occupier, and I so find.'

THE CONTENTIONS OF ORANGE

[14] Orange's contention was simply, though most attractively, made.

a [15] It was first submitted that as a matter of practical reality, in ordinary negotiations: (i) the only potential tenants for the hereditament were telecommunication operators as they alone had the statutory right under the statutory telecommunications code to place masts in the location; (ii) the hereditament the subject of the appeal was not the only location at which Orange could site its mast, because as set out at [3], above, there was a degree of latitude as to the exact positioning of the mast; (iii) thus in negotiating for the rent for the site of the mast, the tenant would have had a strong negotiating position in that he would be able to say that he could site the mast elsewhere, if the demands were excessive; the landlord would have had to take into account the fact that the only tenant would be someone who had the statutory right under the code, that the tenant could use another location and that the tenant would not pay more by way of rent than the alternatives available through the use of the statutory powers under the code.

b [16] There was no justification for departing from what would have happened as a matter of reality. This was particularly so because the only hypothetical tenant for the purposes of the rating hypothesis could be a licensed telecommunications operator who would all have the statutory right to occupy the hereditament free of charge under the code. This was in contradistinction to the position in respect of the mast, as the mast was not provided free and therefore had a value for rating purposes under the regulations to which reference has been made at [10], above.

c [17] The decision of the House of Lords in the *Poplar* case did not require a departure from the principle of reality; in particular it did not require the court to disregard the fact that the only potential occupier would have the statutory rights under the code and that the alternatives available to the occupier were in the real world freely available.

f THE DECISION IN THE *POPLAR* CASE

g [18] The issue in the appeal turned on the application of the principles established by the decision in the *Poplar* case. The speeches in the decision were analysed at length in the written and oral arguments; it is therefore necessary to refer first to the decision and the speeches in some detail.

h [19] In the *Poplar* case the issue before the House related to the fixing of the rateable value of a public house under the Valuation (Metropolis) Act 1869, which provided for the application of principles similar to the statutory hypothesis currently in force as set out at [6], above. The issue was whether account was to be taken of the temporary legislative restriction on the amount of rent that could be charged by a landlord to a tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. The effect of the 1920 Act on the public house was that the rent was less than the true value of the occupation. It was held, Lord Carson dissenting, that the statutory restriction was not material to the determination of the valuation for the purposes of rating.

j [20] The principles relevant to this appeal which can be derived from the speeches of the majority, in my view, are: (i) Rates are levied on the basis of the value of the occupation of the hereditament to the occupier; Lord Buckmaster said ([1922] 2 AC 93 at 104, [1922] All ER Rep 191 at 195):

'From the earliest time it is the inhabitant that has to be taxed. It is in respect of his occupation that the rate is levied, and the standard in the Act is nothing but a means of finding out what the value of that occupation is for the purposes of the assessment. In my opinion, the rent that the tenant might reasonably be expected to pay is the rent which, apart from all conditions affecting or limiting its receipt in the hands of the landlord, would be regarded as a reasonable rent for the tenant who occupied under the conditions which the statute of 1869 imposes.'

Lord Parmoor said ([1922] 2 AC 93 at 118, [1922] All ER Rep 191 at 202):

'Under 43 Eliz. c. 2, rates are to be levied upon every occupier of lands, houses etc. The distinction between occupier and owner, in this connection, is of primary importance. The occupation of property may be, and often is, distinct from its value to the owner. This distinction would probably be emphasized where an artificial statutory maximum is fixed, and a statutory restriction prevents an owner from recovering from any tenant a greater amount, as rent, than the statutory maximum.'

(ii) The rent for the purposes of the statutory hypothesis is the value of the occupation to a hypothetical tenant; the actual rent paid by the actual tenant is not determinative. This principle was set out by Lord Buckmaster ([1922] 2 AC 93 at 103, 104, [1922] All ER Rep 191 at 194, 195):

'The tenant referred to is, by common consent, an imaginary person; the actual rent paid is no criterion, unless, indeed it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section ... Just as the tenant is hypothetical, so also is the rent; it is only used as a standard which must be examined without regard to the actual limitation of the rent paid by virtue of the covenant as between the landlord and tenant, and also, as I regard it, to statutory restrictions that may be imposed upon its receipt.'

Lord Atkinson used very similar terms ([1922] 2 AC 93 at 108, 113, [1922] All ER Rep 191 at 197, 199):

'... but the actual rent paid by the actual tenant is not, and cannot be, treated as a measure of, or a substitute for, the hypothetical rent which conceivably might be expected from a hypothetical tenant ... To make rateability depend on the fact that the person to be rated is, in fact, an actual tenant, or to make the rent payable by the actual tenant the measure of the rateable value of premises ... would be an absolute innovation, in direct conflict with the principles of the law of rating as established for over a century.'

As did Lord Parmoor ([1922] 2 AC 93 at 118, 121, [1922] All ER Rep 191 at 202, 203):

'It has long been recognized that actual rents based on the contractual relationship between tenant and landlord are not the test of the value of a property for rating purposes. I do not think that there is any difference in this respect between a contractual and a statutory rental. In either case ...

a the rateable value must be assessed in accordance with statutory directions ... The fundamental distinction remains that the assumed rental, based on statutory directions for the purpose of ascertaining occupation value, is in itself a different thing from an actual rental which denotes the liability between an owner and tenant, and which may depend on a variety of conditions other than those affecting the beneficial or profitable occupation of property.'

b (iii) In ascertaining the value, although all factors have to be taken into account, the value of the occupation to the occupier has to be ascertained without reference to any specific circumstances personal to the occupier. This principle was expressed by Lord Buckmaster ([1922] 2 AC 93 at 103, [1922] All ER Rep 191 at 194):

c 'But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time the valuation is made ... those words related entirely to determining the value of the occupation to the occupier, excluding, of course, any element due to his skill, industry, or other strictly personal qualifications. In the present case the respondent seeks to introduce into these words the conditions which regulate the value of the hereditament to the landlord.'

d Lord Parmoor's description of the principle was ([1922] 2 AC 93 at 120–121, [1922] All ER Rep 191 at 203):

e 'In ascertaining this annual value, all that can reasonably influence the judgment of an intending occupier ought to be taken into consideration, including not only the natural conditions, but any statutory provisions which may tend either to enhance or diminish the value of the beneficial occupation of the property or its profitearning capacity. The special skill or industry of a particular occupier is not one of the natural conditions which attach to property and on this ground it is excluded from consideration in the assessment of rateable value.'

f A further useful illustration of this principle was given by Lord Pearce in *Dawkins (Valuation Officer) v Ash Bros & Heaton Ltd* [1969] 2 All ER 246 at 252, [1969] 2 AC 366 at 382:

g 'But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded insofar as they are accidental to the letting of a hereditament. They are acknowledged insofar as they are essential to the hereditament itself. It is, for instance, essential to the hereditament itself that it is close to the sea and that humans will pay more highly for a house close to the sea. One can therefore take that into account in the hypothetical letting. It is, however, accidental to the house that its owner was shrewd or that the rich man happened to want it and that therefore the rent being paid is extremely high.'

h (iv) As far as an occupier was concerned, the occupation was not made less beneficial by the operation of the statutory restriction; as Lord Sumner said ([1922] 2 AC 93 at 116, [1922] All ER Rep 191 at 201):

'I think that the word "rent" must now be held to mean something which at any rate is not conditioned by the legal relations which exist between an actual landlord and an actual tenant. An occupier under a beneficial lease cannot require the annual value to be cut down to the rent actually reserved. Equally a hypothetical occupier, although he will occupy, if he occupies at all, under a beneficial statute, must not be supposed to limit what he is prepared to give in order to get the occupation of the hereditament, merely to the amount, the giving of which will enable him to retain it in the face of anything that an actual landlord could legally do against him.'

(v) The principle of equality applicable in rating is a material factor in considering the effect of a statutory regime; Lord Parmoor stated ([1922] 2 AC 93 at 119, [1922] All ER Rep 191 at 202):

'It has long been recognized, as a matter of principle in rating law, that to make actual rentals the basis of rateable value would be to contravene the fundamental principle of equality, both between the rate contributions from individual ratepayers, and between the totals of rate contributions levied in different contributory rating areas. In effect the result would be to make the amount on which the occupier of property is liable to pay rates dependent in many cases on the contractual relationship between a particular landlord and tenant, whereas it is dependent in all cases on a statutory direction applicable on the same principles to all hereditaments, and intended to insure equality of treatment as between the occupiers of rateable property and the rating authority.'

Lord Sumner provided an illustration of the principle of equality by showing that it would be unfair to enable an occupier who derived a benefit from the 1920 Act by way of restricted rent to gain the collateral advantage of lower rates ([1922] 2 AC 93 at 116–117, [1922] All ER Rep 191 at 201):

'Rating is a process between an occupier and a rating authority, to the determination of which the landlord and the lessee are strangers ... If, as is contended, "rent" is throughout rigidly restricted to its meaning as a term of art, and the measure of value thus applied by hypothetical hands is the real thing, the result would be that the occupier, who already has been enriched under the Rent Restrictions legislation by receiving a statutory present of part of the value of his landlord's property, would profit still further and equally unmeritoriously by escaping from the rates, which the hereditament ought to bear, to the prejudice of less fortunate occupiers. I say "ought to bear," because the only justification for the restriction is that the hereditament is really worth more by the year in the market than the landlord is allowed to charge, but that it is inexpedient that he should have the benefit of it. As a matter of fact, not only does the Act not deal with rating expressly except in another connection and for another purpose, but it actually (s. 2, sub-s. 1 (b)) enables the landlord to pass on to the tenant an enhanced burden of rates falling on himself, without discriminating between an enhancement due to increased rateable value and one only due to increased poundage.'

(vi) The specific purpose of a statute has to be taken into account. Lord Atkinson considered that the 1920 Act was not intended to interfere with the

a system of valuation set up under the rating legislation; he said ([1922] 2 AC 93 at 108, [1922] All ER Rep 191 at 197):

b 'It therefore appears to me that where you find a statute dealing exclusively with actual rent paid by actual tenants, actual increases of such rent ... the natural conclusion to arrive at is that this statute was not designed or intended to deal with the rating of hereditaments at all ... It is plain, I think, from the provisions of the Act, that the evil it was designed to cure was not excessive or defective rating. The evil it was obviously designed to prevent was the exploiting by landlords of the great demand for dwelling houses, of which the supply was inadequate, in order to exact excessive rents for the dwelling houses they owned.'

c After referring to the consequences of the 1920 Act, he concluded ([1922] 2 AC 93 at 109, [1922] All ER Rep 191 at 197):

d 'Results such as these seem to show that it was never designed to supersede by this Act the old system of rating dwelling houses. Again, it cannot, I think, be disputed that equality of rating is and should be one of the main object of all rating systems.'

THE HEREDITAMENT IN THIS APPEAL

e [21] Applying these principles to the hereditament the subject of this appeal and to the issue as to whether the right under the statutory telecommunications code of free occupation of the land on which the mast was sited was a matter to be taken into account, I have come to the clear view that that right was not to be taken into account. The decisions of the valuation tribunal and the Lands Tribunal were, in my view, correct.

f [22] The occupation of the land on which a mast was erected was a right that would ordinarily be of value to the occupier; that followed from the operation of any market. The value of the right was illustrated by the fact that telecommunications operators had to pay for the right to occupy land in private ownership on which they erected masts. For the purpose of determining the value of the occupation under the hypothesis, the rent payable by the tenant should be that value.

g [23] The statutory right that Orange had to occupy the land without payment was not determinative of that value in the same way as an actual rent is not determinative; I accept the submission made on behalf of the valuation officer that the code operated to determine that the price paid for the occupancy was nil; it did not operate to determine the value of the occupation.

h [24] Moreover the right to occupy free of charge was a right that pertained to Orange as a personal right or qualification derived from the telecommunications code; it was not a matter that affected the hereditament as any other occupier (other than a telecommunications operator) would have had to pay for that right.

j [25] Clearly the hereditament had a value to Orange as the occupier which, if the right to occupy free of charge under the statutory rights under the code was disregarded, was agreed as £1,000; that was the agreed value of the benefit to Orange of its occupancy, absent the statutory right, and that value had been derived, as appears from the decision of the valuation tribunal, from comparables where masts had been erected on private land.

[26] The submission, in the case advanced on behalf of Orange, that a nil value was the value to be derived applying the 'principle of reality' was, in my view, in fact not grounded in reality. There could have been as a matter of reality no hypothetical negotiations of the kind outlined in [15], above. If a telecommunications operator was entitled to occupy land along or adjacent to the highway for the purpose of siting a mast without charge, there would never be a negotiation with the hypothetical landlord; if the operator was entitled to free occupation, he would utilise the right to place the mast anywhere else on or adjacent to the highway; it was only if topographical or other conditions impelled him to place the mast on privately-owned land, that he would not utilise that right; on privately-owned land, he would have to pay. The whole argument summarised in [15], above was unreal, because if the statutory right to free occupation of the land was brought into account, there would, *ex hypothesi*, have been no negotiation as there would have been nothing to negotiate about. The suggestion that in the negotiations the tenant might have been influenced by his ability to go to another location along the highway was entirely circular, as he had a right of free occupation anywhere on the highway; that was an incident of the statutory regime. It is quite unlike the position summarised by Scott LJ in *Robinson Bros (Brewers) Ltd v Houghton and Chester-le-Street Assessment Committee* [1937] 2 All ER 298 at 308, [1937] 2 KB 445 at 470:

'... the rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for that hereditament, in the light of competition or its absence in both demand and supply, as a result of "the higgling of the market" ...'

As Scott LJ went on to point out, the inquiry is primarily economic and not legal; it is impossible, for the reasons given, to understand in economic terms how there could ever be, as Orange contended, the 'higgling of the market' in relation to a site on or adjacent to the highway where all such sites could be occupied free of charge under the code.

[27] Nor, for the same reasons, was it real to look at the valuation on the basis that there was a market in sites on or adjacent to the highway with the participants in that market comprising only those who were telecommunication operators with a free right of occupation; there is no market in any sense of the word for the location of masts on or adjacent to the highway, merely a statutory regime that permitted the operators to erect masts free of charge.

[28] Nor could the reference to comparables be of assistance if the only comparables used were locations which the telecommunications operator had the right to occupy without charge. If the statutory right was brought into account the value of the occupancy of the land was nil; it was meaningless to compare one site on or adjacent to the highway with an alternative site on or adjacent to the highway where the value for both, on the basis the statutory right was brought into account, was nil. The use of the alternative as a comparable used in valuation was, in such circumstances, totally meaningless; both depended on the same statutory right to occupy the land without payment. A true comparable is a similar occupancy, subject to the ordinary incidents of the market.

- a [29] Furthermore, there was nothing to suggest that the statutory rights under the code were intended to affect the liability to rates; if the rights were to have such an effect, they would confer a further collateral benefit on telecommunications operators. No doubt such powers were given as part of the decision by Parliament to facilitate the creation of mobile telecommunications networks and the fact they were free of charge was a
- b matter within the terms of the licensing arrangements then current. Ordinarily the right to occupy land and erect a mast on it would be a right that had a monetary value; that occupation would therefore ordinarily benefit the tax base of the locality by subjecting the occupation to rates. Furthermore, the fact that telecommunications operators had a right to free occupation could not, in
- c my judgment, have been intended to bring about a departure from the principle of equality applicable to all occupiers. The right of free occupation was personal to them and dependent on their status as telecommunications operators; the right did not affect the value of the beneficial occupation of the hereditament.
- d [30] Finally, I do not accept the submission that the actual circumstances of the *Poplar* decision provide any grounds for distinguishing it. (i) The effect of the 1920 Act was to provide a statutory restriction on the amount that a tenant would otherwise have been prepared to pay and the landlord otherwise permitted to accept; it was a statutory intervention in the market which affected some dwellings and not others. (ii) The power under the code was a
- e statutory intervention in the market; absent the right under the code to occupation of the land on which the mast was situated without payment, payment would ordinarily have been made, just as payment was made when the mast was placed on private land. (iii) In my view, it made no difference that, under the regime created by the 1984 Act and the code set out in Sch 2, the
- f only potential tenants who could occupy the land for the purpose of erecting a mast were entitled to occupy the land without charge. The fact that they were entitled to free occupation was an incident particular to Orange and other telecommunications operators and not to the occupation of the land. (iv) There was no meaningful distinction between the circumstances in the
- g *Poplar* case and in the present appeal by reason of the fact that the speeches in the *Poplar* case discussed the issues in terms of the restriction placed on the landlord and not the tenant. In the *Poplar* case the legislation restricted the amount that could be recovered by the actual landlord. In the present appeal, the legislation provided that nothing could be charged to the actual tenant by
- h the highway authority; in both instances, the legislation affected the actual parties and not the value of the beneficial occupation of the hereditament. (v) The illustrations used by Lord Pearce in *Dawkins's* case did not assist Orange. It was argued on their behalf that it was essential that the hereditament be located on the highway and that the tenant would pay less for
- j a hereditament located on the highway because the statutory powers under the code provided them with an alternative. However, for the reasons given at [26], above, this submission was circular. Orange's argument that the only hypothetical tenant of the hereditament the subject of the appeal could be a licensed telecommunications operator begged the question for the same reason.

[31] In my view therefore it was clear that the beneficial occupation of the hereditament did have a value and that the right of free occupation under the code was not to be brought into account in determining that value. a

[32] I would therefore uphold the decision of the Lands Tribunal and dismiss this appeal.

JACOB LJ.

[33] I agree. b

AULD LJ.

[34] I also agree.

Appeal dismissed. c

Kate O'Hanlon Barrister.

a

Pennycook v Shaws (EAL) Ltd

[2004] EWCA Civ 100

COURT OF APPEAL, CIVIL DIVISION

THORPE, ARDEN LJ AND SIR MARTIN NOURSE

b

16 JANUARY, 12 FEBRUARY 2004

c

Landlord and tenant – Business premises – Notice by landlord to terminate tenancy – Tenant giving counter-notice erroneously indicating willingness to give up possession – Tenant giving second counter-notice within prescribed period correctly indicating unwillingness to give up possession — Whether first counter-notice binding – Landlord and Tenant Act 1954, ss 25(5), 29(2) – Human Rights Act 1998, s 3, Sch 1, Pt I, art 6(1), Pt II, art 1.

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The respondent tenant held premises under a tenancy to which Pt II of the Landlord and Tenant Act 1954 applied. The appellant landlord served a notice of termination of tenancy under s 25^a of the 1954 Act. The tenant erroneously served a positive counter-notice, stating that he would be willing to give up possession of the property. The error was spotted before the expiry of the two-month period, prescribed by s 25(5), for giving a counter-notice, and the tenant served a negative counter-notice within the prescribed period, stating that he was not willing to give up possession of the property. The tenant subsequently applied to the county court for the grant of a new tenancy. Under s 29(2)^b of the 1954 Act, the court was precluded from entertaining that application unless the tenant had given a negative counter-notice. The landlord applied to strike out the proceedings on the basis that they disclosed no prospect of success. That application was granted by the circuit judge who applied a High Court decision (the previous High Court decision) which had held that a positive counter-notice to a s 25 notice could not be revoked by a subsequent negative counter-notice. The circuit judge nevertheless granted permission to appeal to the High Court on human rights grounds. The appeal was therefore expected to turn on human rights authorities, and for that reason a Court of Appeal decision (the previous Court of Appeal decision), approving the previous High Court decision, was not cited to the judge on the appeal. Believing that there was no authority binding on him, the judge proceeded to depart from the previous High Court decision, holding that the tenant had been entitled to give a second counter-notice and accordingly allowed his appeal without dealing with the human rights issues. On the landlord's application for permission to appeal, with the appeal to follow if the application were successful, the Court of Appeal was required to determine whether the judge had been bound by the previous Court of Appeal decision to follow the interpretation of ss 25 and 29(2) in the previous High Court decision. In the event of that question being answered in the affirmative, the tenant submitted that the court was required to reject the interpretation in the previous High Court decision by virtue of its obligation, under s 3^c of the Human Rights Act 1998, to read and give effect to legislation, so

a Section 25, so far as material, is set out at [4], below

b Section 29, so far as material, is set out at [8], below

c Section 3, so far as material, provides: '(1) So far as it is possible to do so, primary legislation ... must be read and given effect in a way which is compatible with the Convention rights ...'

far as it was possible to do so, in a way which was compatible with rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). In so contending, the tenant submitted that the interpretation in the previous High Court decision violated his right to property under art 1^d of the First Protocol to the convention and his right of access to the court under art 6(1)^e of the convention.

Held – (1) Unless s 3 of the 1998 Act required a conclusion to the contrary, it was not open to a tenant to serve a second counter-notice to a landlord's notice under s 25 of the 1954 Act. It was part of the ratio of the previous Court of Appeal decision that the previous High Court decision had been correct. In those circumstances, the judge's decision in the instant case could not stand unless s 3 of the 1998 Act required the court to construe ss 25 or 29(2) of the 1954 Act in the same way as the judge (see [27], [29], [51], [52], below); *Re 14 Grafton Street, London W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1 and *Bridgers & Hamptons Residential v Sandford* (1991) 63 P & CR 18 applied.

(2) Section 3 of the 1998 Act did not require the court to place a different construction on ss 25 or 29(2) of the 1954 Act. The interpretation placed on the 1954 Act in the previous High Court decision had the advantage that, if the landlord received a positive counter-notice in response to his s 25 notice, he could make arrangements for what was to happen on the termination of the tenancy. There were obvious economic benefits to both landlord and tenant in having certainty at that stage, if possible, and that was so even if it were rare for a positive counter-notice to be given. That conclusion was not undermined by the fact that hardship would occur in an exceptional case, and there was nothing obviously wrong with the balance that Parliament had drawn. Thus although art 1 of the First Protocol to the convention was engaged in the instant case, it had not been violated. As regards art 6(1) of the convention, it had not been shown that there was a good reason why, in a democratic society, a court should hear applications which fell to be dismissed on the interpretation of the 1954 Act in the previous High Court decision. The bar in the instant case was more naturally seen as a bar on the substantive right rather than as a procedural bar. Accordingly, art 6(1) was not engaged. If it were engaged, it had not been violated. It followed that the application for permission to appeal and the appeal would be allowed (see [41], [44], [45], [50]–[52], below); *Wilson v First County Trust Ltd* [2003] 4 All ER 97 considered.

Decision of Pumfrey J [2003] 3 All ER 1316 reversed.

Notes

For the convention right of access to a court and the convention right to property, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 141, 165, and for the right of tenants under business tenancies to apply for a new tenancy, see 27(1) *Halsbury's Laws* (4th edn reissue) para 574.

For the Landlord and Tenant Act 1954, ss 25, 29, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 147, 151. Section 25(5) has been repealed, with effect from 1 June 2004, by the Regulatory Reform (Business Tenancies) (England and

^d Article 1 is set out at [30], below

^e Article 6, so far as material, provides: '1. In the determination of his civil rights ... , everyone is entitled to a fair ... hearing ...'

- a Wales) Order 2003, arts 2, 4(1), 28(2), Sch 6. A new s 29(2) has been substituted, with effect from 1 June 2004, by arts 2 and 5 of the 2003 order.

For the Human Rights Act 1998, s 3, Sch 1, Pt I, art 6, Pt II, art 1, see 7 Halsbury's Statutes (4th edn) (2002 reissue) 532, 554, 556.

Cases referred to in judgments

- b *Baglarbasi v Deedmethod Ltd* [1991] 2 EGLR 71.
Bramelid v Sweden (1983) 5 EHRR 249, [1982] ECHR 8588/79, E Com HR.
Bridgers and Hamptons Residential v Stanford (1991) 63 P & CR 18, CA.
Central Estates (Belgravia) Ltd v Woolgar (No 2) [1972] 3 All ER 610, [1972] 1 WLR 1048, CA.
Doe d Cheny v Batten (1775) 1 Cowp 243, [1775–1802] All ER Rep 594, 98 ER 1066.
- c *Dun & Bradstreet Software Services (England) Ltd v Provident Mutual Life Assurance Association* (2 April 1995, unreported), Ch D.
Grafton Street (14) London W1, Re, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd [1971] 2 All ER 1, [1971] Ch 935, [1971] 2 WLR 159.
Håkansson v Sweden (1991) 13 EHRR 1, [1990] ECHR 11855/85, ECt HR.
- d *James v UK* (1986) 8 EHRR 123, [1986] ECHR 8795/79, ECt HR.
Johnson v Agnew [1979] 1 All ER 883, [1980] AC 367, [1979] 2 WLR 487, HL.
Marckx v Belgium (1979) 2 EHRR 330, ECt HR.
Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 All ER 689, [2003] 1 AC 1163, [2003] 2 WLR 435.
Mellacher v Austria (1990) 12 EHRR 391, [1989] ECHR 10522/83, ECt HR.
- e *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791, [2000] Ch 12, [1999] 3 WLR 57, CA.
Peyman v Lanjani [1984] 3 All ER 703, [1985] Ch 457, [1985] 2 WLR 154, CA.
R v Johnstone [2003] UKHL 28, [2003] 3 All ER 884, [2003] 1 WLR 1736.
Sayers v Clarke Walker (a firm) [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 3095.
- f *Webber (CA) (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 1 WLR 320.
Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568; *rvsg* [2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74, [2001] 3 WLR 42.
- g

Cases referred to in skeleton arguments

- Barclays Bank plc v Bee* [2001] EWCA Civ 1126, [2002] 1 WLR 332.
Blackstone (David) Ltd v Burnetts (West) End Ltd [1973] 3 All ER 782, [1973] 1 WLR 1487.
- h *Family Housing Association v Donellan* (12 July 2001, unreported), Ch D; *affd* [2001] EWCA Civ 1840.
Ghaidan v Mendoza [2002] EWCA Civ 1533, [2002] 4 All ER 1162, [2003] Ch 380, [2003] 2 WLR 478.
Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287, HL.
- j *Osman v UK* (1998) 5 BHRC 293, ECt HR.
Poplar Housing and Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595, [2001] 4 All ER 604, [2002] QB 48, [2001] 3 WLR 183.
Pressos Cia Naviera SA v Belgium (1996) 21 EHRR 301, [1995] ECHR 17849/91, ECt HR.
Pridding v Secretary of State for Work and Pensions [2002] EWCA Civ 306.

Pye (JA) (Oxford) Ltd v Graham [2001] EWCA Civ 117, [2001] Ch 804, [2001] 2 WLR 1293; *rvsd* [2002] UKHL 30, [2002] 3 All ER 865, [2003] 1 AC 419, [2002] 3 WLR 221. a

R v Carass [2001] EWCA Crim 2845, [2002] 1 WLR 1714.

Scarff v Jardine (1882) 7 App Cas 345, [1881–5] All ER Rep 651, HL.

Application for permission to appeal b

Shaws (EAL) Ltd, the landlord of business premises at 130 Railton Road, Herne Hill, London SE24, applied for permission to appeal, with the appeal to follow if permission were granted, from the order of Pumfrey J on 28 November 2003 ([2002] EWHC 2769 (Ch), [2003] 3 All ER 1316, [2003] Ch 399) allowing an appeal by the respondent tenant, Walbert Pennycook, from the order of Judge Cox in the Lambeth County Court on 9 July 2002 striking out the tenant's claim, under s 24(1) of the Landlord and Tenant Act 1954, for a new tenancy of the premises. The facts are set out in the judgment of Arden LJ. c

Judith Jackson QC, who did not appear below (instructed by *asb Law*, Croydon), for the landlord. d

William Geldart (instructed by *Hallmark Atkinson Wynter*) for the tenant.

Cur adv vult

12 February 2004. The following judgments were delivered.

ARDEN LJ (giving the first judgment at the invitation of Thorpe LJ). e

[1] This is an application for permission to bring a second appeal, with the appeal to follow if permission is granted and an extension of time against the order dated 28 November 2002 of Pumfrey J whereby he allowed an appeal against the order of Judge Cox sitting in the Lambeth County Court.

[2] The facts are very simple. The respondent to this appeal (whom I shall call the tenant) is the tenant of premises known as 130 Railton Road, Herne Hill, London. The tenancy was a tenancy to which Pt II of the Landlord and Tenant Act 1954 applies. The tenancy was due to expire on 25 March 1999 and it continued after that date by virtue of s 24 of the 1954 Act. The appellant is the landlord of these premises and I shall refer to it as the landlord. On 4 July 2001 the tenant served an invalid notice under s 26 of the 1954 Act. Section 26(1) and (2) provide as follows: f

'Tenant's request for a new tenancy.—(1) A tenant's request for a new tenancy may be made where the tenancy under which he holds for the time being (hereinafter referred to as "the current tenancy") is a tenancy granted for a term of years certain exceeding one year, whether or not continued by section twenty-four of this Act, or granted for a term of years certain and thereafter from year to year. g

(2) A tenant's request for a new tenancy shall be for a tenancy beginning with such date, not more than twelve nor less than six months after the making of the request, as may be specified therein ...' h

[3] The notice under s 26 did not comply with s 26(2) since it required a new tenancy to be granted on 6 July 2001. j

[4] On 8 November 2001 the landlord served a notice under s 25 of the 1954 Act. Section 25(1) and (5) provide as follows:

Termination of tenancy by the landlord.—(1) The landlord may terminate a tenancy to which this Part of this Act applies by a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (hereinafter referred to as “the date of termination”) ...

(5) A notice under this section shall not have effect unless it requires the tenant, within two months after the giving of the notice, to notify the landlord in writing whether or not, at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy.’

[5] The landlord relied on certain breaches of covenant. On 4 December 2001 the tenant served a counter-notice which, in response to that part of the landlord’s notice which complied with s 25(5), stated in error that the tenant would be willing to give up possession of the property. I will refer to a counter-notice in this form as a ‘positive counter notice’ and to a counter-notice which states that the tenant is not willing to give up possession of the property as a ‘negative counter notice’. This follows the classification used by Brightman J in *Re 14 Grafton Street London W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1, [1971] Ch 935, to which I refer below.

[6] The error in the counter-notice was spotted before the two months for serving a counter-notice had expired. On 4 January 2002, the tenant served a negative counter-notice. He subsequently applied to the county court for the grant of a new tenancy in pursuance of s 24(1) of the 1954 Act (as amended), which provides as follows:

‘Continuation of tenancies to which Part II applies and grant of new tenancies.—(1) A tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the provisions of section twenty-nine of this Act, the tenant under such a tenancy may apply to the court for ... a new tenancy—(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy, or (b) if the tenant has made a request for a new tenancy in accordance with section twenty-six of this Act.’

[7] The landlord applied to strike out the proceedings on the basis that they disclosed no prospect of success. On this application, Judge Cox gave judgment in favour of the landlord.

[8] Section 29(2) of the 1954 Act provides that, where the landlord has served a notice under s 25, the court cannot entertain proceedings for a new tenancy unless the tenant has duly given a negative counter-notice:

‘Order by court for grant of a new tenancy.—(1) Subject to the provisions of this Act, on an application under subsection (1) of section twenty-four of this Act for a new tenancy the court shall make an order for the grant of a tenancy comprising such property, at such rent and on such other terms, as are hereinafter provided.

(2) Where such an application is made in consequence of a notice given by the landlord under section twenty-five of this Act, it shall not be entertained unless the tenant has duly notified the landlord that he will not be willing at the date of termination to give up possession of the property comprised in the tenancy ...’

RE 14 GRAFTON STREET

[9] The leading authority on the question whether the tenant can serve a second counter-notice in a different form is *Re 14 Grafton Street* above. The landlord's notice under s 25 was dated 27 September 1969 and it required possession to be given up on 1 April 1970. At that time, in order to claim compensation under s 37 of the 1954 Act, the tenant had to serve a negative counter-notice and apply to the court for a new tenancy. On 13 October 1969, the tenant served a positive counter-notice. Section 37 was amended by the Law of Property Act 1969 with effect from 1 January 1970 to remove the requirement that the tenant apply for a new tenancy. On 1 April 1970 the tenant vacated the premises and sought compensation. Two issues arose: first, whether the landlord acquired an indefeasible right to recover possession on 1 April 1970, without payment of compensation, before the amendment came into effect on 1 January 1970, and second, whether the amendment to s 37 of the 1954 Act had retrospective effect. Brightman J held that the landlord had acquired an indefeasible right to the property prior to 1 January 1970 and that accordingly the tenant had no right to compensation. It is to be noted that in this case there was neither the service of a negative counter-notice nor the making of any application to the court. The landlord argued that the landlord acquired an indefeasible right to possession and that they acquired this right before the commencement of the Law of Property Act 1969 on 1 January 1970.

[10] Brightman J ([1971] 2 All ER 1 at 6–7, [1971] Ch 935 at 943–944) reached a conclusion in favour of the landlord on two bases. The first basis was that the counter-notice was irrevocable:

‘There was some discussion, unsupported by authority as I was told none existed, whether the tenants could, on or before 27th November, have revoked their positive counter-notice and given the negative counter-notice required by s 29(2) to enable proceedings to be taken. In my view the purpose of s 25(5) is to introduce an element of certainty into the relationship between the landlord and the tenant. A tenant is not bound to serve a negative counter-notice before the end of the two month period allowed to him. He may pause for that period of time while he makes up his mind. If however he does serve a positive counter-notice during the two month period, I think that he must abide by what he has done. If that were not the case, the positive counter-notice would serve no purpose whatever compared with complete inaction, for in either case the landlord would not know where he stood until the end of the two month period. If a positive counter-notice is revocable, the tenant serving the same would be able to serve a negative counter-notice right up to the end of the two month period. If on the other hand the tenant does nothing, he may likewise serve a negative counter-notice right up to the end of the two month period. It follows that a positive counter-notice would be wholly devoid of any function, even that of courtesy, if it were revocable at the will of the tenant. I therefore conclude that a positive counter-notice is irrevocable; and that in this case the tenants ceased to be able to serve a negative counter-notice after 13th October 1969 and that they then lost their right to apply to the court for an order for the grant of a new tenancy.

I have not overlooked the fact that the Act of 1954 is not expressed to impose on the tenant an obligation to serve a notice of either description within the two month period. All that the Act does is to impose on the landlord, as a condition of a valid s 25 notice, the obligation of informing the

a tenant that he is required to serve a notice one way or the other within the two month period, and to place the tenant under a disability if he fails to serve a negative counter-notice. In my view, however, it is a necessary implication from s 25(5) that a tenant is under a statutory obligation to serve notice one way or the other within the two month period, although I accept that there is no sanction imposed on him for ignoring that obligation, except his inability to apply to the court.

b In these circumstances the position in my view was as follows. On 14th October 1969, ie about eight days before the Law of Property Act 1969 received the royal assent, the landlords had an indefeasible right to recover possession on 1st April 1970 without payment of compensation, if I am correct in my conclusion that the tenants were precluded from withdrawing their letter of 13th October, and from serving a negative counter-notice. c Alternatively, on 28th November, ie just over a month before the 1969 Act came into force, the landlords had an indefeasible right to recover possession on 1st April 1970 without payment of compensation, if, contrary to my view, the tenants were able, notwithstanding their letter of 13th October, to serve a negative counter-notice after that day. d

[11] In the later case of *Bridgers and Hamptons Residential v Stanford* (1991) 63 P & CR 18, this court had to consider whether a notice which did not comply with s 25 in several respects was none the less a valid notice. One of the defects in the notice was that it did not comply with the requirements of s 25(5) in that it only required the tenants to notify the landlord in writing within two months if they were not willing to give up possession. In other words it required the tenants to give a negative counter-notice but it did not require them to give a positive counter-notice if they were willing to give up possession. This court held that the notice was valid. It applied a purposive approach to the construction of the 1954 Act. It held that the object of the positive counter-notice was to introduce certainty into the transaction for the benefit of the landlord alone, and accordingly the requirement to make a statement about a positive counter-notice could be waived by the landlord. Lloyd LJ, having set out part of the passage from the judgment of Brightman J in *Re 14 Grafton Street* set out above, held (at 22):

g 'The importance of the passage for us lies in the judge's view that the only purpose of the positive counter notice is to introduce certainty into the transaction. By contrast, the negative counter notice serves another obvious purpose, since it links in directly with section 29(2) of the Act. If that is right, h as I believe it to be, I ask myself next, what was the object of introducing certainty into the transaction in the case of a positive counter notice? Was it for the benefit of the landlord or the tenant or both? The answer to that question must surely be that it was for the benefit of the landlord alone. Mr. Elvin (counsel for the tenant) sought to persuade us that certainty could also have been for the benefit of the tenant. But as Nourse L.J. pointed out j in the course of the argument, the tenant must know already if he is willing to give up possession. If he knows, how could the giving of a positive counter notice make him more certain of that fact? So far from being a benefit to the tenant, the only foreseeable consequence to him of giving a positive counter notice is prejudicial. Once given, the notice cannot be withdrawn, as the judgment of Brightman J. demonstrates.'

[12] Nourse and Ralph Gibson LJ delivered concurring judgments.

[13] Judge Baker QC, sitting as a deputy judge of the Chancery Division, in the case of *Baglarbasi v Deedmethod Ltd* [1991] 2 EGLR 71 also accepted the view that a counter-notice once given was irrevocable. He took the view that once a positive counter-notice was served, the landlord could proceed on the basis that the tenant was willing to give up possession. He referred to *Re 14 Grafton Street*.

THE JUDGMENTS BELOW

[14] In this case Judge Cox followed *Re 14 Grafton Street*. In addition he rejected any argument based on s 3 of the Human Rights Act 1998 but he gave permission to appeal to the High Court on human rights grounds.

[15] The appeal came before Pumfrey J ([2002] EWHC 2769 (Ch), [2003] 3 All ER 1316, [2003] Ch 399). The judge did not decide the case on human rights grounds as anticipated. He took the view that the decision in *Re 14 Grafton Street* was distinguishable. He held that Brightman J had been unable to identify any practical function which was performed by a positive counter-notice except to act as an act of courtesy to the landlord, and that on that basis it was, at first sight, surprising that the effect of serving a positive counter-notice was to preclude the tenant from later serving a negative counter-notice within the two-month period.

[16] With respect to Pumfrey J, it seems to me that his observation about the judgment of Brightman J overlooks the fact that Brightman J was satisfied that the effect of the serving of the first counter-notice was to prevent the serving of a further different counter-notice. That by implication this gave a positive counter-notice the function that it would otherwise lack.

[17] The crux, however, of the judge's conclusions on *Re 14 Grafton Street* follows on from the citation of most of the first complete paragraph of the judgment of Brightman J set out above, but stopping at the word 'irrevocable' in the last sentence. The judge then said:

[16] I approach this passage with all the respect which is owing from me to a judge of great experience and authority in this field. I would, however, respectfully doubt whether the "therefore" in the words, "I therefore conclude that a positive counter-notice is irrevocable" in fact indicates a logical conclusion from the premises. It seems to me that it is a possible view that a positive counter-notice is not devoid of any function including that of courtesy if the tenant gives it, and thereafter it is acted upon by the landlord. If, however, there is no (to use a shorthand expression) "change of position" on the part of the landlord in reliance upon the serving of a positive counter-notice, I do not, as presently advised, understand why it is necessary to conclude that the counter-notice is irrevocable. Mr Vickery, who appeared on behalf of the landlord in the present case, suggested a number of reasons why that should be so. He pointed to the symmetrical nature of the provisions of the statute relating first of all to landlord's notices under s 25 and secondly to the tenant's notice under s 26. He pointed out, correctly, that if a landlord gives a counter-notice, as is permitted under s 26(6), it is well settled that the grounds of opposition set out in such a notice are, like the grounds of opposition specified in the landlord's notice under s 25, unamendable and irrevocable. He submits that to treat the tenant's counter-notice under s 25(5), albeit it appears to have no other legal effect, as revocable, introduces an anomaly in the scheme of the 1954 Act which must be doubtful in view of the irrevocability of the other notices.

a [17] Mr Vickery submitted further that there is a good reason for treating
a tenant's positive counter-notice as irrevocable. If the only question, he
says, is whether in all the circumstances it is fair to allow the tenant to resile
b from a positive counter-notice, then an undesirable species of satellite
litigation is introduced into a well-understood, well-circumscribed, kind of
application made all the time in the county court and well understood by all
involved. He says that it is thoroughly undesirable to introduce into this
well-understood system a possibility of satellite disputes as to the validity of
c tenants' negative notices if previous positive notices have been given and the
tenant has for some reason or other changed its mind.

d [18] I see the force of these submissions. However, I am not satisfied that
in point of fact the circumstances arising here are likely as a practical matter
to arise at all frequently. There can be little doubt that there is no question
of a change of mind here, but a simple error on the part of the solicitor.
Second, I cannot see why, in the ordinary course, a tenant will give a positive
notice unless quite satisfied that it does indeed intend to give up possession
e at the end of the notice period. I am not satisfied that positive
counter-notices are such a common phenomenon in any event that it is
necessary to consider the risks involved from the point of view of the proper
administration of justice in permitting, in a proper case, a negative
counter-notice to be substituted for a positive counter-notice already given.
So although I freely accept the possibilities to which Mr Vickery referred, I
doubt very much whether in point of fact they amount to a cogent objection
f to the construction of the relevant provisions, which I prefer. The
construction which I prefer is that s 29(2) is satisfied if in point of fact within
the two-month period, thus giving proper emphasis to the word "duly", a
notice stating that the tenant will not be willing at the date of termination to
give up possession, has in point of fact been given.

g [19] I do not believe that this construction is precluded by the judgment of
Brightman J, since in that case although Brightman J [held] that the landlords
had an indefeasible right to recover possession on 1 April 1970 without
payment of compensation, Brightman J is considering the indefeasible right
of landlords having regard to the ability of the tenants to give a negative
counter-notice after 13 October. It is to be observed that in that case no
negative counter-notice was in fact given. The point, therefore, did not arise
and the tenants took no steps to raise the question until after the expiry of
the two-month period. I do not think it can be seriously contended that the
two-month period is in any way extensible, and it would follow, therefore,
that after the expiry of the two-month period the landlord's right became
h indefeasible whether or not during the period from 13 October to
27 November there had been a contingent right in the tenants to revoke their
original positive notice. Accordingly, it does not seem to me that this
determination was essential to the decision of Brightman J, but if that is a
wrong analysis I would, to the extent that I have indicated, very respectfully
j disagree with the generality of what he said.

[20] It follows that in my view this appeal ought to succeed on the grounds
that the tenant was entitled to give a second notice and that s 29(2) was
potentially satisfied. However, it seems to me that in any case where the
tenant has made a positive representation, it will be a question whether it is
in fact entitled to resile from the positive notice which is given in answer to
a s 25 notice given by the landlord. I say no more about that in this case, save

to say that it must be open to the court to determine that in all the circumstances it is wrong for a tenant to seek to substitute a new statement of his intention for the purposes of s 29(2), but each such case must be dealt with on its own merits. I would accordingly allow this appeal on this ground.'

[18] The judge accordingly concluded that a second counter-notice could be served within the two-month period allowed by the 1954 Act. He further concluded that the decision of Brightman J turned on the fact that there was no negative counter-notice. Alternatively, if the judge was wrong on this, the judge disagreed with the judgment of Brightman J. In the final paragraph cited above, the judge held that a different result might be appropriate where the tenant had made a positive representation and it would be wrong for the tenant to be allowed to resile from his original position.

[19] Unfortunately, as the appeal to the High Court was expected to turn on the human rights authorities, the decision of the Court of Appeal in *Bridgers and Hamptons Residential v Stanford* (1991) 63 P & CR 18 was not cited to Pumfrey J. The judge was, therefore, led to believe that there was no authority binding on him. This case is regrettably a cautionary tale against deciding cases on points other than those on which the advocates are properly prepared to address the court. That course carries risks. It also demonstrates the reliance which the court must inevitably place on advocates to cite the relevant law. The judge mistakenly thought that he could decide the case without further citation and without dealing with the human rights issues.

SUBMISSIONS

[20] On this appeal, Miss Judith Jackson QC, who did not appear below, submits that the *Bridgers* case represents binding authority which precluded the judge from departing from the reasoning of Brightman J in *Re 14 Grafton Street London W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1, [1971] Ch 935. She also submits that in any event the conclusion of Brightman J follows from the doctrine of election. Under the doctrine of election, once a party has made a clear choice between two inconsistent rights, with the knowledge of the facts that gave rise to those rights, he cannot reverse that choice. The paradigm example of election is the acceptance of rent from a tenant who is in breach of covenant. This constitutes an election not to forfeit the lease on the ground of the breach of covenant: see for example, *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610, [1972] 1 WLR 1048. The doctrine of election was recently considered by Robert Walker LJ in *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [1999] 2 All ER 791 at 798–799, [2000] Ch 12 at 27, who said this:

'In his first judgment the judge considered the old case of *Doe d Cheney v Batten* ((1775) 1 Cowp 243, [1775–1802] All ER Rep 594), and the recent discussion of it by Knox J in *Dun & Bradstreet Software Services (England) Ltd v Provident Mutual Life Assurance Association* (2 April 1995, unreported). But before any detailed consideration of those cases it is necessary to make some general observations about estoppel, election and waiver. All share a common foundation in a simple instinct of fairness, and in particular the perception that as between two parties to a transaction or a legal relationship it is or may be unfair for one party (A) to adopt inconsistent positions in his dealings with the other (B). As Lord Wilberforce said in *Johnson v Agnew*

[1979] 1 All ER 883 at 894, [1980] AC 367 at 398: "Election, though the subject of much learning and refinement, is in the end a doctrine based on simple considerations of common sense and equity." Equitable (or promissory) estoppel applies only where there is an unequivocal representation (in words or conduct) by A and it is relied on by B. That does not arise here (the tenant's original pleading of estoppel was concerned with the identity of the landlord to which the notice was addressed, a point which is no longer live). In election, by contrast, A's words or conduct unequivocally evince a choice by A between inconsistent alternatives. In such a situation reliance by B on A's unequivocal words or conduct (as opposed to B's knowledge of what A has said or done) is not a necessary ingredient. But knowledge on the part of A that there is a choice to be made is a necessary ingredient. He must make an informed choice. But as Stephenson LJ said in *Peyman v Lanjani* [1984] 3 All ER 703 at 724, [1985] Ch 457 at 487: "When a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption ..."

[21] As Robert Walker LJ makes clear, it is not necessary for it to be shown that there was reliance on the choice made.

[22] Mr William Geldart, for the tenant, seeks to uphold the judgment of Pumfrey J. He submits that there is no requirement for a positive counter-notice, and that the landlord does not obtain full certainty until the two month period has expired. He, therefore, challenged the first ground on which Brightman J decided *Re 14 Grafton Street* and did not press any challenge to the alternative ground of Brightman J's decision. On his submission, his interpretation gives the landlord some assurance and he can start to make some arrangements for the termination of the tenancy. As I see it, this is not certainty at all. It deprives the positive counter-notice of any effect.

[23] Mr Geldart also submits that a positive counter-notice, if properly construed, is not unequivocal because there are very likely to be negotiations between the landlord and tenant. In my judgment, this is not a strong argument since the effect of a notice must turn on the Act rather than on what may or may not be happening outside the Act.

[24] Mr Geldart further submits that the 1954 Act makes a specific reference to election in Pt 1, s 13(1). This refers to a tenant electing to retain possession in the case of residential premises. In my judgment, this reference does not help Mr Geldart. Although there is no equivalent reference in Pt II, the reference to election in Pt I shows that election is the appropriate concept to use when a tenant makes a choice as to whether to stay in possession or give up possession.

[25] Mr Geldart then submits that an elector must generally obtain a benefit from his election: see 16(2) *Halsbury's Laws* (4th edn reissue) para 962. But in this case, it cannot be said that there is no benefit to the tenant since when the notice takes effect he will be discharged from the covenants on the lease. Mr Geldart's answer to this is that the tenant could serve his own notice under s 27(2) of the 1954 Act but this only arises when the tenant is holding over.

[26] Mr Geldart makes further submissions on the subject of human rights. He contends that the statutory right to renew is a form of property for the purposes of art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) but that election would violate this right to property conferred by art 1 of the First Protocol since it is disproportionate in its

effect on the tenant. Moreover, he submits that the consequence of election would also be to give minimal benefit to the landlord who always retains the reversion. He submits that Parliament did not provide expressly for election, and that it did not have in mind the possibility that the tenant might be disadvantaged by serving the first notice under a mistake and then serving the second notice. Mr Geldart submits for similar reasons that the decision in *Re 14 Grafton Street* violates the tenant's right of access to court under art 6 of the convention. On Mr Geldart's submission, the court is bound to reject the interpretation placed on s 25 by *Re 14 Grafton Street* by virtue of its interpretative obligation under s 3 of the 1998 Act.

CONCLUSIONS

[27] In my judgment, Pumfrey J was bound by the decision of this court in *Bridgers and Hamptons Residential v Stanford* (1991) 63 P & CR 18. In that case it is part of the ratio of the court's decision that the decision of Brightman J in *Re 14 Grafton Street* was correct. The basis of the relevant part of the decision was that the counter-notice brought about an irrevocable change in the relationship between the landlord and tenant. On that basis, it was not open to a tenant to serve a second counter-notice. In the case of a positive counter-notice, this gave the landlord (but only the landlord) an advantage, which he could decide to waive.

[28] Miss Jackson has emphasised the doctrine of election. In my judgment, Brightman J reached his conclusion on the irrevocability of a counter-notice once served on the basis that that was Parliament's intention, ie as a matter of statutory construction. The doctrine of election may well have supplied the inspiration for the construction, but Brightman J, rightly in my respectful view, does not say that. He was entitled to use the technique of election since Parliament is presumed to know the law. However that may be, the construction reached by Brightman J is a construction which has stood for over thirty years and has been followed in at least two reported cases.

[29] In the circumstances, the decision of Pumfrey J cannot stand unless the flexible result which he held should apply is the construction now required to be placed on ss 25 or 29(2) of the 1954 Act by reason of the court's duty under s 3 of the 1998 Act to construe legislation whenever enacted compatibly with convention rights so far as it is practicable so to do. I therefore turn to consider whether the interpretation of the 1954 Act adopted in *Re 14 Grafton Street* violates the tenant's convention rights. Mr Geldart has relied on art 1 of the First Protocol to the convention and art 6 of the convention. It is to those rights that I now turn.

ARTICLE 1 OF THE FIRST PROTOCOL

[30] Article 1 of the First Protocol provides in material part that—

'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

- a [31] The first question is whether the statutory right to renew a business tenancy conferred by Pt II of the 1954 Act is a 'possession' for the purposes of art 1 of the First Protocol. This question was not decided by this court in *CA Webber (Transport) Ltd v Railtrack plc* [2003] EWCA Civ 1167, [2004] 1 WLR 320. In that case this court held that a notice under s 25 was served when it was put into the post rather than when it was received in the ordinary course of post, although
- b Longmore LJ (at [60]) in effect expressed the view that the right was a right for the purposes of art 1 (cf [45] per Peter Gibson LJ). In *Wilson v First County Trust Ltd* [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568, an issue arose as to whether a statutory bar imposed by s 127(3) of the Consumer Credit Act 1974 on the right of a lender to enforce security obtained from the borrower engaged
- c art 1, but the House was divided on this issue. Lord Nicholls of Birkenhead (at [44]) considered that art 1 was engaged. Lord Hope of Craighead (at [108]) and Lord Scott of Foscote (at [168]) came to the opposite conclusion. It was unnecessary for Lord Rodger of Earlsferry (at [220]) to deal with the point as he was content to decide the appeal solely on the retrospectivity issue, though in so approaching the case he may have proceeded on the basis that art 1 was engaged.
- d Lord Hobhouse of Woodborough (at [136]–[137]) considered that art 1 would have been engaged if the transaction was one of pledge but not if the lender was seeking to enforce a right which it had never validly acquired.

[32] There are important differences between s 127(3) of the 1974 Act and the relevant provisions of the 1954 Act. Section 24 of the 1954 Act provides for business tenancies to which Pt II of the 1954 Act applies to continue unless

e terminated in accordance with the provisions of that Part. Accordingly, subject to the provisions of Pt II, the tenant has a statutory right to the continuation of his tenancy. Moreover, again under s 24, he has a statutory right to a new tenancy if the landlord has served a notice under s 25. I have set out the material provisions of ss 24, 25 and 29 above.

- f [33] For the tenant to succeed on its art 1 argument, it has to satisfy the court not merely that it has a right to renew the tenancy by serving a negative counter-notice but also that it has a right to give that notice at any time within the statutory period of two months even if it has previously served a positive counter-notice. It has to argue that the interpretation placed on Pt II of the 1954
- g Act by *Grafton Street (14) London W1, Re, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1, [1971] Ch 935 is not merely a limitation on the right to apply for a new tenancy but a deprivation of the right where a positive counter-notice has been served first.

- [34] In my judgment, the speech of Lord Nicholls in *Wilson v First County Trust Ltd* contains the most detailed guidance as to how the tenant's statutory right in
- h this case should be analysed. He held:

- j '[39] ... "Possessions" in art 1 is apt to embrace contractual rights as much as personal rights. Contractual rights may be more valuable and enduring than proprietary rights. But, by virtue of the statute, the contractual rights acquired by First County Trust were enforceable only with the consent of the borrower pursuant to s 173(3).

[40] The response of the Secretary of State and others is that all the rights acquired by First County Trust under the agreement were from their inception subject to the limitations prescribed by the 1974 Act. A restriction on the scope of the rights acquired by a lender under a transaction is not within art 1 of the First Protocol. A person who acquires property subject to

limitations under national law which subsequently bite according to their tenor cannot complain that his rights under art 1 of the First Protocol have been infringed.

[41] I do not agree. This proposition is stated too widely and too loosely to be acceptable. Clearly, the expiry of a limited interest such as a licence in accordance with its terms does not engage art 1. That is not this case. Here the transaction between the parties provided for repayment of the loan and for the car to be held as security. What is in issue is the "lawfulness" of overriding legislation. The proposition advanced by the Secretary of State would mean that however arbitrary or discriminatory such legislation might be, if it was in existence when the transaction took place a court enforcing human rights values would be impotent. A convention right guaranteeing a right of property would have nothing to say. That is not an attractive conclusion.

[42] There are of course many circumstances where statutes empower the Executive or the courts to make orders depriving a person of some of his possessions. Compulsory acquisition, and property adjustment orders on divorce, are instances. The exercise of powers such as these *prima facie* engages art 1. This is so irrespective of whether the enabling statute was enacted before or after the property affected by the order was acquired. *Håkansson v Sweden* (1991) 13 EHRR 1 is an example where the law was in place before the property in question was acquired. The law providing for the compulsory resale of the applicants' land within two years existed when they bought the land. Thus a provision in the 1974 Act empowering a court to refuse to enforce a regulated agreement may engage art 1 even though the Act was in force before the agreement was entered into.

[43] In the present case the relevant statutory provisions are framed differently. They do not empower the court to refuse to enforce the agreement now in question. They go further. The court is compelled to refuse to make an enforcement order. Is this difference material? I think not. It would be passing strange if art 1 were engaged in the former case but not the latter. A law regulating the effect of a transaction between the parties in the public interest does not always escape review under art 1 of the First Protocol. Such a law may infringe art 1 if it creates an "imbalance" between the parties which would result in one party being arbitrarily or unjustly deprived of his possessions for the benefit of the other (see *Bramelid v Sweden* (1982) 5 EHRR 249 at 256).

[44] Thus the question in the present case is one of characterisation of the nature and effect of the relevant provisions of the 1974 Act, considered as a matter of substance rather than form. In my view, consistently with the underlying objective of art 1 of the First Protocol, the relevant provisions in the 1974 Act are more readily and appropriately characterised as a statutory deprivation of the lender's rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction. The rigid ban on enforcement of security and contractual rights prescribed by s 127(3) alone and in conjunction with ss 106 and 113 engages art 1 of the First Protocol. The lender's rights were extinguished in favour of the borrower by legislation for which the state is responsible. This was a deprivation of possessions within the meaning of art 1 (see *James v UK* (1986) 8 EHRR 123 at 140 (para 38)). Whether this statutory interference

a with First County Trust's peaceful enjoyment of its possessions was justified, and therefore not a breach of art 1, is a separate issue.'

b [35] On this analysis the court must look at the substance of the claimed right to see whether the bar in this case to the exercise of the tenant's right is a delimitation of the right or whether it represents a deprivation of right. A relevant circumstance is that the bar is rigid, arbitrary or discriminatory. Lord Nicholls referred in terms to contractual rights, but a statutory right of the kind in issue in this case cannot be distinguished from a contractual right for art 1 purposes: a statutory right is an asset of the tenant in just the same way that a contractual right would be.

c [36] Lord Hope was the only other member of the House to consider in general terms the distinction between the delimitation of a right on the one hand and the deprivation of a right. He held:

d '[106] Article 1 of the First Protocol has a similar character [to art 6(1)]. It does not confer a right of property as such nor does it guarantee the content of any rights in property. What it does instead is to guarantee the peaceful enjoyment of the possessions that a person already owns, of which a person cannot be deprived except in the public interest and subject to the conditions provided for by law: (*Marckx v Belgium* (1979) 2 EHRR 330 at 350 (para 50)). Here too it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into. One must, of course, distinguish carefully between cases where the effect of the relevant law is to deprive a person of something that he already owns and those where its effect is to subject his right from the outset to the reservation or qualification which is now being enforced against him. The making of a compulsory order or of an order for the division of property on divorce are examples of the former category. In those cases it is the making of the order, not the existence of the law under f which the order is made, that interrupts the peaceful enjoyment by the owner of his property. The fact that the relevant law was already in force when the right of property was acquired is immaterial, if it did not have the effect of qualifying the right from the moment when it was acquired.

g [107] The rights of property which are in issue in this case are those set in an agreement which is regulated by the 1974 Act. The Act subjects the rights of the creditor to restrictions in some circumstances. Section 65 declares that a regulated agreement which is improperly executed cannot be enforced by the creditor except by means of an order of the court, and s 127(3) declares that it is not to be enforceable at all except upon the condition which it lays h down. The agreement which was entered into in this case was from the outset an agreement which was improperly executed. So it was always subject to the restrictions on its execution which ss 65(1) and 127(3) of the 1974 Act set out. I would hold that [First County Trust's] convention rights under art 1 of the First Protocol are not engaged in these circumstances.

j [108] The Court of Appeal ([2001] 3 All ER 229 at [32]) said that the effect of ss 65(1) and 127(3) was to deprive the pawnbroker of its ability to enjoy benefit from the contractual rights arising from the agreement or from the rights arising from the delivery of the pawn. But the fact is that [First County Trust] never had an absolute and unqualified right to enforce this agreement or to enforce the rights arising from the delivery of the motor car. Article 6(1) of the convention and art 1 of the First Protocol cannot be used

to confer absolute and unqualified rights on [First County Trust] which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into. a

[109] As I would hold that art 1 of the First Protocol is not engaged in this case, I do not need to examine the question whether s 127(3) is compatible with the rights guaranteed by that article. Had it been necessary for me to do so, I would have reached the same conclusion as Lord Nicholls of Birkenhead has done for the reasons he gives. b

[37] Accordingly Lord Hope reached the opposite conclusion to that of Lord Nicholls on the question whether art 1 was ever engaged on the footing that the agreement in the instant case had from the outset been an agreement which was improperly executed. Section 127(3) of the 1974 Act did not deprive him of anything to which he had ever been entitled. c

[38] Returning to the statutory scheme in the present case, I consider that the correct analysis is that the tenant had a right to apply to the court for a continuation of a tenancy if he served the requisite notice at any time within the period of two months from service of the landlord's notice (see s 25(5)). The bar that arises if he first serves a positive counter-notice is not apparent on the face of ss 25(5) or 29(2). In those circumstances I consider that it is more accurately analysed as a deprivation of a right rather than a delimitation of a right. That means that the court is obliged to scrutinise the interpretation placed on Pt II of the 1954 Act in *Re 14 Grafton Street London W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1, [1971] Ch 935 to see whether it complies with art 1. It has not been argued that the conditions are not provided for by law. Moreover, given that *Re 14 Grafton Street* was decided over 30 years ago and has been applied since, I doubt whether that requirement could be successfully challenged. d

[39] The remaining issue is whether the restriction imposed by *Re 14 Grafton Street* is in the public interest and fairly balances the respective interests of landlords and tenants. e

[40] On this issue, too, Lord Nicholls' speech provides assistance. He held: f

'[68] I turn now to consider whether s 127(3) of the 1974 Act is compatible with the rights guaranteed by art 1 of the First Protocol. Inherent in art 1 is the need to hold a fair balance between the public interest and the protection of the fundamental rights of creditors such as First County Trust. It is common ground that s 127(3) pursues a legitimate aim. The fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another (see the leasehold enfranchisement case of *James v UK* (1986) 8 EHRR 123 at 141, (para 41)). More specifically, persons wishing to borrow money are often vulnerable. There is a public interest in protecting such persons from exploitation. g

[69] There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The means chosen to cure the social mischief must be appropriate and not disproportionate in its adverse impact. Whether that relationship exists in the case of s 127(3) is the key issue. h

[70] In approaching this issue, as noted in *R v Johnstone* [2003] UKHL 28 at [51], [2003] 3 All ER 884 at [51], [2003] 1 WLR 1736, courts should have in mind that theirs is a reviewing role. Parliament is charged with the primary responsibility for deciding whether the means chosen to deal with a social problem are both necessary and appropriate. Assessment of the advantages and disadvantages of the various legislative alternatives is primarily a matter for Parliament. The possible existence of alternative solutions does not in itself render the contested legislation unjustified (see the *Rent Act* case of *Mellacher v Austria* (1990) 12 EHRR 391 at 411 (para 53)). The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's convention right. The readiness of a court to depart from the views of the legislature depends upon the circumstances, one of which is the subject matter of the legislation. The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.'

[41] It is evident in this case that the interpretation placed on the 1954 Act in *Re 14 Grafton Street* has the advantage that if the landlord receives a positive counter-notice in response to his s 25 notice he can make arrangements for what is to happen on the termination of the tenancy. There are obvious economic benefits to both landlord and tenant in having certainty at this stage, if possible, and this is so even if it is rare for a positive counter-notice to be given. The fact that in an exceptional case hardship occurs does not undermine that conclusion. It is difficult (though not impossible) to think of an exceptional case other than that where the tenant erroneously serves a positive counter-notice as here. All such cases are probably rare, and the law could not produce certainty yet be flexible in this case. The need for certainty in the area of termination of business tenancies was also a consideration in this court's reasoning in *CA Webber (Transport) Ltd v Railtrack plc* [2004] 1 WLR 320. In other words, I do not see that there is anything obviously wrong with the balance that Parliament has drawn with respect to the issue in this case. As Lord Nicholls said in *Wilson's* case, the role of the courts is a supervisory one. Moreover, in my judgment, the courts will be less ready to intervene where the legislation concerns matters of economic policy, as here, than in some other cases. Such other cases may include legislation which affects an individual's right to freedom of expression or his right to respect for his private life. There is no material difference for this purpose between matters of broad social policy, to which Lord Nicholls referred, and matters of economic policy. Accordingly, I conclude that, even though art 1 is engaged it is not in the circumstances violated.

[42] Miss Jackson has drawn our attention to the fact that as from 1 June 2004 ss 25(5) and 29(2) will no longer be in force and the tenant will be able to make an application for a new tenancy under s 24(1) at any time before the date specified in the landlord's s 25 notice (see the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI 2003/3096). This indicates that Parliament has restricted the balance between landlord and tenant in this area. However, the amendment does not apply to the proceedings in this case: Parliament has not decided to apply the change retrospectively. Moreover, the repeal of ss 25(5) and 29(2) clearly forms part of a package of changes in the law, including power for the landlord to apply for an interim rent to be fixed at any time after he serves his s 25 notice. Mr Geldart has not suggested that the court should take this statutory instrument into account when considering the question of the proportionality of

the construction imposed on the 1954 Act by *Re 14 Grafton Street*. In my judgment, he was right not to do so. Accordingly the prospective repeal of ss 25(5) and 29(2) does not affect the conclusion which I have reached above. a

ARTICLE 6(1)

[43] Article 6(1) of the convention secures the right of access to court for the determination of civil rights and obligations. In my judgment, the right to apply for a new tenancy is a 'civil right' for this purpose. However, art 6(1) does not guarantee the content of any particular civil right (see *Wilson's case* [2003] 4 All ER 97 at [32]–[37], [103]–[105], [145], [165]–[166]). Accordingly, on the basis that the interpretation on Pt II of the 1954 Act in *Re 14 Grafton Street* does not violate art 1 of the First Protocol, it is difficult to see how it could violate art 6(1) even if that article applies. To apply it would have to be characterised as a procedural bar. Lord Nicholls, with whom Lord Scott and Lord Rodger agreed on this point (see [2003] 4 All ER 97 at [165] and [215], respectively), points out that it can be difficult to distinguish procedural and substantive bars: b

[35] The distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case. As a matter of drafting, a restriction on the scope of a right may be framed in several different ways. But the drafting technique chosen by the draftsman cannot be determinative of this issue. Human rights conventions are concerned with substance, not form, with practicalities and realities, not linguistic niceties. The crucial question in the present context is whether, as a matter of substance, the relevant provision of national law has the effect of preventing an issue which ought to be decided by a court from being so decided. The touchstone in this regard is the proper role of courts in a democratic society. A right of access to a court is one of the checks on the danger of arbitrary power. In *Matthews v Ministry of Defence* ([2003] UKHL 4 at [142], [2003] 1 All ER 689 at [142], [2003] 1 AC 1163), Lord Walker of Gestingthorpe noted that art 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system. Lord Hoffmann observed (at [29]), that it should not matter how the law is framed, provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers. d

[36] In the present case the essence of the complaint is that s 127(3) of the 1974 Act has the effect that a regulated agreement is not enforceable unless a document containing all the prescribed terms is signed by the debtor. In my view, thus framed, the complaint does not bring art 6(1) into play. In terms of labels, that is a restriction on the scope of the rights a creditor acquires under a regulated agreement. It does not bar access to court to decide whether the case is caught by the restriction. It does bar a court from exercising any discretion over whether to make an enforcement order. But in taking that power away from a court the legislature was not encroaching on territory which ought properly to be the province of the courts in a democratic society. e

[37] In reaching the opposite conclusion the Court of Appeal focused on the exclusion of any meaningful consideration by the court of the creditor's rights under the agreement in a case where the document signed by the debtor does not include all the prescribed terms. The court held ([2001] 3 All ER 229 at [31], [32], [2002] QB 74 at [31], [32]) that the exclusion of any f

a judicial remedy in such a case engages art 6(1). I am unable to agree. The inability of the court to make an enforcement order in such a case, whatever the circumstances, is a limitation on the substantive scope of a creditor's rights. It no more offends the rule of law and the separation of powers than would be the case if Parliament had said that such an agreement is void.'

b [44] For my part, consistently with my conclusions on the art 1 issue, I do not consider that it has been shown that there is a good reason why in a democratic society a court should hear applications which fall to be dismissed on the interpretation of the 1954 Act in *Re 14 Grafton Street London W1, De Havilland (Antiques) Ltd v Centrovincial Estates (Mayfair) Ltd* [1971] 2 All ER 1, [1971] Ch 935. Thus the test set out by Lord Nicholls is not met. The bar in this case is more naturally seen as a bar on a substantive right rather than as a procedural bar, and in this respect it may be compared with the bar on enforcement in issue in *Wilson's* case. Accordingly, in my judgment, art 6(1) is not engaged in this case.

c [45] If art 6(1) were engaged, the bar in this case would violate art 6(1) if the essence of the right to apply for a new tenancy is destroyed, or the bar fails to meet the requirement of proportionality, or if the bar does not achieve a legitimate aim. However, the bar clearly does not destroy the essence of the right since the tenant could have applied to the court if he had served the right notice, and the same arguments as to proportionality as apply under art 1 would apply under this article also. The bar serves a legitimate aim as it forms part of a scheme of regulation for the renewal of business tenancies. Accordingly, if I had concluded that art 6 was engaged in this case, I would have concluded that it was not violated.

EXTENSION OF TIME

[46] I must finally deal with the question of an extension of time. The appellant filed his appellant's notice on 17 March 2003, over three months late. f The delay was due to mistakes on the part of the appellant's former solicitors. The firm acting on the appeal before Pumfrey J merged with another firm. One of the constituent firms was involved in an office move. The solicitor involved in the matter was not aware of the time limit. The matter was then handed to a solicitor experienced in litigation within the new firm. He appreciated in January 2003 that the time limit for filing the appeal had been exceeded. However, he g himself was caught up with a lengthy trial and that led to a delay in the filing of the appellant's notice.

[47] However, the respondent was told on 23 January 2003 that the appellant was considering an appeal.

h [48] Mr Geldart relied on *Sayers v Clarke Walker (a firm)* [2002] EWCA Civ 645, [2002] 3 All ER 490, [2002] 1 WLR 309 for submission that this was not a complex case. Brooke LJ in that case considered that cases which were not complex could be dealt with on the basis of the information provided in the appellant's notice. I do not see how this point can assist Mr Geldart. In any event, in referring to non-complex cases Brooke LJ, in my judgment, was referring to cases where the reasons for delay rather than the underlying appeal were straightforward. In this case they are clearly not straightforward, and indeed, when the matter came before Mance LJ on paper for permission to appeal and an extension of time, he set the matter down so that the respondent could be heard on the issue of an extension of time.

j [49] However, having heard both parties, the crucial point in my judgment is that the tenant was not prejudiced because it continued to be in possession of the

property and to be liable to pay rent on the same basis as before by virtue of s 64 of the 1954 Act. Moreover, the appeal was clearly one which had merit. In those circumstances, in my judgment, this was an appropriate case for the granting of an extension time. I would accordingly in principle allow the appellant's application in that respect. On the other hand, I would do so on the condition that the appellant is liable to pay the respondent's costs caused by the application for an extension on an indemnity basis and would wish to hear counsel as to the appropriate proportion of the costs of the appeal overall that should be allocated to the costs involved in the application for an extension of time. a
b

DISPOSITION

[50] I would allow the application for permission to appeal and the appeal. I would extend time for the application for permission to appeal on the basis set out above. c

SIR MARTIN NOURSE.

[51] I agree.

THORPE LJ.

[52] I also agree. d

Application for permission to appeal allowed. Appeal allowed.

Kate O'Hanlon Barrister.

Pickett v Roberts and another

[2004] EWCA Civ 6

COURT OF APPEAL, CIVIL DIVISION

PILL, CHADWICK AND MAY LJJ

25 NOVEMBER 2003, 22 JANUARY 2004

Motor Insurance – Motor Insurers’ Bureau – Liability of bureau to satisfy judgment against uninsured driver – Passenger allowing herself to be carried in vehicle she knew to be uninsured – Passenger telling driver to stop vehicle when driver driving dangerously – Whether passenger withdrawing consent to be carried – Motor Insurers’ Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1988, cl 6(1)(e).

The claimant owned a car but had no vehicle insurance. She and her boyfriend (the driver) decided to go out for a drive. The driver began to perform handbrake turns and drive dangerously. The claimant was frightened and told the driver to stop the car. He continued to drive dangerously and lost control of the car. The claimant suffered serious injuries. She brought proceedings against the driver, and as there was no prospect of recovering damages from him, the Motor Insurers’ Bureau (MIB) was added as a defendant. Judgment was awarded against the driver. The claimant claimed against the MIB under the Motor Insurers’ Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1988 under which, if a judgment was not satisfied in relation to a liability in respect of which a policy of insurance was obliged to be in force in order to comply with the Road Traffic Act 1972, the MIB would satisfy the judgment, subject, inter alia, to the provisions of cl 6^a of the 1988 agreement. Clause 6(1)(e) excepted the MIB from satisfying a judgment where, inter alia, at the time of the use which gave rise to the liability the person suffering injury was allowing himself to be carried in the vehicle and knew before the commencement of the journey that the vehicle was not insured. The judge dismissed her claim and the claimant appealed. It was common ground that the claimant knew that the vehicle was being used without insurance. The issue before the Court of Appeal was whether, at the time of the use which gave rise to the driver’s liability to the claimant, the claimant was allowing herself to be carried in the vehicle which he was driving.

Held – (Pill LJ dissenting) Consent to be carried in a vehicle, within the meaning of cl 6(1)(e) of the 1988 agreement, given by the person allowing himself to be carried, could be withdrawn, although to do so would require more than voicing an objection to the manner of driving; it had to amount to an unequivocal repudiation of the common venture to which consent had been given when the person entered the vehicle. An unequivocal request to allow the person to alight from the vehicle, coupled with a request to stop the vehicle for that purpose, would be sufficient to withdraw consent. Thereafter, save for the limited purpose of enabling the driver to comply with that request, the person could not be said to be ‘allowing himself to be carried’ in the vehicle for the purposes of cl 6.1(e). In the instant case, at the time of the use which had given rise to the driver’s liability, the claimant had not made an unequivocal request that the car

^a Clause 6, so far as material, is set out at [8], below

be stopped so that she could get out in terms sufficient to bring home to the driver that she was repudiating the common venture on which they had together embarked when they had left for a drive in her car. Accordingly, the appeal would be dismissed (see [20], [21], [24]–[32], [44], [49], [52], [53], below).

White v White [2001] 2 All ER 43 considered.

Notes

For the liability of the Motor Insurers' Bureau to satisfy claims for damages against uninsured drivers, see 25 *Halsbury's Laws* (4th edn) (2003 reissue) para 758.

Cases referred to in judgments

Cooper v Motor Insurers' Bureau [1985] 1 All ER 449, [1985] QB 575, [1983] 2 WLR 248, CA.

White v White [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481.

Appeal

The claimant, Claire Pickett, appealed with permission of Richards J from his order on 27 February 2003 dismissing her claim under cl 2(1) of the Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1988 against the Motor Insurers' Bureau (MIB) following proceedings for damages for personal injury brought by the claimant against Nathan Roberts and the MIB in which judgment was given against Mr Roberts for 85% of the claim. Mr Roberts took no part in the proceedings.

Brian Langstaff QC (instructed by *Levenes*, Cardiff) for the appellant.

Daniel Pearce-Higgins QC (instructed by *Weightman Vizzards*, Liverpool) for the MIB.

Cur adv vult

22 January 2004. The following judgments were delivered.

CHADWICK LJ (giving the first judgment at the invitation of Pill LJ).

[1] This is an appeal from an order made on 27 February 2003 by Richards J, sitting in Cardiff, in proceedings brought by the appellant, Miss Claire Pickett, against Mr Nathan Roberts and the Motor Insurers' Bureau (MIB). The appeal, for which the judge gave permission, raises an issue of some general importance as to the obligations of MIB under the Compensation of Victims of Uninsured Drivers agreements. Although, on the facts in this case, the relevant agreement is that made between the Department of Transport and MIB on 21 December 1988 (the 1988 agreement), the comparable provision in the current agreement (made with the Secretary of State for the Environment, Transport and the Regions on 13 August 1999) (the 1999 agreement) is in the same terms.

[2] The appellant's claim in these proceedings is for damages in respect of injuries which she suffered on 12 July 1999 when a passenger in a motor vehicle driven by Mr Roberts. Mr Roberts has taken no part in the proceedings. Judgment was awarded against him for 85% of the claim, with damages to be assessed. The appellant accepted that a 15% discount was appropriate on the basis of her own contributory negligence; in that she was not secured by a seat belt at the time that the accident occurred.

a [3] The vehicle was uninsured. It is common ground that there is no prospect of recovering from Mr Roberts moneys due under the judgment. In those circumstances MIB was added as a defendant to the proceedings by an order made on 18 January 2002.

b [4] The appellant claimed against MIB under cl 2 of the 1988 agreement, which had remained in force under the transitional provisions contained in cl 23 of the 1999 agreement. Clause 2(1) of the 1988 agreement was in these terms, so far as material:

c 'If judgment in respect of any relevant liability is obtained against any person ... and any such judgment is not satisfied in full within seven days ... then MIB will, subject to the provisions of paragraphs (2), (3), and (4) below and to Clauses 4, 5 and 6 hereof, pay or satisfy ... any sum payable ... in respect of the relevant liability ... whatever may be the cause of the failure of the judgment debtor to satisfy the judgment.'

RELEVANT LIABILITY

d [5] For the purposes of cl 2(1) of the 1988 agreement 'relevant liability' means a liability in respect of which a policy of insurance must insure a person in order to comply with Pt VI of the Road Traffic Act 1972 as amended by the Motor Vehicles (Compulsory Insurance) Regulations 1987, SI 1987/2171 (see cl 1 of the 1988 agreement). Part VI of the 1972 Act required insurance against third party risks arising from the use of a motor vehicle on a road. The obligation to have insurance in force was imposed by s 143(1) of that Act. The section was in these terms, so far as material:

f 'Subject to the provisions of this Part of this Act, it shall not be lawful for a person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance ... in respect of third-party risks as complies with the requirements of this Part of this Act ...'

g A person who used, or who caused or permitted another to use, a motor vehicle on a road in contravention of the section was guilty of an offence unless he proved that the vehicle did not belong to him, that he was using it in the course of his employment and that he neither knew, nor had reason to believe, that insurance was not in force (see s 143(2) of the 1972 Act). Comparable obligations to insure are now found in Pt VI of the Road Traffic Act 1988.

h [6] The phrase 'in respect of third-party risks' is not defined in Pt VI of the 1972 Act; but some indication as to its meaning is to be found in s 145(1) and (3)(a) of that Act:

j '(1) In order to comply with the requirements of this Part of this Act, a policy of insurance must satisfy the following conditions ...

(3) Subject to subsection (4) below, the policy—(a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road ...'

It was held by this court, in *Cooper v Motor Insurers' Bureau* [1985] 1 All ER 449 at 452, [1985] QB 575 at 581, that, read in conjunction with s 143(1) of the 1972 Act, s 145(3)(a) did not impose upon the owner of the vehicle an obligation to have in force a policy of insurance in respect of his liability to the person who was the driver of the vehicle at the time of the use of the vehicle which gave rise to that liability. The driver was not a 'third party' vis-à-vis the owner. So, where the driver—who does not know that the vehicle is uninsured and who is not at fault in relation to the accident from which his own injuries arise—establishes liability on the part of the owner in respect of the defective condition of the vehicle, MIB cannot be required to pay an unsatisfied judgment.

[7] In the present case the appellant was, herself, the owner of the vehicle. She knew that the vehicle was not insured. It might, perhaps, have been contended by MIB that the reasoning of this court in *Cooper's* case should lead to the conclusion that, in so far as the appellant (as a person causing or permitting the vehicle to be used) or Mr Roberts (as a person using the vehicle) were under obligations imposed by ss 143(1) and 145(3)(a) of the 1972 Act, those obligations did not require there to be in force a policy of insurance which insured Mr Roberts in respect of his liability in respect of injury which the appellant might suffer arising out of his use. But that point was not taken. It is unnecessary to decide (and I do not decide) whether it would have been an answer to the appellant's claim against MIB. It was not in dispute at the trial that the judgment which the appellant obtained against Mr Roberts was a judgment in respect of a 'relevant liability' for the purposes of cl 2.1 of the 1988 agreement.

THE EXCEPTION TO LIABILITY PROVIDED BY cl 6(1)e OF THE 1988 AGREEMENT

[8] Clause 6 of the 1988 agreement sets out circumstances in which MIB shall be exempted from liability under cl 2(1). Clause 6(1)(e) is in these terms:

'MIB shall not incur any liability under Clause 2 of this Agreement in a case where ... (e) at the time of the use which gave rise to the liability the person suffering death or bodily injury or damage to property was allowing himself to be carried in or upon the vehicle and either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from the vehicle he—(i) knew or ought to have known that the vehicle had been stolen or unlawfully taken, or (ii) knew or ought to have known that the vehicle was being used without there being in force in relation to its use such a contract of Insurance as would comply with Part VI of the Road Traffic Act 1972.'

Clause 6(3) provides that references to a person being carried in a vehicle include references to his being carried 'in or upon or entering or getting onto or alighting from' the vehicle.

[9] It has been common ground on this appeal—as it was before the judge—that, unless MIB can rely on the exception from liability provided by cl 6(1)(e) of the 1988 agreement, it has become subject to the obligation to pay to the claimant an amount equal to the amount of the unsatisfied judgment which she has obtained against Mr Roberts. It has been common ground, also, that before the commencement of the 'journey' in the vehicle in the course of which she suffered injury—whatever meaning is to be given to 'journey' in that context—the appellant knew that the vehicle was being used without insurance. The issue on this appeal is whether, at the time of the use which gave rise to

- a Mr Roberts's liability to the appellant, the appellant was allowing herself to be carried in the vehicle which he was driving.

THE UNDERLYING FACTS

- b [10] As I have said, Mr Roberts took no part in the proceedings. In particular, he did not give evidence at the trial. The judge accepted the appellant's account of the circumstances in which she was injured. She had met Mr Roberts about five months before the accident on 12 July 1999. For the last month or so they had been living together in a flat in Merthyr Tydfil. Money was tight; but between them they had managed to find enough to buy a cheap car. The appellant applied for registration in her name; but there was no money to pay for insurance. The judge described the events leading to the accident:

- c '14. On 12 July 1999 they managed to borrow £100 and "[w]e were so happy we just decided to put £5.00 of petrol in the car and go for a drive in order to have some fun". The first defendant drove, she was in the front passenger seat and their dog was in the back. She had been with the first defendant in the car before and knew he could drive. She also knew that he did not have a driving licence.

- d 15. It was a warm, sunny day. They took the road to Fochriw, a village in the hills above Merthyr, and stopped at a pub, where they took the dog out of the car and each had a pint to drink. They went back down to Merthyr to buy some provisions, including some cans of lager which they intended to drink at home later. They did not drink any of the lager before the accident. She was cross-examined about her consumption of alcohol but I accept her evidence on the point.

- e 16. They went back up the mountainside, taking an old track which runs parallel with the road from Merthyr to Fochriw. The claimant's evidence is that they wanted to go back up the mountainside because the dog needed some more exercise ...'

- f [11] The judge took up the account from the appellant's witness statement (at para 17 of his judgment):

- g '19. Nathan began to make handbrake turns. I had been in the car before with Nathan when he wanted to do handbrake turns but I and the dog got out of the car because I did not want to take part. On one occasion he was doing them on a gravelly bit near Cyfartha Park and I found that very scary because he could easily have driven into a wall in the middle of the car park. On that occasion I asked Nathan to stop the car and he did so when asked and myself and the dog got out.

- h 20. Now Nathan was doing handbrake turns again on the gravel path whilst we were driving. He would accelerate, then pull the handbrake up and then he would have to keep really good control of the steering wheel as the car spun round. The dog was flying about in the back seat.

- i 21. I did not like what Nathan was doing and I was telling him to stop it. I did not like the handbrake turns, they scared me, the dog was being flung about and I did not know how I was going to end up and whether there would be damage to ourselves as well as to the car. Despite me telling him to stop it, he carried on doing more handbrake turns.

22. I became really fed-up and frightened and concerned for my safety and I got very agitated, I said words like "for God's sake stop the car". Nathan knew I did not like the handbrake turns. He also knew I was concerned for the dog in the back seat. I was certain he was stopping to let me and the dog out. The car had slowed down. He had previously allowed me to get out. I unclipped my seat belt in order to get the dog out as soon as possible. I was sure the dog needed to relieve itself. Suddenly and unexpectedly Nathan accelerated again, made another handbrake turn and lost control of the steering. He did not pull the steering wheel around quick enough. We were going too fast. I could not have got my seat belt fastened in time even if I had tried. I do not recall whether or not I attempted this.

23. The car carried on forward and went off the gravel track into a ditch, then overturned ...'

[12] As a result of the accident the appellant suffered serious injuries. These included a fracture of the spine which has rendered her paraplegic.

WAS THE APPELLANT 'ALLOWING HERSELF TO BE CARRIED' AT THE RELEVANT TIME?

[13] As the judge pointed out (at para 35 of his judgment) there are two distinct conditions to be satisfied before MIB can rely on the exception provided by cl 6(1)(e) of the 1988 agreement. The first—which the judge described as 'consent'—is found in the opening words 'the person ... was allowing himself to be carried in or upon the vehicle'. The second—which the judge described as 'knowledge'—is found in the words 'he ... knew or ought to have known' that the vehicle had been stolen, unlawfully taken or was being used without insurance (as the case may be). As the judge recognised there is an apparent distinction, made in the language of cl 6(1)(e) itself, as to the point in time at which each of those conditions is to be satisfied. The first of the two conditions (consent) is to be satisfied 'at the time of the use which gave rise to the liability'. The second (knowledge) is to be satisfied 'either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from the vehicle'.

[14] The judge appreciated that, if the difference in language reflected a difference in intent as to the point of time at which each of the two conditions—consent on the one hand and knowledge on the other—was to be satisfied, then it was open to him to adopt what he described as 'a narrow approach' to the meaning of the phrase 'at the time of the use which gave rise to the liability' and to hold that 'the question of consent is to be determined at the time of the accident ... rather than at the commencement of the journey'. He observed that—

'if one focuses on consent at the time of the accident, then it can be said with some force that, although the claimant originally consented to being carried in the car, she had on the evidence withdrawn her consent by the time of the accident. If that is right, the exclusion cannot be relied on against her.'

He described that as the strongest point in the appellant's favour.

[15] The judge rejected that approach. He reminded himself of the provisions of the Second Council Directive (EEC) 84/5 of 30 December 1983 on the approximation of the laws of member states relating to insurance against civil

a liability in respect of the use of motor vehicles (OJ 1984 L8 p 78) (the directive) and, in particular, of the permitted exception to the requirement in art 1(4) of the directive. The article, and the permitted exception, are in these terms, so far as material:

b 'Each Member State shall set up and authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for ... personal injuries caused by ... a vehicle for which the insurance obligation ... has not been satisfied ... However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.'

c The judge expressed (at para 36) the view that to adopt the narrow approach urged on behalf of the appellant would be to give insufficient weight to the need to construe cl 6(1)(e) of the 1988 agreement in accordance with that provision. He said:

d 'That provision focuses on whether the person voluntarily entered the vehicle. In order to adopt a consonant construction of the relevant part of cl 6(1)(e), "at the time of the use which gave rise to the liability the person ... was allowing himself to be carried in ... the vehicle", one ought to give it the same focus. Thus in order to determine whether a person was allowing himself to be carried in the vehicle at the time of the relevant use of that vehicle, one should look at whether he entered the vehicle voluntarily. If he did, then for the purposes of cl 6(1)(e) he was allowing himself to be carried in the vehicle. It makes no difference if thereafter he objects to the driving or asks the driver to stop the vehicle. That is not sufficient to negative the effect of the voluntary entry into the vehicle so as to justify the conclusion that he was no longer allowing himself to be carried.'

g [16] The judge accepted that there might be circumstances—which he described as exceptional—in which, despite the fact that the person entered the vehicle voluntarily, the permitted exception could not have been intended to apply. He accepted that those circumstances would include a case where 'the original voluntary entry into the vehicle would have been negated by supervening duress'. He adopted the submission of counsel for MIB that cl 6(1)(e) of the 1988 agreement, taken as a whole, was directed 'at voluntary acceptance of the risk of being driven in an uninsured vehicle'. But, as he held (at para 38 of his judgment):

h 'A person who voluntarily enters a vehicle knowing of the lack of insurance must be taken to have accepted that risk and cannot negative such acceptance by objecting to the driving or even by asking the driver to stop the vehicle.'

j [17] The judge found support for his approach in the speech of Lord Nicholls of Birkenhead in *White v White* [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481. The question in that appeal was whether the phrase 'knew or ought to have known' in cl 6(1)(e) of the 1988 agreement was apt to include knowledge which the person injured would have acquired if he had made the inquiries which an ordinarily prudent person in his position would have made. Lord Nicholls (with

whom three of the other members of the House agreed, Lord Scott of Foscote (dissenting) held that it was not. That is not a point which arises in the present case. But, in explaining how the word 'knew' was to be construed in the context of the permitted exception to art 1(4) of the directive, Lord Nicholls had said (at [14]):

'The context is an exception to a general rule. The Court of Justice has stressed repeatedly that exceptions are to be construed strictly. Here, a strict and narrow interpretation of what constitutes knowledge for the purpose of art 1 is reinforced by the subject matter. The subject matter is compensation for damage to property or personal injuries caused by vehicles. The general rule is that victims of accidents should have the benefit of protection up to specified minimum amounts, whether or not the vehicle which caused the damage was insured. The exception, therefore, permits a member state, contrary to the general rule, to make no provision for compensation for a person who has suffered personal injury or damage to property. Proportionality requires that a high degree of personal fault must exist before it would be right for an injured passenger to be deprived of compensation. A narrow approach is further supported by the other prescribed limitation on the permissible ambit of any exclusion: the person claiming compensation must have entered the vehicle voluntarily. The need for the passenger to have entered the vehicle voluntarily serves to confirm that the exception is aimed at persons who were consciously colluding in the use of an uninsured vehicle.'

[18] The judge placed emphasis on the final sentence of the passage just cited. This was, as he saw it, a plain case of 'conscious collusion' in the use of an uninsured vehicle. As he put it (at para 39 of his judgment):

'It is abundantly clear that [the appellant] and the first defendant colluded in the use of the car without insurance. It was her car, she knew there was no insurance, she knew that he had no driving licence and that he was in the habit of doing handbrake turns, yet she embarked willingly upon the journey as his passenger in the car.'

The judge dismissed the claim against MIB.

[19] For my part, I think that the judge was right to accept the submission made on behalf of MIB that the object and intent of cl 6(1)(e) of the 1988 agreement, taken as a whole, was to relieve MIB from the obligation imposed by cl 2(1) of that agreement in cases where the person injured had accepted the risk of being driven in the vehicle, knowing it to be uninsured. There are, of course, two elements to that risk. There is the risk that, while in the vehicle, the person will be injured; and there is the risk that the injury will be wholly or partly the fault of the driver. Voluntary acceptance of the risk of being driven in the uninsured vehicle, as it seems to me, requires both acceptance of the risk of being injured and acceptance of the risk that, if injured, compensation will not be recoverable from the uninsured driver whose fault has caused the injury.

[20] The two conditions which must be satisfied before MIB can rely on the exception provided by cl 6(1)(e) of the 1988 agreement—consent and knowledge—are relevant to a voluntary acceptance of the two elements of the risk. Acceptance of the risk of being injured while in the vehicle requires that, 'at

- a the time of the use' which gave rise to the injury, the person injured consented to being in the vehicle—that is to say, 'was allowing himself ... to be carried in ... the vehicle'. Acceptance of the risk that, if injured, compensation will not be recoverable from the uninsured driver of that vehicle requires that the person injured had knowledge that the driver was uninsured. It is that combination of consent and knowledge which, as it seems to me, led Lord Nicholls refer, in
- b *White's* case, to 'persons who were consciously colluding in the use of an uninsured vehicle'.

- [21] I find it impossible to identify any reason in principle why the point of time at which the two conditions—consent and knowledge—fall to be satisfied should differ; nor any reason in principle why that point should not be 'the time of the use which gave rise to the liability'—as, plainly, it is in relation to the first
- c of the two conditions. I accept that there is an apparent distinction in the language of cl 6(1)(e) as to the point in time relevant to each condition. But, as it seems to me, that apparent distinction is no more than a reflection of the difference, in practice, between the circumstances in which consent may be given and the circumstances in which knowledge may be acquired; and the difference
- d between the circumstances in which consent, once given, may be withdrawn and those in which knowledge, once acquired, may be lost. Different language is required to meet the different problems which will arise in practice. In my view, the apparent distinction in language does not reflect a difference of substance as to the point of time at which the parties to the 1988 agreement intended that each of the two conditions—consent on the one hand and knowledge on the other—is
- e to be satisfied.

- [22] It is difficult (but not impossible) to conceive of circumstances in which consent to being carried in the vehicle will be given, for the first time, after the relevant journey has begun. But, in practice, consent will given (if at all) before the person giving the consent enters the vehicle or (at the latest) before the
- f vehicle moves off. The issue, in relation to consent, is likely to be whether, once given, the consent has been withdrawn before 'the time of the use which gave rise to the liability'. By contrast, it is not at all difficult to conceive of circumstances in which knowledge that there is no policy of insurance in force is acquired after the relevant journey has commenced. An obvious example of such a case would be where the absence of insurance is revealed in response to the passenger's
- g inquiry during the course of the journey. What is difficult is to conceive of circumstances in which a person who, before the relevant journey has commenced, knows that the vehicle is uninsured does not continue to have that knowledge throughout the journey. The issue, in relation to knowledge, is likely to be whether (and, if so, when) it was first acquired; not whether knowledge
- h which the passenger is shown to have had at the commencement of the journey has been lost thereafter.

- [23] Voluntary acceptance of the risk that compensation will not be recoverable from the uninsured driver requires that, before the commencement of the relevant journey or (at the latest) no later than the last reasonable
- j opportunity to alight, the person injured had knowledge that the vehicle in which he is allowing himself to be carried is not insured. A person who discovers, in the course of a journey which he cannot reasonably be expected to bring to an end by alighting from the vehicle, that the vehicle is not insured cannot sensibly be said to have accepted the risk of inability to recover compensation from the uninsured driver. But, a person who has accepted that risk by entering the vehicle with the relevant knowledge—or by failing to alight when, having acquired that

knowledge in the course of the journey, he could reasonably have been expected to do so—and who allows and continues to allow himself to be carried in the vehicle up to and including the time of the use which gave rise to the uninsured driver's liability, can sensibly be said to have accepted the risk of being driven in the vehicle, knowing it to be uninsured, at the time of that use.

[24] The question whether the person has accepted the risk of being carried in the vehicle, knowing it to be uninsured, has to be answered by reference to the use which gives rise to the uninsured driver's liability and to facts as they are at the time when that liability arises. But, as I have said, there are two elements to that risk; and in relation to the second element, the answer to that question is provided by the circumstances in which (and the time at which) knowledge that the vehicle was uninsured was first acquired. There is, inherent in cl 6.1(e), a presumption that, once acquired, knowledge that the vehicle is uninsured persists throughout the journey. But there is no presumption that consent, once given, cannot be withdrawn. That depends on the facts in each case.

[25] To my mind, therefore, the judge would have been wrong to hold (at para 36), without qualification, that—

'in order to determine whether a person was allowing himself to be carried in the vehicle at the time of the relevant use of that vehicle, one should look at whether he entered the vehicle voluntarily. If he did, then for the purposes of cl 6(1)(e) he was allowing himself to be carried in the vehicle.'

The judge did not hold that that test was to be applied without qualification. He accepted that there might be 'exceptional circumstances in which, despite the fact that the person entered the vehicle voluntarily, the exclusion cannot be intended to apply'. He was correct, I think, to hold that a person who had entered the vehicle voluntarily—and so had allowed himself to be carried in it—did not withdraw consent to being carried by voicing an objection to the manner in which the vehicle was driven. Something more than that is required; the protest must go beyond an objection to the manner of driving. As it seems to me, the protest must amount to an unequivocal repudiation of the common venture to which consent was given when the protestor entered the vehicle.

[26] In my view the judge was correct to hold that 'an express request to the driver to stop the vehicle' would not, of itself, be sufficient to withdraw consent to being carried. But he would not have been correct to hold (if he did) that an unequivocal request to allow the protestor to alight from the vehicle—coupled, as it might have to be if the vehicle was moving, with a request to stop the car for that purpose—was insufficient to withdraw consent. Thereafter, save for the limited purpose of enabling the driver to comply with that request, the protestor cannot be said to be 'allowing himself to be carried in ... the vehicle' for the purposes of cl 6(1)(e) of the 1988 agreement.

[27] I find it impossible to be confident that the judge appreciated the significance of the distinction between a request to stop the vehicle—so bringing to an end, at least temporarily, the manner of driving to which the appellant was objecting—and an unequivocal request to stop so that she could get out, sufficient to repudiate the common venture on which they had together embarked when they agreed 'to go for a drive in order to have some fun'. I think it is necessary, therefore, to approach this appeal on the basis that the judge may well have applied the wrong test.

[28] In other circumstances a conclusion that the judge may well have applied the wrong test to the facts would lead the court to allow the appeal and remit the

a case, either to the judge with a direction that he reconsider his decision in the light of the test which ought to be applied to the facts which he found, or (if the findings of fact are insufficient for that purpose) for a retrial by that or another judge. In the particular circumstances of this case I am persuaded that remission would not be the appropriate course. The only evidence given at trial was that of the appellant herself; her evidence was substantially unchallenged; and where there b was challenge to her evidence, the judge decided the issue of fact in her favour. In my view the proper course for this court—in the light of the overriding objective set out in CPR 1.1—is to reach its own conclusion on the basis that the evidence on which the appellant is entitled to rely is that contained in her witness statement of 16 June 2002.

c [29] The material paragraphs of that witness statement are set out earlier in this judgment. It is, I think, impossible to find anything in paras 19, 20 or 21 of that statement which (taking those paragraphs alone) provides support for a finding of an unequivocal request by the appellant that the car be stopped *so that she could get out*—as distinct from a request that Mr Roberts stop executing handbrake turns. For that finding the appellant must rely on the first eight d sentences of para 22, which (for convenience) I set out again:

‘I became really fed-up and frightened and concerned for my safety and I got very agitated, I said words like “for God’s sake stop the car”. Nathan knew I did not like the handbrake turns. He also knew I was concerned for the dog in the back seat. I was certain he was stopping to let me and the dog e out. The car had slowed down. He had previously allowed me to get out. I unclipped my seat belt in order to get the dog out as soon as possible. I was sure the dog needed to relieve itself.’

f [30] I accept that, had Mr Roberts stopped the car, the appellant would have alighted; if only for the comfort and benefit of the dog. But I do not find in that passage of her evidence an assertion that she made an unequivocal request to Mr Roberts that the car be stopped so that she could get out; in terms sufficient to bring it home to him that she was repudiating the common venture on which they had together embarked when they left Merthyr Tydfil on 12 July 1999 for a drive in her car. It is, I think, significant that—in executing handbrake g turns—Mr Roberts was doing what he had done on a previous occasion. It seems reasonably plain that executing handbrake turns on a gravel surface came within his understanding of ‘a drive in order to have some fun’; and reasonably plain that the appellant must have appreciated that. There was nothing unusual, in the context of their common experience, in what he was doing. If, as I think, the true h test for withdrawal by the appellant of her consent to being carried in the vehicle at the time of the use which gave rise to Mr Roberts’ liability required that she do something to bring home to him her unequivocal repudiation of the common venture, I am unable to hold that the appellant has met that test.

i CONCLUSION

[31] I would dismiss this appeal.

MAY LJ.

[32] I agree that this appeal should be dismissed for the reasons given by Chadwick LJ, whose account of the facts and circumstances I gratefully adopt. I shall not repeat all the statutory material to which he has referred nor cite at

length from the opinion of Lord Nicholls of Birkenhead in the case of *White v White* [2001] UKHL 9, [2001] 2 All ER 43, [2001] 1 WLR 481. a

[33] Article 1 of the Second Council Directive (EEC) 84/5 of 30 December 1983 on the approximation of the laws of member states relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L8 p 78) (the directive) requires each member state to have compulsory motor insurance covering third party liability for both personal injury and damage to property. b
Article 1(4) is concerned with unidentified and uninsured vehicles. It provides:

‘Each Member State shall set up or authorize a body with the task of providing compensation, at least up to the limits of the insurance obligation for damage to property or personal injuries caused by an unidentified vehicle or a vehicle for which the insurance obligation provided for in paragraph 1 has not been satisfied.’ c

[34] There is, however, a permitted exception to this as follows:

‘However, Member States may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew it was uninsured.’ d

[35] The body established to comply with this part of the directive in Great Britain is the Motor Insurers’ Bureau (MIB). For the purposes of the present proceedings, compliance was achieved by an agreement dated 21 December 1988 between the Secretary of State for Transport and MIB (the 1988 agreement). Clause 2.1 of this agreement obliges MIB to satisfy a judgment in respect of any relevant liability, if the judgment is not satisfied in full within seven days from the date on which the person or persons in whose favour the judgment was given became entitled to enforce it. Clause 6 contains exceptions. The exception relevant to the present appeal is in cl 6(1)(e), which provides: e
f

‘MIB shall not incur any liability under Clause 2 of this Agreement in a case where ... (e) at the time of the use which gave rise to the liability the person suffering death or bodily injury or damage to property was allowing himself to be carried in or upon the vehicle and either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from the vehicle he—(i) knew or ought to have known that the vehicle had been stolen or unlawfully taken, or (ii) knew or ought to have known that the vehicle was being used without there being in force in relation to its use such a contract of Insurance as would comply with Part VI of the Road Traffic Act 1972.’ g
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[36] The word ‘use’ also appears in sub-cll (a), (b) and (d) of cl 6(1). As Mr Pearce-Higgins QC (for the MIB) explained, expressions with the word ‘use’ mirror the terms of s 143 of the Road Traffic Act 1972. The expression in sub-cl (d) ‘the use giving rise to the damage’ is parallel with the expression in sub-cl (e) ‘the use which gave rise to the liability’. The liability in that sub-clause is that which MIB undertakes in cl 2, that is ‘relevant liability’ as defined in cl 1 of the 1988 agreement incurred under a judgment which remains unsatisfied for more than seven days. j

a [37] The issue in *White's* case concerned the construction in the
1988 agreement of the words 'knew or ought to have known' that the vehicle was
uninsured. Lord Nicholls of emphasised that it was always important to identify,
if possible, the purpose the provision was intended to achieve. Reference to the
directive showed that the permitted exception was 'when the body can prove that
they knew it was uninsured'. The context was an exception to the general rule,
b and the European Court of Justice had stressed repeatedly that exceptions are to
be construed strictly. Proportionality required that a high degree of personal
fault must exist before it would be right for an injured passenger to be deprived
of compensation. The person claiming compensation must have entered the
vehicle voluntarily. This served to confirm that the exception is aimed at persons
who were 'consciously colluding in the use of an uninsured vehicle' ([2001] 2 All
c ER 43 at [14]). A passenger who was careless in the matter of the existence of
obligatory insurance did not collude in the use of an uninsured vehicle. The
judge only made a finding of carelessness. The accident in question fell outside
the circumstances in which the directive permits a member state to exclude
payment of compensation. The 1988 agreement was to be interpreted against
d this background. The words 'ought to have known' were intended to bear the
same meaning as 'knew' in the directive. The exception spelled out in
cl 6(1)(e)(ii) of the 1988 agreement was intended by the parties to carry through
the provisions of the directive.

[38] The words were to be interpreted restrictively. '[O]ught to have known'
was apt to include knowledge which an honest person who enters the vehicle
e voluntarily would have. It includes the case of a passenger who deliberately
refrains from asking questions. It is not apt to include mere carelessness or
negligence. The crucial question in the present appeal is whether 'at the time of
the use which gave rise to the liability [the claimant] was allowing [herself] to be
carried in ... the vehicle'. There is no doubt but that at all times she knew that
f the vehicle was uninsured. The answer to the question is firstly a matter of
construction, and then a matter of applying the facts as found by the judge to that
construction.

[39] The judge set out the claimant's essential case (at para 35 of his
judgment):

g 'The need for a restrictive construction gives rise to what I regard as the
strongest point in the claimant's favour. Clause 6(1)(e), so far as material,
lays down two separate conditions for the exclusion to apply. The first may
be described as consent to being carried ("allowing himself to be carried")
h and the second is knowledge of the lack of insurance ("knew or ought to
have known"). On a narrow approach the question of consent is to be
determined at the time of the accident ("at the time of the use which gave
rise to the liability") rather than at the commencement of the journey: it is
the question of knowledge that is linked in to the commencement of the
journey ("either before the commencement of his journey"); and if one
j focuses on consent at the time of the accident, then it can be said with some
force that, although the claimant originally consented to being carried in the car,
she had on the evidence withdrawn her consent by the time of the accident. If
that is right, the exclusion cannot be relied on against her.'

[40] The judge gave his reasons for rejecting that submission (at para 36):

'In my view, however, that is to adopt an unduly restrictive construction and to give insufficient weight to the need to construe cl 6(1)(e) in accordance with the relevant provision of the directive. That provision focuses on whether the person voluntarily entered the vehicle. In order to adopt a consonant construction of the relevant part of cl 6(1)(e), "at the time of the use which gave rise to the liability the person ... was allowing himself to be carried in ... the vehicle", one ought to give it the same focus. Thus in order to determine whether a person was allowing himself to be carried in the vehicle at the time of the relevant use of that vehicle, one should look at whether he entered the vehicle voluntarily. If he did, then for the purposes of cl 6(1)(e) he was allowing himself to be carried in the vehicle. It makes no difference if thereafter he objects to the driving or asks the driver to stop the vehicle. That is not sufficient to negative the effect of the voluntary entry into the vehicle so as to justify the conclusion that he was no longer allowing himself to be carried.'

[41] The judge acknowledged that there might be exceptional circumstances in which, despite the fact that the person entered the vehicle voluntarily, the exclusion cannot be intended to apply. He gave as an example a case where someone gets into a vehicle voluntarily but is subsequently prevented at knifepoint from getting out when the vehicle comes temporarily to a halt. He was prepared to accept that the exclusion did not apply to the continuation of the journey in those circumstances. The original voluntary entry into the vehicle would have been negated by supervening duress. But he considered that such exceptional circumstances did not include a case of objection to the driving or even an express request to the driver to stop the vehicle.

[42] As may be seen, the judge's essential decision was that, in order to determine whether a person was allowing himself to be carried in the vehicle at the time of the relevant use of that vehicle, it was necessary to look at whether he entered the vehicle voluntarily. He derived this from the terms of the directive, considering that it was necessary to adopt a consonant construction of the relevant part of cl 6(1)(e) of the 1988 agreement. In my judgment, this was wrong. I agree with Mr Langstaff QC's submission (for the appellant) that there is no intrinsic reason why a member state should not put in place provisions in compliance with the directive which are more generous to passengers in uninsured motor vehicles than those which the directive requires as a minimum. Construing the exception restrictively means construing it so as only to bring within it those persons and circumstances which a strict construction requires. If on its proper construction the 1988 agreement excludes even fewer people and circumstances than this, there is no principle which requires the construction to be pulled back to be consonant with the directive.

[43] The judge recognised that there may be circumstances in which a person at the start of a journey in a motor vehicle was allowing himself to be carried in the vehicle knowing it to be uninsured within the terms of the exception; but that circumstances occurred later in the journey in which the person withdrew their consent to this so that the exception ceased to apply. The judge's example was one of duress. Another example would be if a person, who knew the vehicle was uninsured, allowed himself to be carried in it on an intended short trip to the local supermarket, but the driver suddenly announced that he was going to drive at great speed to a place 100 miles away. If the passenger made it clear that he did not consent to this long-distance drive in an uninsured car and demanded to be

a let out at the next lay-by, but the driver drove on regardless, I do not consider that the exception would apply once the first lay-by had been passed. The passenger would not thereafter be allowing himself to be carried in the vehicle. He would in all probability be technically falsely imprisoned. If he were then injured in an accident and established liability for the accident against the driver, the exception would not apply. The example also incidentally in my view indicates that the words
b 'at the time of the use which gave rise to the liability' refer to the use at the time of the accident. This accords with the other instances where the word 'use' appears in cl 6(1).

[44] In my judgment, therefore, cl 6(1)(e) of the 1988 agreement is to be construed so that, if a person is voluntarily travelling in a vehicle which he knows to be uninsured, there may be circumstances in which he withdraws his consent
c to being carried in the vehicle and demands to be let out of the vehicle; and that, if despite this the driver passes the next reasonable opportunity to let the passenger out, the passenger is no longer allowing himself to be carried in the vehicle. He is, as I have indicated, technically imprisoned. Circumstances in which this will arise will necessarily be very rare. The court will examine the facts against the general
d background that the exception in both the directive and the 1988 agreement is aimed at persons who consciously collude in the use of an uninsured vehicle.

[45] Since, for the reasons which I have given, I consider that the judge misconstrued cl 6(1)(e) of the 1988 agreement, it is not surprising that he did not,
e as I think, make a specific finding whether the claimant sufficiently withdrew her consent so that she was no longer allowing herself to be carried in the vehicle. Such a finding is not a finding of primary fact, but an inference from the primary facts. This court is invited to supply the inferential conclusion which the judge himself did not clearly reach. I would accede to that invitation, since I believe that the other possibility, a further first instance hearing or a retrial, would not be satisfactory. This court is as well placed as any other to consider what inference
f should be drawn from the primary facts found by the judge.

[46] The relevant factual material to be derived from the judge's judgment is as follows:

g '15. It was a warm, sunny day. They took the road to Fochriw, a village in the hills above Merthyr, and stopped at a pub, where they took the dog out of the car and each had a pint to drink. They went back down to Merthyr to buy some provisions, including some cans of lager which they intended to drink at home later. They did not drink any of the lager before the accident ...

h 16. They went back up the mountainside, taking an old track which runs parallel with the road from Merthyr to Fochriw. The claimant's evidence is that they wanted to go back up the mountainside because the dog needed some more exercise ...

17. What happened next is described as follows in the claimant's witness statement:

j "19. Nathan began to make handbrake turns. I had been in the car before with Nathan when he wanted to do handbrake turns but I and the dog got out of the car because I did not want to take part. On one previous occasion he was doing them on a gravely bit near Cyfartha Park and I found that very scary because he could easily have driven into a wall in the middle of the car park. On that occasion I asked Nathan to stop the car and he did so when asked and myself and the dog got out.

20. Now Nathan was doing handbrake turns again on the gravel path whilst we were driving. He would accelerate, then pull the handbrake up and then he would have to keep really good control of the steering wheel as the car spun round. The dog was flying about in the back seat. a

21. I did not like what Nathan was doing and I was telling him to stop it. I did not like the handbrake turns, they scared me, the dog was being flung about and I did not know how I was going to end up and whether there would be damage to ourselves as well as to the car. Despite me telling him to stop it, he carried on doing more handbrake turns. b

22. I became really fed-up and frightened and concerned for my safety and I got very agitated, I said words like 'for God's sake stop the car'. Nathan knew I did not like the handbrake turns. He also knew I was concerned for the dog in the back seat. I was certain he was stopping to let me and the dog out. The car had slowed down. He had previously allowed me to get out. I unclipped my seat belt in order to get the dog out as soon as possible. I was sure the dog needed to relieve itself. Suddenly and unexpectedly Nathan accelerated again, made another handbrake turn and lost control of the steering. He did not pull the steering wheel around quick enough. We were going too fast. I could not have got my seat belt fastened in time even if I had tried. I do not recall whether or not I attempted this. c

23. The car carried on forward and went off the gravel track into a ditch, then overturned ... d

19. In cross-examination the claimant accepted that she knew that the first defendant had a habit of making handbrake turns when he was out driving. e

20. More importantly, she did not accept that in her evidence to the court she had exaggerated her concerns about the first defendant's driving and in particular about telling the first defendant to stop the car because she was frightened. The suggestion put to her was that she had only asked him to stop so as to let the dog out to go to the toilet. This was based on the following passage from a statement she had given to the police on 20 January 2000, which was suggested to be more accurate than the account she had given to the court: f

"8. We parked up on the grass verge but then Nathan moved off and started making handbrake turns on the grass. *Nathan had a habit of making handbrake turns when he was out driving.* (This sentence is not in the judgment, but supplied from the statement.) g

9. We continued along and I then became aware that we were on a gravel track. He would continually accelerate away from stop, apply the handbrake, turn the steering wheel and swing the car around on the track. I quickly became fed-up of this conduct because I felt he was wearing the car out prematurely and I felt uncomfortable and concerned for my safety. I can recall that the dog was being thrown about in the back of the car. h

10. I said something to Nathan along the lines of, 'could the dog be let out to go to the toilet?' I kept asking him to stop but he continued. He would drive along the track for a few yards then do a handbrake turn to turn around and then go down and do the same again, going back and fore. As I told him to stop to leave the dog out I can remember taking my j

a seat belt off. I thought he was agreeing to stop. I can then remember him saying he was going to do one more or something similar.”

b 21. I have given careful consideration to the suggestion that the claimant has exaggerated or amplified her account as a result of being made aware of the issue under cl 6(1)(e) through questioning by her solicitor. Both in her statement to the police and in her evidence to the court she admitted in effect that the first defendant had at first made handbrake turns without objection from her. As to the point when she asked the first defendant to stop, although her police statement appeared to link the request to stop with the dog being let out to go to the toilet, it also contained the wider elements of concern for her own safety and concern for the dog which were spelled out in her evidence; and although the police statement did not mention the actual words described in her evidence (“for God’s sake stop the car”) or the manner in which those words were uttered (shouted, as she described in cross-examination), it did refer to repeated requests to the first defendant to stop. There is in my view no fundamental inconsistency between the two versions. It is understandable that she should give greater detail than in her police statement when questioned later by her solicitor. Further, I have no reason to reject her evidence that she was unaware of the MIB agreement when questioned by her solicitor. Most importantly, I saw the claimant give evidence, including in particular her cross-examination on these issues, and in my judgment she was a witness of truth. For all those reasons I accept her evidence and in particular the account given in her witness statement concerning the events immediately prior to the accident.’

[47] Counsel had submitted on behalf of the claimant that she had expressly instructed the first defendant to stop the car but he had driven on in disregard of her instructions. She had withdrawn her consent to being carried in the vehicle and was therefore no longer allowing herself to be carried in it. The judge rehearsed the submission again at para 35 of his judgment, which I have already quoted. He said that he saw some force in the submission. The judge then on four occasions in later paragraphs of his judgment refers to a person objecting to the driving and even asking the driver to stop the vehicle (see paras 36–38 and 40). g Although the first three of these were in form impersonal references during the judge’s consideration of the construction of the clause, they clearly in the context amount to a summary of the findings of fact which he had made. He said (at para 40):

h ‘In any event she was in my view allowing herself to be carried in the car at the time of the use which gave rise to the liability. Although I have accepted her account of her concern for her own safety and her requests to the first defendant to stop the car, for the reasons I have given, that is not a sufficient basis for concluding that she was not allowing herself to be carried j in the car at the time of such use.’

I do not consider that this paragraph may be regarded as an inferential finding of fact on the question which in my judgment needed to be decided in this case. The paragraph admittedly begins with the words ‘in any event’. But the shortly expressed finding was ‘for the reasons I have given’, which did not address the critical question.

[48] Finally, the judge's findings (at para 39), although not directed to the question which I regard as critical, are nevertheless distinctly unhelpful to the claimant. He said: a

'If one looks at the present case in terms of conscious collusion in the use of an uninsured vehicle, then it must clearly be decided against the claimant. It is abundantly clear that she and the first defendant colluded in the use of the car without insurance. It was her car, she knew there was no insurance, she knew that he had no driving licence and that he was in the habit of doing handbrake turns, yet she embarked willingly upon the journey as his passenger in the car.' b

[49] The question, as I have indicated, is whether the court should conclude from this material that the claimant withdrew her consent to being driven in her own motor car with sufficient clarity and determination so that, at the time of the accident, she was not allowing herself to be carried in the vehicle. I do not consider that the court can or should reach that conclusion. Mr Langstaff accepted that she did not withdraw her consent by telling Nathan to stop what he was doing. In other circumstances, it would not be sufficient for a passenger in a car being driven on a motorway to tell the driver he knew to be uninsured to stop driving at 100 mph and reduce his speed. That is not demanding to be let out of the car. Mr Langstaff accepted that the material in the passages from the claimant's statement to the police which the judge quoted were not evidence of a sufficient withdrawal of consent. She was asking Nathan to stop mainly so that the dog could leave the car to relieve itself. In so far as she was asking him to stop making handbrake turns, this did not extend to a demand that she herself should be let out of the car. Her written evidence also included wanting to enable the dog to relieve itself and she unclipped her seat belt for that purpose. The high point of her evidence was the sentence in her written statement in which she said that she became really fed-up and frightened and concerned for her safety; that she got very agitated and said words like 'for God's sake stop the car'. c
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[50] The judge accepted the claimant as a witness of truth. He said that in his view there was no fundamental inconsistency between her statement to the police and her written evidence. In my view, the thrust of the evidence was that the claimant told Nathan to stop doing handbrake turns; that she told him to stop the car out of concern for her own safety, but also to enable the dog to relieve itself. As between the two, the emphasis in the police statement was on the dog. What she did not do was to demand to be let out of the car so as to dissociate herself from its use. g

[51] This evidence in my view has to be seen against a background unfavourable to the claimant. It was her car. She knew that it was uninsured. She knew that Nathan was not licensed to drive it. She knew that Nathan had a habit of making handbrake turns when he was out driving. They drove up the mountainside to the old track which was, no doubt, a place where Nathan was likely to do his handbrake turns. He did indeed make handbrake turns there at first without objection from her. She did not clearly demand to be let out of the car so as to dissociate herself from Nathan's driving. She did not, as she would have been entitled to, forbid him from driving her car. If she had got out of the car to enable the dog to relieve itself, she would no doubt have got back into it and continued the uninsured journey. h
j

[52] In my judgment, the proper inferential finding on this evidence is that the claimant was allowing herself to be carried in this car at the time of the accident

a when she knew that it was uninsured. She was throughout aiding and abetting the unlawful use of a motor car. She was consciously colluding in the use of her own uninsured vehicle. There was a high degree of personal fault. I do not consider that the facts come anywhere near false imprisonment on any burden or standard of proof. I entirely acknowledge that the relevant question under the exception on the facts of this case may well not be identical with the question
b whether the claimant was falsely imprisoned. I also acknowledge that to allude to false imprisonment is to introduce somewhat emotive terms. But I do consider that something akin to false imprisonment would be necessary on facts such as these for a conclusion that the claimant was not allowing herself to be carried in the vehicle at the relevant time.

[53] For these reasons, I too would dismiss this appeal.

c **PILL LJ.**

[54] The issue is whether Miss Claire Pickett, 'at the time of the use [of the vehicle] which gave rise to the liability' was allowing herself to be carried in the vehicle within the meaning of those expressions in cl 6(1)(e) of the agreement
d made between the Department of Transport and the Motor Insurers' Bureau (MIB) on 21 December 1988 (the 1988 agreement).

[55] Chadwick LJ has set out the facts. The vehicle was driven on the mountain track from Merthyr to Fochriw, with Miss Pickett as passenger. The accident happened when the driver, Mr Nathan Roberts, was doing handbrake turns on an area of gravel on or alongside the track. He lost control of the vehicle
e which went into a ditch and overturned.

[56] I respectfully agree with the propositions Chadwick LJ has stated at [22], [24] and [26], above. (a) The issue, in relation to consent, is likely to be whether, once given, the consent has been withdrawn before 'the use which gave rise to the liability'. (b) The question whether the person has accepted the risk of being
f carried in the vehicle, knowing it to be uninsured, has to be answered by reference to the use which gives rise to the uninsured driver's liability and to the facts as they are at the time when the liability arises. (c) There is no presumption that consent, once given, cannot be withdrawn. That depends on the facts in each case. (d) The judge would not have been correct to hold (if he did) that an unequivocal request to allow the protestor to alight from the vehicle—coupled as
g it might have to be if the vehicle was moving, with a request to stop the car for that purpose—was insufficient to withdraw consent.

[57] I agree with Chadwick LJ that the judge did not apply the correct test when holding (at paras 36 and 38 of his judgment) that, save possibly in
h exceptional circumstances, consent should be judged at the moment of entry to the vehicle. Moreover, if the judge held, as he appears to have done (at para 36 of his judgment), that consistency with the Second Council Directive (EEC) 84/5 of 30 December 1983 on the approximation of the laws of member states relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L8 p 78) (the directive) required that approach, he was, in my respectful view, in
j error. The relevant part of art 1(4) of the directive is set out by Chadwick LJ at [15], above. Member states may exclude liability in a body such as MIB 'in respect of persons who voluntarily entered the vehicle'. That is a permitted exception to a general insurance obligation. Member states may, however, place limits on that exception, if they see fit, as recognised by Chadwick and May LJ and the exception is limited in the 1988 agreement by the concept of consent to the use. There is a public as well as a private interest in a passenger having the opportunity

to disassociate himself from a use to which he objects or in which he does not wish to participate. a

[58] The relevance of the speech of Lord Nicholls of Birkenhead in *White v White* [2001] UKHL 9 at [14], [2001] 2 All ER 43 at [14], [2001] 1 WLR 481, in the present context, is the statement that such exceptions are to be construed strictly. A 'strict and narrow interpretation of what constitutes knowledge [of lack of insurance] for the purpose of art 1 is reinforced by the subject matter'. That b
approach to the exception applies equally to the issue of consent, as defined in the United Kingdom document, the 1988 agreement, with its reference to use. Lord Nicholls stated that the exception in art 1(4) 'is aimed at persons who were consciously colluding in the use of an uninsured vehicle'. However, Lord Nicholls stated: 'Proportionality requires that a high degree of personal fault must exist before it would be right for an injured passenger to be deprived of c
compensation.'

[59] Upon the wording of the 1988 agreement, that applies to the use at the time as it does to knowledge. The judge not having applied the correct test, the case must either be remitted or the court must make its own judgment on the evidence.

[60] I accept that a good deal of the background to this accident is unhelpful to Miss Pickett. It was her car, she knew it was uninsured and colluded in its d
being driven on the day. She entered it voluntarily knowing that Roberts had done handbrake turns on previous occasions.

[61] The question is, however, whether Miss Pickett was consenting at the time of the relevant use. The use at the time of the accident must be construed specifically in relation to the time and circumstance of the accident, as e
Chadwick LJ accepts. Giving the word 'use' the required narrow construction, it should be taken as a use for handbrake turns on gravelly ground and not the more general use at the start; a journey from Fochriw to Merthyr and back.

[62] On the evidence, in my judgment, Miss Pickett made sufficiently clear her objections to the specific use; her wish to have no part in the handbrake turns and f
to get out of the car so that she cannot be said to have been consenting as contemplated in cl 6(1)(e). The driver had embarked upon a much higher-risk use than that to which she had consented. Whether or not she is a religious person, the exhortation 'for God's sake stop the car' is a plain indication of her lack of consent, whether her concern was for her safety or that of the dog, or of g
both. Plainly, because she unclipped her seat belt, she was confident that her lack of consent had been acknowledged and that the driver was going to stop. Equally plainly, she acted as she did so that she could get out of the car.

[63] By her conduct, Miss Pickett was not merely objecting to a bad piece of driving, such as a dangerous overtake, but had withdrawn her consent to the use h
to which the vehicle was being put. While not as extreme a case, it is in the same category as that of a passenger who believes she is to be driven to a destination but finds herself instead being driven on a race track or a skid-pan. It appears to me, moreover, that, applying the 'unequivocal request' test stated by Chadwick LJ, Miss Pickett succeeds on the present facts.

[64] I would allow the appeal and find MIB liable under the agreement. j
Failing that, I would remit to allow further consideration of the evidence, applying the correct test and would not find against Miss Pickett on what appears to me, with respect, to be unacceptable inferences from her evidence.

[65] Chadwick LJ's conclusion that Miss Pickett's claim must fail is based on her failure to repudiate unequivocally the common venture, which is defined as 'going for a drive in order to have some fun', fun apparently including handbrake

- a turns. The court has not been referred to evidence as to what she meant by 'fun'. Placed as she was, a drive, a drink at a public house, shopping in Merthyr and a walk on the mountain with the dog is likely to have been the fun anticipated without contemplating handbrake turns, to which she immediately objected, as she had on a previous occasion. Moreover, whatever her initial intention, she made plain before the accident that she did not regard handbrake turns as fun.
- b [66] In my judgment the concept of common venture as defined by Chadwick LJ and applied to the facts of this case has insufficient regard to the need to identify the use *at the time* and, in any event, requires an inference not justified by the evidence and indeed contrary to Miss Pickett's conduct as accepted in evidence.
- c [67] May LJ's conclusion (at [51] and [52], above) is also based on an inference. It arises from a claimed distinction between Miss Pickett's request in strong terms to stop the car and a demand to be let out of the car so as to disassociate herself from Roberts's use. I can think of no reason for her conduct other than a firm desire to get out of the car when it stopped. The demand to be let out is implicit in the demand to stop, confirmed, if necessary, by the unclipping of the seat belt.
- d [68] The distinction is, in my respectful view, too subtle. As to whether, and on what terms, she might have got back in, would depend on the evidence and was not explored before the judge, nor need it have been, on the test the judge applied.
- e [69] Inferences adverse to the claimant have been drawn from the evidence, which, applying Lord Nicholls of Birkenhead's test, should not in my view have been drawn and at least a remission is required. I do not find the analogy with false imprisonment helpful.

Appeal dismissed.

Melanie Martyn Barrister.

R v Davies (Derrick)

[2003] EWCA Crim 3110

COURT OF APPEAL, CRIMINAL DIVISION

WALLER LJ, HUGHES J AND DAME HEATHER STEEL

6 OCTOBER, 6 NOVEMBER 2003

Sentence – Confiscation order – Qualifying offences – Benefit from offence – Defendant convicted of trade mark offences of possession of items with a view to gain – Whether defendant benefiting from offences – Criminal Justice Act 1988, ss 71(4), 72AA – Trade Marks Act 1994, s 92(1)(c), (3)(b).

The defendant pleaded guilty to a number of offences under s 92(1)(c)^a of the Trade Marks Act 1994 of having possession of certain items bearing a sign identical to registered trade marks with a view to gain. He also pleaded guilty to a number of offences under s 92(3)(b) of the 1994 Act of having computer disks in his possession designed or adapted to make copies of signs identical to or likely to be mistaken for registered trade marks with a view to gain. After sentence the Crown initiated confiscation proceedings under the Criminal Justice Act 1988 and obtained a confiscation order, relying on s 72AA^b of the 1988 Act. Under that section the court might make assumptions that property in the possession of a defendant had resulted from criminal conduct to which the confiscation provisions applied. Section 72AA applied where, inter alia, a defendant had been convicted of at least two ‘qualifying offences’, being offences from which the defendant had benefited. Section 71(4)^c of the 1988 Act provided that a person benefited from an offence if he obtained property as a result of or in connection with its commission and his benefit is the value of the property so obtained. The defendant appealed against the confiscation order contending, inter alia, that the court had had no jurisdiction under s 72AA of the 1988 Act as the offences to which he had pleaded guilty were not ‘qualifying offences’ since he had not obtained any benefit from them and had been charged not with selling or otherwise actually gaining from the sale or use of the items in question but only with possession ‘with a view to’ making a gain.

Held – The offences under ss 92(1)(c) and 92(3)(b) of the 1994 Act to which the defendant had pleaded guilty were qualifying offences for the purposes of s 72AA of the 1988 Act. The defendant had ‘benefited’ from them within the meaning of s 71(4) of the 1988 Act; the offences involved items which bore false trade marks or which enabled false trade marks to be applied to goods and were ‘property’ within the meaning of s 71(4) which the defendant had obtained in connection with the commission of the relevant offence. The items had been adapted, either by the application of a false trade mark or by their capability to produce false marks, with the intention of enhancing their value and, at least as regarded the items to which false trade marks had been applied, the trade marks had been stolen by the defendant and applied to those items. The property bearing false trademarks had a value which was of benefit to the defendant and had been held

^a Section 92, so far as material, is set out at [4], below

^b Section 72AA, so far as material, is set out at [11]–[13], below

^c Section 71, so far as material, is set out at [14], below

- a by him 'with a view to gain'. Accordingly, the court had had jurisdiction under s 72AA and the appeal would therefore be dismissed (see [21], [23]–[25], [34], below).

R v Smith (David) [2002] 1 All ER 366 and *R v Wilkes (Gary John)* [2003] 2 Cr App Rep (S) 625 applied.

b Notes

For unauthorised use of trademarks, and for making a confiscation order, see, respectively, 48 *Halsbury's Laws* (4th edn) (2000 reissue) paras 136–138, 11(2) *Halsbury's Laws* (4th edn reissue) para 1285, and Supp to 11(2) *Halsbury's Laws* (4th edn reissue) para 1285.

- c Sections 71 and 72AA of the Criminal Justice Act 1988 were repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, paras 1, 17(1), (2)(a), Sch 12 with effect from 24 March 2003. Part 2 of the 2002 Act deals with confiscation orders.

For the Proceeds of Crime Act 2002, Pt 2, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2463.

- d For the Trade Marks Act 1994, s 92, see 48 *Halsbury's Statutes* (4th edn) (2001 reissue) 174.

Cases referred to in judgment

Harwood v Harwood [1992] 1 FCR 1, CA.

R v Smith (David) [2001] UKHL 68, [2002] 1 All ER 366, [2002] 1 WLR 54.

- e *R v Newton (Robert John)* (1983) 77 Cr App R 13, CA.

R v Wilkes (Gary John) [2003] EWCA Crim 848, [2003] 2 Cr App Rep (S) 625.

Tinker v Tinker [1970] 1 All ER 540, [1970] P 136, [1970] 2 WLR 331, CA.

Cases referred to in skeleton arguments

- f *B, Re* (1991, unreported).

DPP v Anderson [1978] 2 All ER 512, [1978] AC 964, CA.

Heseltine v Heseltine [1971] 1 All ER 952, [1971] 1 WLR 342, CA.

R v Crutchley (1994) 15 Cr App R (S) 627, CA.

R v Buckman [1997] 1 Cr App R (S) 325, CA.

- g *R v Palmer (John)* [2002] EWCA Crim 2202, [2002] All ER (D) 159 (Oct).

R v Sekhon, *R v McFaul*, *R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655.

Appeal

- h The defendant Derrick Davies appealed against a confiscation order made by Judge Bing in the Snaresbrook Crown Court on 6 December 2002 following the defendant's plea of guilty to nine counts of offences contrary to s 92(1)(c) of the Trade Marks Act 1994 and two counts of offences contrary to s 92(3)(b) of the 1994 Act. The prosecution was brought by the London Borough of Waltham Forest on behalf of the Crown. The facts are set out in the judgment of the court.

Jonathan Rose (assigned by the Registrar of Criminal Appeals) for the appellant.
David Groome (instructed by *Satish Mistry*) for the Crown.

6 November 2003. The following judgment of the court was delivered.

WALLER LJ.

[1] On 23 November 2001 at the Crown Court at Snaresbrook before Judge Bing the appellant pleaded guilty to an indictment containing 13 counts. Counts 1–9 were of a similar nature. They all alleged that the appellant:

‘With a view to gain and with a view to sale or distribution for sale, having possession, custody or control in the course of a business, of goods bearing a sign identical to or likely to be mistaken for a registered trade mark, without the consent of the proprietor, contrary to s 92(1)(c) of the Trade Marks Act 1994.’

[2] The particulars of each of the offences on counts 1–9 asserted that different items were in the appellant’s possession with a view to sale or distribution bearing a sign identical to certain registered trade marks. Thus for example on count 1 the particulars of offence were:

‘Derrick Davies on 8 December 1998 at 44a Argall Avenue, Leyton Industrial Village, London E.10. in the course of business with a view to gain for himself and without the consent of the proprietor you had in your possession, custody or control with a view to sale or distribution for sale a wristwatch bearing a sign identical to, or likely to be mistaken for, a registered trade mark, namely the Adidas mark.’

Count 2 related to a blue shirt with a Hugo Boss mark; count 3 a toilet bag with a Burberry mark; count 4 a stripped pique shirt with a Fila mark; count 5 a navy blue zipped jacket with Tommy Hilfiger mark; count 6 a leather jacket with a Kickers mark; a black nylon jacket with the Ralph Lauren mark; count 8 a black nylon jacket with the Nike mark; and count 9 a wristwatch bearing a Reebok mark. Counts 10 and 11 charged offences under s 92(2)(c) of the 1994 Act related to packaging material bearing a sign identical to or likely to be mistaken for certain registered trade marks.

[3] Counts 12 and 13 alleged offences under s 92(3)(b) of the 1994 Act and related to computer discs in the possession of the defendant designed or adapted for making copies of signs identical to or likely to be mistaken for certain registered trade marks.

[4] Section 92 of the 1994 Act provides as follows:

‘(1) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) applies to goods or their packaging a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) sells or lets for hire, offers or exposes for sale or hire or distributes goods which bear, or the packaging of which bears, such a sign, or (c) has in his possession, custody or control in the course of a business any such goods with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

(2) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) applies a sign identical to, or likely to be mistaken for, a registered trade mark to material intended to be used—(i) for labelling or packaging goods, (ii) as a business paper in relation to goods, or (iii) for

a advertising goods, or (b) uses in the course of a business material bearing such a sign for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods, or. (c) has in his possession, custody or control in the course of a business any such material with a view to the doing of anything, by himself or another, which would be an offence under paragraph (b).

b (3) A person commits an offence who with a view to gain for himself or another, or with intent to cause loss to another, and without the consent of the proprietor—(a) makes an article specifically designed or adapted for making copies of a sign identical to, or likely to be mistaken for, a registered trade mark, or (b) has such an article in his possession, custody or control in the course of a business, knowing or having reason to believe that it has
c been, or is to be, used to produce goods, or material for labelling or packaging goods, as a business paper in relation to goods, or for advertising goods.

d (4) A person does not commit an offence under this section unless—(a) the goods are goods in respect of which the trade mark is registered, or (b) the trade mark has a reputation in the United Kingdom and the use of the sign takes or would take unfair advantage of, or is or would be detrimental to, the distinctive character or the repute of the trade mark.

e (5) It is a defence for a person charged with an offence under this section, to show that he believed on reasonable grounds that the use of the sign in the manner in which it was used, or was to be used, was not an infringement of the registered trade mark.

f (6) A person guilty of an offence under this section is liable—(a) on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum, or both; (b) on conviction on indictment to a fine or imprisonment for a term not exceeding ten years, or both.'

[5] It will be seen that the counts did not allege in relation to the individual items the subject of counts 1–9 'the selling or letting for hire, offering or exposing for sale of goods which bear a sign' contrary to s 92(1)(b). Nor (though significantly) so far as counts 10 and 11 are concerned did the counts allege under
g s 92(2)(b) the using in the course of a business material bearing such a sign for labelling. Nor so far as the computer discs the subject of counts 12 and 13 were concerned was there alleged that any articles had contrary to s 92(3)(b) been made, designed or adapted for making copies of a sign. The allegation in all cases as accepted by Mr Groome for the Crown before us was that on a particular day
h in all cases 8 December 1998 (the date when the appellant's premises were raided) the appellant had the particular items in his possession with a view to gain.

[6] When sentencing the appellant on 17 January 2002 the judge said:

j 'It is common ground that the indictment to which the defendant pleaded guilty is a specimen indictment. The indictment, counts 1 to 9, represent counterfeit watches; counts 2 and 4 to 8 counterfeit garments; count 3 a bag and count 11 a label. The only counts which are not specimen counts are counts 12 and 13 which fully represent the offences in relation to the computer disc. The indictment is a sample of a total of 5,429 counterfeit items, 86,000 counterfeit labels, 11,000 price stickers, some of which prices were in dollars as well as pounds. There were 140,000 counterfeit plastic bags found when the defendant's premises were raided in December of 1998.

The premises were exclusively a dishonest and illegal business devoted to counterfeiting.’

[7] The judge then identified his approach to sentencing by reference to certain questions. The third question which he posed to himself was: ‘What was the actual or likely profit?’ His answer to that question was (see 4b of the sentencing remarks):

‘The agreed basis upon which sentence should be passed is that in the period of trading, which was a period of about 18 months from June 1997 to December 1998, the turnover was in the region of £1m. I conclude from that the profits would have been considerable.’

He then sentenced the appellant to three-and-a-half years concurrent on each of the counts of the indictment. There was then an offence under the Bail Act 1976 for which he passed a consecutive sentence of six months making four years in all.

[8] That sentence followed a *Newton* hearing (see *R v Newton (Robert John)* (1983) 77 Cr App R 13) at which the Crown were contending that the turnover of the appellant’s business was over £1.5m and at which a compromise was reached under which it was agreed that the judge should assess the turnover as £1m, the figure appearing in his sentencing remarks.

[9] The sentence of imprisonment is not challenged on this appeal. The prosecution had served a notice under s 71 of the Criminal Justice Act 1988 giving notice that the court should consider whether it was appropriate to make a confiscation order under the relevant legislation. Once a notice is served s 71(1A) requires a court to determine first whether the offender has benefited from any relevant criminal conduct. Under sub-s (1B) subject to sub-s (1C) (which does not apply in this case) if the court determines that the offender has benefited from any relevant criminal conduct it shall then (a) determine in accordance with sub-s 6 below the amount to be recovered in his case by virtue of this section and (b) make an order under this section ordering the offender to pay that amount. Subsection (1D) provides:

‘In this Part of this Act “relevant criminal conduct” ... means (subject to section 72AA(6) below) that offence taken together with any other offences of a relevant description which are either—(a) offences of which he is convicted in the same proceedings, or (b) offences which the court will be taking into consideration in determining his sentence for the offence in question.’

Subsection 6 requires an order to be made by the court requiring an offender to pay either the benefit or the amount appearing to the court to be the amount that might be realised at the time the order is made whichever is the less.

[10] The reference to s 72AA(6) is important. Under s 72AA if a notice is served pursuant to that section and provided certain conditions are satisfied the court may make assumptions that property in the possession of the defendant has resulted from criminal conduct to which the confiscation provisions will apply. These are called the extended benefit provisions.

[11] The court will however only have jurisdiction under s 72AA if—

‘(a) the prosecutor gives written notice for the purposes of subsection (1)(a) of section 71 above; (b) that notice contains a declaration that it is the prosecutor’s opinion that the case is one in which it is appropriate for the provisions of this section to be applied; and (c) the offender—(i) is convicted

a in those proceedings of at least two qualifying offences (including the offence in question); or (ii) has been convicted of a qualifying offence on at least one previous occasion during the relevant period.'

[12] Subsection (2) of 72AA provides:

b 'In this section "qualifying offence", in relation to proceedings before the Crown Court, means any offence in relation to which all the following conditions are satisfied, that is say—(a) it is an offence to which this Part of the Act applies; (b) it is an offence which was committed after the commencement of section 2 of the Proceeds of Crime Act 1995; and (c) that court is satisfied that it is an offence from which the defendant has benefited.'

c [13] Subsection (6) of 72AA provides:

d 'Where the assumptions specified in subsection (4) above are made in any case, the offences from which, in accordance with those assumptions, the defendant is assumed to have benefited shall be treated as if they were comprised, for the purposes of this Part of this Act, in the conduct which is to be treated, in that case, as relevant criminal conduct in relation to the defendant.'

[14] So far as benefit is concerned s 71(4) provides that:

e 'For the purpose of this Part of this Act a person benefits from an offence if he obtains property as result of or in connection with its commission and his benefit is the value of the property so obtained.'

f [15] The confiscation proceedings before the judge were conducted on the basis that all the conditions by reference to which the court might have jurisdiction under s 72AA had been complied with. In particular there was no contest that the court was dealing with two qualifying offences so far as the appellant's plea of guilty was concerned. There was no contest that the court should be satisfied that the qualifying offences were ones from which the defendant had benefited. There was no contest that that benefit was a result of or in connection with the commission of the relevant offences.

g [16] Thus it was that the judge in giving his judgment in relation to the confiscation said:

h 'Simply stated, the law is (1) it is for the prosecution to prove benefit. In this case, it is agreed by both sides that the benefit figure is £1m. That figure came about in this way. Prior to sentence, I was invited to hold a *Newton* hearing to determine the turnover over a period in the specimen indictment in counterfeit trading. The prosecution were contending for a figure higher than £1m, the defence was arguing for a figure very much lower. After two days of evidence, the parties each invited me to pass sentence on the basis of a turnover of £1m. In fact, this was the figure I would probably have arrived at myself if I had had to decide the *Newton* issue. Sensibly, both Mr Groom and Mr Rose have agreed, putting legal niceties to one side that £1m should be the benefit figure for these proceedings.'

j [17] Mr Rose who appeared below and appeared for the appellant on this appeal has however argued that any concession made in the court below went to jurisdiction and he should not be bound by it. He submits that on analysis of the indictment there are not two qualifying offences within s 72AA in that none of

the offences are ones in relation to which the appellant obtained any benefit. He submits that in relation to all counts on the indictment they simply assert that the appellant was in possession of certain items 'with a view' to making a gain. He submits that it would have been possible to charge the appellant with selling or otherwise actually gaining from the sale or use of the items the subject of the counts but since the Crown did not choose so to do the position is that no benefit was obtained.

[18] The Crown's submission is that this places too narrow an interpretation on the word 'benefit'. The Crown stress that s 71(4) provides that a person benefits from an offence if he obtains property both 'as a result of' or 'in connection with' its commission.

[19] The Crown relied on two authorities: *R v Smith (David)* [2001] UKHL 68, [2002] 1 All ER 366, [2002] 1 WLR 54 and *R v Wilkes (Gary John)* [2003] EWCA Crim 848, [2003] 2 Cr App Rep (S) 625. In the first, the House of Lords were dealing with s 71(5) and the question whether the defendant in that case had obtained a pecuniary advantage. The House of Lords ruled that in relation to a conviction for evading duty the defendant in that case had obtained a pecuniary advantage once duty had been evaded even if the goods were thereafter seized by the customs and thus not sold by the defendant. Lord Rodger of Earlsferry commented at the end of his speech ([2002] 1 All ER 366 at [29]):

'I am accordingly satisfied that the decision of the Court of Appeal on this point was wrong. It is worth adding that, if adopted, their interpretation would go a long way to making the confiscation provisions ineffective against smugglers. After all, there will be few, if any, cases where customs officers will fail to seize contraband goods which they find in the hands of smugglers. The decision of the Court of Appeal would mean that any such case, for the purposes of s 71(5), the smugglers would derive no pecuniary benefit from evading the excise duty and so no confiscation order could be made against them. Fortunately, the terms of the legislation do not lead to that result.'

[20] In *R v Wilkes (Gary John)* the Court of Appeal was concerned with s 71(4). They followed the reasoning of the House of Lords in *R v Smith (David)* and held that a burglar who takes property from a house which is then immediately seized still obtains a benefit to the extent of the value of the property. Gross J in delivering the judgment of the court and giving the reasons for the court's view as to the proper construction of the statutory provision said:

[28] 1. Section 72AA of the Act can be draconian in accordance, we think, with the intention of Parliament. As Lord Rodger observed in para. [23] of his speech in *Smith (David Cadman)* in the House of Lords: "That may not be out place in a scheme for stripping criminals of the benefits of their crimes."

[29] 2. The applicability of s.72AA of the Act is triggered by the commission of the qualifying offences; their "success" or otherwise is irrelevant.

[30] 3. Once s.72AA is triggered, and if the assumptions are made, the property to be confiscated need not be, as counsel for the Crown had put in his skeleton argument, "referable to any particular piece of criminality", let alone a "successful" outcome of triggered offences; were it otherwise the purpose of the statutory scheme could readily be defeated.

a [31] 4. The provisions are compatible with Convention rights because any serious or real risk of injustice can be avoided either by not making the assumptions or by disapplying them.

b [32] We turn to the interpretation of s.71(4). Viewed in this context we have no doubt that s.71(4) is to be interpreted as meaning what it says without any gloss. When the appellant had completed committing the trigger offences he obtained property—that he was unable to realise that property because of police intervention is irrelevant, as it would have been if the property had been destroyed by fire or in some other accident.’

c [21] It follows from the above authorities that the fact that the appellant in the instant case was not charged with having sold or disposed of items bearing false trade marks is not the end of the matter. The question is whether the items that bear false trade marks or which enable false trade marks to be applied to goods are ‘property’ and whether they have been obtained in connection with the commission of the relevant offence.

d [22] Mr Rose suggested that to decide that these items had been obtained in connection with the offence in this case would lead to the provisions of the 1988 Act being used in many circumstances where Parliament simply cannot have intended them to apply. He thus for example suggested that in relation to the evasion of duty cases Parliament cannot have intended the provisions to apply to the cigarettes bought outside the country and bought for the purpose of evading duty although loosely it could be said that such cigarettes were property obtained in connection with the commission of the offence.

e [23] It is unnecessary in our view to deal with the question whether the cigarettes in the evasion of duty case would be property obtained in connection with the commission of the offence of evading duty. This is not a case where the Crown rely on the obtaining of the original garment or watch or computer disc or labelling machine. This is a case in which those items have been adapted either by the application of a false trade mark or by their capability to produce false marks. Their value was certainly intended to be enhanced thereby. The reality is that certainly so far as counts 1–9 were concerned these trade marks were being stolen by this appellant and applied to the items. There is very little distinction between that act and the act of the burglar who takes property from a house which is then immediately seized.

f [24] We accordingly also think that there is no reason to gloss the provisions of s 71(4). If one asks whether the wristwatch with the Adidas mark was property obtained by this appellant in connection with the commission of the offence with which he was charged the answer appears to us to be it was. In one sense ‘with a view to gain’ demonstrates that the property bearing the false trade mark had a value which was of benefit to the appellant and thus there is no reason why s 71(4) should not be construed as to apply to it.

g [25] Thus as it seems to us the judge did have jurisdiction. There were at least two qualifying offences. There is no dispute that if that be so having regard to the concession made below the appropriate figure for benefit is the £1m.

j SECOND POINT ON APPEAL

[26] The next point relates to whether the judge was right to hold that the appellant had a 100% interest in a property ‘Hillcrest’ which was occupied by himself and his former wife Susan Cook. She was the registered legal owner. However the judge found that the appellant using the proceeds of his illegal operations provided 100% of the money for the purchase.

[27] Mr Rose both before the judge and before us sought to rely on s 74(1) and (10) which provide:

Definition of principal terms used.—(1) In this Part of this Act, “realisable property” means, subject to subsection (2) below—(a) any property held by the defendant; and (b) any property held by a person to whom the defendant has directly or indirectly made a gift caught by this Part of this Act ...

(10) A gift (including a gift made before the commencement of this Part of this Act) is caught by this Part of this Act if—(a) it was made by the defendant at any time after the commission of the offence or, if more than one, the earliest of the offences to which the proceedings for the time being relate; and (b) the court considers it appropriate in all the circumstances to take the gift into account.

[28] It was Mr Rose’s submission before the judge and before us that s 74(10) was designed to deal with precisely the situation that has occurred in this case but that by virtue of the fact that this house was purchased prior to the date of the offence in this case the house is not caught by the provisions of s 74(10).

[29] Mr Groome for the Crown accepted both here and below that if this house was a gift within the meaning of s 74(10) then it would not be caught by virtue of the provisions of that Act having regard to the date when the property was transferred to Miss Cook. The judge looked at the matter this way:

‘The relevant date for the interpretation of s 74(10) must be 8 December 1998 because that is the date on all the counts of the specimen indictment to which the defendant pleaded guilty. The defendant admitted, for the purposes of sentence, that the indictment was a specimen indictment of offences committed over a period of 18 months, beginning in June 1997. Parliament, in my judgment, cannot have intended to preclude me, in these circumstances, from looking at the true nature of the defendant’s intentions during that period. The events of that period have been the subject of intense scrutiny and cross-examination by the Crown. In my judgment, the answers given by the defendant and his mother as to what occurred at that time are relevant. The Crown rely on the answers given to submit that the evidence is not true that gifts were made. The Crown submit the intention was to disguise his assets by placing them in the name of his wife. In my judgment, the court is entitled to consider whether the evidence is true and to assess the true intentions of the parties. If, on the facts, I was to conclude that there was not a real intention on Davies’s part to make a genuine gift to his wife in the relevant period, I would be entitled to conclude that no gifts were made.’

[30] It may be that the judge’s approach at the beginning of that quotation could be criticised. It was in fact not truly relevant if he was performing an exercise under s 72AA whether the indictment was concerned with offences committed over a period of 18 months. Nor in one sense was it by reference to the construction of s 74(10) that the point should be decided. But it is clear that he directed himself properly that the true question was whether any genuine gift to the wife had been made. He further quite rightly directed himself that if there was no question of there being a gift then the property was 100% the appellant’s and the gift provisions were of no relevance at all.

[31] Mr Rose relied upon the presumption of advancement between husband and wife and on decisions which show that it is not necessarily rebutted in

a circumstances where the husband has placed property in his wife's name in order to place it beyond the reach of any future creditors (see *Tinker v Tinker* [1970] 1 All ER 540, [1970] P 136, and generally *Harwood v Harwood* [1992] 1 FCR 1, and 48 *Halsbury's Laws* (4th edn) (2000 reissue) para 616).

b [32] The presumption of advancement can be rebutted, sometimes by quite slight evidence. In many of these cases, the question will be whether there is an honest and genuine transfer intending to give the wife the beneficial interest, albeit motivated by a desire to avoid the property falling into the hands of any future creditors (as in *Tinker's* case) or whether the transfer is a sham with the true beneficial interest remaining with the husband. In the present case the judge examined the evidence in great detail and concluded that Miss Cook had not contributed from her own resources or from any gifts made to her to the purchase of 'Hillcrest'. He found that 'the proper conclusion to draw from all the evidence is that the defendant had 100% interest in Hillcrest'.

c [33] In our view this was a finding that was open to the judge on the evidence and there is no basis for reversing it in this court.

[34] In those circumstances this appeal should be dismissed.

Appeal dismissed.

Stephen Leake Barrister.

KR and others v Bryn Alyn Community (Holdings) Ltd (in liquidation) and another

[2003] EWCA Civ 85

COURT OF APPEAL, CIVIL DIVISION

AULD, WALLER AND MANTELL LJJ

11–15 FEBRUARY, 26 JUNE, 11–13 NOVEMBER 2002, 12 FEBRUARY 2003

Limitation of action – Period of limitation – Personal injury claim – Claims made by adults relating to sexual, physical or emotional abuse during childhood by staff at children's homes – Date of knowledge of claimants that injury 'significant' – Whether employer of staff vicariously liable – Whether claims statute-barred – Whether judge should exercise discretion to disapply limitation period – Limitation Act 1980, ss 11, 14, 33.

The 14 adult claimants alleged that they suffered sexual and/or physical and/or emotional abuse between 1973 and 1991 while they were children in the care of the first defendant's children's homes. In claims for damages for negligence, nuisance, or breach of duty, where the damages claimed were for personal injury, s 11^a of the Limitation Act 1980 provided a special time limit of three years from the accrual of the cause of action or 'the date of knowledge (if later) of the person injured'. Under s 14(1)(a)^b, 'date of knowledge' was defined as the date on which the person first had knowledge 'that the injury in question was significant' and under s 14(2) an injury was 'significant' if the person would 'reasonably have considered it sufficiently serious to justify' the institution of proceedings against a compliant defendant who could satisfy judgment. The judge held that the first defendant was liable in whole or in part in all but one of the claims, and that the claimants had had the relevant knowledge of having been assaulted, for the purposes of ss 11 and 14 of the 1980 Act, before they had left the first defendant's care, but the judge exercised his discretion under s 33^c of the 1980 Act to disapply the limitation period, and made awards of damages. Certain claimants appealed against their damages awards; the claimants whose claims had been wholly or partially dismissed also appealed. In issue before the Court of Appeal were, inter alia, the application of ss 11, 14 and 33 of the 1980 Act to cases involving sexual mistreatment and physical abuse crossing the line of reasonable discipline of young children in care homes; and whether s 11 of the 1980 Act applied to vicarious responsibility for deliberate abusive conduct as distinct from an employee's delegated or 'entrusted' duty of care to prevent such abuse.

Held – (1) The word 'significant' in s 14(2) of the 1980 Act had a special and partly subjective meaning, and the words 'the injury in question' in s 14(1)(a) had a confining effect, identifying as one of the facts required for the date of knowledge that a claimant knew that 'the injury in question' was significant. The s 14(2) test was likely to be somewhat unrealistic in many child abuse cases when applied to claims for immediate injury. Such injury was likely to include, in addition to any

^a Section 11, so far as material, are set out at [22], below

^b Section 14, so far as material, is set out at [22], below

^c Section 33, so far as material, is set out at [59], below

- a physical injury, a mix of emotions and other mental effects. Depending on the severity of a victim's condition and the dates of the abuse, it might have been unreasonable and unreal to have expected him, as he moved from childhood to three years beyond maturity, to consider recourse to the civil courts for damages. Given the circumstances of the abuse and his subsequent way of life, making such a claim, or seeking advice about it, might reasonably never occur to him. In some
- b cases it might only be after the intervention of a psychiatrist that a claimant realised that there could have been a causal link between childhood abuse and psychiatric problems suffered as an adult. Increasing public awareness of child abuse meant, generally, that it would be difficult for a claimant coming of age in the late 1980s to establish that he had acted reasonably in not starting proceedings alleging child abuse within three years of attaining his majority. However, that
- c approach should be treated with caution where, as in the instant cases, claimants had come to the abuse in question already deeply disturbed and acclimatised by previous ill treatment and poor backgrounds, and moved on after it into similar cultures as adults. The nature, condition and circumstances of each individual claimant had to be considered in each case. It had been for the judge to
- d determine, in each claimant's case, whether within three years after majority, he or she had significant knowledge within the meaning of s 14(2) and in respect of what injury, whether physical, and/or mental, although it was for a claimant to prove how long he had been without the relevant knowledge. Accordingly, the judge had erred in law (see [28], [40], [42], [45]–[50], below); *Stubbings v Webb* [1993] 1 All ER 322 applied; dicta of Lord Griffiths in *Stubbings v Webb* [1993] 1
- e All ER 322 at 328 not followed.

(2) Section 33 of the 1980 Act provided a third, but discretionary, line of protection to claimants who had already had the benefit of their entitlement to the delay permitted by the primary limitation period and of any extension to it under s 14. It did not accord with the broad discretion conferred on the court by

f s 33 and the fact sensitive nature of the exercise to suggest some form of tariff. As a general rule, however, the longer the delay after the occurrence of the matters giving rise to the cause of action the more likely it was that the balance of prejudice would swing against disapplication under s 33. In cases, such as the

g instant cases, where issues of liability, causation and quantum could be so difficult with or without delay, the permissible delay in each case was likely to be highly sensitive to the prejudice it caused to the defence notwithstanding good reasons of the claimant for its length. If the date of knowledge test in s 14 of the 1980 Act was properly applied so as to provide a claimant with an extension of the period by reference to it, the weight to be given to his reasons for delay thereafter should, in normal circumstances, be limited. When considering whether to

h disapply s 33, particularly when, as in the instant cases, there was difficulty in testing old and unsupported complaints, a judge should not form a concluded view on their validity for the purpose of determining the existence and extent of potential prejudice to claimants of being deprived of a remedy (see [79]–[82], below).

- j (3) The correct approach to vicarious liability for abusive conduct was, whether or not s 11 of the 1980 Act was relevant, to identify the wrongful act, deliberate or otherwise, in respect of which vicarious responsibility was claimed and to assess the closeness of its connection to the employment in question. If the act was sufficiently closely connected with the employment, there was vicarious responsibility. In such circumstances, there was no justification or

need, for the purpose of establishing vicarious responsibility, to elide the duty in respect of which the employee's deliberate act was a breach with a duty of care delegated or 'entrusted' to him by the employer. The two were quite distinct. Where s 11 was under consideration, it followed that claims for personal injuries in respect of deliberate conduct, whether considered in the context of vicarious responsibility or not, were not caught by its provisions. Therefore, in the instant case, in the absence of some provable allegation of systematic negligence of the first defendant, its employees' deliberate abuse did not fall within s 11 and was therefore governed by the non-extendable six-year period of limitation rather than the extendable three-year period. Accordingly, the judge had not erred in this respect (see [108], below); dicta of Lord Millett in *Lister v Hesley Hall Ltd* [2001] 2 All ER 769 at [82], [84] applied.

Per curiam. Early statutory implementation of the Law Commission's recommendation that claims for personal injuries, including those of child abuse and whether in trespass to the person or negligence, should be subject to the same core regime of an extendable three-year limitation period with discretion to disapply would obviate much arid and highly wasteful litigation turning on a distinction of no apparent principle or other merit (see [100], below).

Notes

For the limitation period for personal injury actions, for a plaintiff's knowledge, and for the court's power to override time limits and the factors to which the court must have regard, see 28 *Halsbury's Laws* (4th edn reissue), paras 904, 905, 907, 908.

For the Limitation Act 1980, ss 11, 14, 33, see 24 *Halsbury's Statutes* (4th edn) (2003 reissue) 945, 949, 974.

Cases referred to in judgment

Ackbar v CF Green & Co Ltd [1975] 2 All ER 65, [1975] QB 582, [1975] 2 WLR 773.

Allen v British Rail Engineering Ltd [2001] EWCA Civ 242, [2001] ICR 942.

B v Leicestershire CC (2 April 1996, unreported).

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582.

Bristow v Grout (1986) Times, 3 November; *aff'd* (1987) Times, 9 November, CA Transcript 1134.

Buck v English Electric Co Ltd [1978] 1 All ER 271, [1977] ICR 629, [1977] 1 WLR 806.

C v A local authority [2001] EWCA Civ 302, [2001] 1 FCR 614.

Children's Foundation v Bazley [1999] 4 LRC 327, sub nom *Bazley v Curry* (1999) 174 DLR (4th) 45, Can SC.

Clunis v Camden and Islington Health Authority [1998] 3 All ER 180, [1998] QB 978, [1998] 2 WLR 902, CA.

Coad v Cornwall and Isles of Scilly Health Authority (1996) 33 BMLR 168, [1997] 1 WLR 189, CA.

Crocker v British Coal Corp (1995) 29 BMLR 159.

Dobbie v Medway Health Authority [1994] 4 All ER 450, [1994] 1 WLR 1234, CA.

Donovan v Gwent Toys Ltd [1990] 1 All ER 1018, [1990] 1 WLR 472, HL.

Farthing v North East Essex Health Authority [1998] 2 Lloyd's Rep Med 37, CA.

Griffiths v Williams [1995] CA Transcript 1599, (1995) Times, 24 November.

Hartley v Birmingham City DC [1992] 2 All ER 213, [1992] 1 WLR 968, CA.

- a* *Hatton v Sutherland, Barber v Somerset CC, Jones v Sandwell Metropolitan BC, Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76, [2002] 2 All ER 1, [2002] ICR 613.
Howe v David Brown Tractors (Retail) Ltd (Rustons Engineering Co Ltd, third party) [1991] 4 All ER 30, CA.
Jacobi v Griffiths [1999] 4 LRC 348, (1999) 174 DLR (4th) 71, Can SC.
Letang v Cooper [1964] 2 All ER 929, [1965] 1 QB 232, [1964] 3 WLR 573, CA.
- b* *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769, [2002] 1 AC 215, [2001] 2 WLR 1311.
Long v Tolchard & Sons Ltd [2001] PIQR P18, CA.
Margolis v Imperial Tobacco Ltd [2000] CA Transcript 611.
McCafferty v Metropolitan Police District Receiver [1977] 2 All ER 756, [1977] ICR 799, [1977] 1 WLR 1073, CA.
- c* *Mold v Hayton* [2000] CA Transcript 957.
Morris v CW Martin & Sons Ltd [1965] 2 All ER 725, [1966] 1 QB 716, [1965] 3 WLR 276, CA.
Nash v Eli Lilly & Co [1993] 4 All ER 383, [1993] 1 WLR 782, CA.
Page v Smith [1995] 2 All ER 736, [1996] AC 155, [1995] 2 WLR 644, HL.
- d* *Parry v Clwyd Health Authority* [1997] PIQR P1.
Penney v East Kent Health Authority (2000) 55 BMLR 63, CA.
Photo Production Ltd v Securicor Transport Ltd [1980] 1 All ER 556, [1980] AC 827, [1980] 2 WLR 283, HL.
Roberts v Winbow (1999) 49 BMLR 134, CA.
Seymour v Williams [1995] PIQR P470, CA.
- e* *Smith v Manchester Corp* (1974) 17 KIR 1, CA.
Spargo v North Essex District Health Authority (1997) 37 BMLR 99, CA.
Stubbings v Webb [1993] 1 All ER 322, [1993] AC 498, [1993] 2 WLR 120, HL; *rvsg* [1991] 3 All ER 949, [1992] QB 197, [1991] 3 WLR 383, CA.
Thompson v Brown Construction (Ebbw Vale) Ltd [1981] 2 All ER 296, [1981] 1 WLR 744, HL.
- f* *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881, [1984] QB 405, [1984] 2 WLR 522.
Walkin v South Manchester Health Authority [1995] 4 All ER 132, [1995] 1 WLR 1543, CA.
- g* *Whitfield v North Durham Health Authority* [1995] 6 Med LR 32, CA.

Cases also cited or referred to in skeleton arguments

- Baker v Willoughby* [1969] 3 All ER 1528, [1970] AC 467, [1970] 2 WLR 50, HL.
Firman v Ellis [1978] 3 All ER 851, [1978] QB 886, [1978] 3 WLR 1, CA.
Flannery v Halifax Estate Agencies Ltd (t/a Colleys Professional Services) [2000] 1 All ER 373, [2000] 1 WLR 377, CA.
- h* *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All ER 421, [2000] ICR 1086, CA.
Leadbitter v Hodge Finance Ltd [1982] 2 All ER 167.
Rahman v Arearose Ltd [2001] QB 351, [2000] 3 WLR 1184, CA.
Snieszek v Bundy (Letchworth) Ltd [2000] PIQR P213, CA.
- j* *Spargo v North Essex Health Authority* [1997] PIQR P235, CA.

Appeals

KR and thirteen other claimants appealed the decision of Connell J on 26 June 2001 ([2001] All ER (D) 322 (Jun)), whereby he awarded all but one of the claimants damages for personal injury in their consolidated actions against Bryn

Alyn Community (Holdings) Ltd (in liquidation) (the first defendant) and Royal & Sun Alliance plc (the second defendant), the putative insurer of the first defendant. The second defendant cross-appealed. The facts are set out in the judgment of the court. a

Robert F Owen QC and Philip Turton (instructed by *Uppal Taylor*, Nottingham) for the claimants. b

Edward Faulks QC and Nicholas Fewtrell (instructed by *Hill Dickinson*, Liverpool) for the second defendant.

Bryn Alyn was not represented.

Cur adv vult

12 February 2003. The following judgment of the court was delivered. c

AULD LJ.

[1] This is the judgment of the court, to which we all have contributed. These are the appeals of 14 adults all of whom claim to have suffered sexual and/or physical and/or emotional abuse between 1973 and 1991 while children in the care of the first defendant's children's homes in North Wales. In a consolidated action tried by Connell J in early 2001 ([2001] All ER (D) 322 (Jun)) they claimed damages in negligence against the first defendant, which had gone into liquidation in 1997. The respondent, on its own application, was joined as second defendant in the action to enable it to protect its position as the first defendant's putative insurer. The claims were primarily for long-term psychiatric or psychological injury. d

[2] On 26 June 2001, Connell J found the first defendant liable in negligence in respect of all the claims, save that of the appellant, MCK, and part of those of JS and CD. The judge held that all the successful claims were out of time and not saved by the 'date of knowledge' provisions in ss 11 and 14 of the Limitation Act 1980. However, in all those claims, he exercised his discretion under s 33 of the 1980 Act to disapply the period of limitation. He said that he would have done the same in respect of MCK's claim if she had established a case in negligence. He awarded all the successful claimants damages for pain, suffering and loss of amenities and some of them for loss of earnings and cost of psychotherapy. e

[3] Each of the appellants, except KR, now challenges the level and/or make-up of the judge's award of damages. MCK appeals against the judge's dismissal of her claim and JS and CD appeal against the judge's dismissal of part of their respective claims. Each of those three appellants also seek to overcome the judge's related ruling, in the light of the House of Lords decision in *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769, [2002] 1 AC 215 that he had no power under s 33 of the 1980 Act to extend the limitation period to tortious conduct in respect of which the first defendant was vicariously responsible but which was not in itself negligent. f

[4] The respondent, with the judge's permission, cross-appeals the judge's decision to disapply the limitation period under s 33 in the case of the 13 successful claims in negligence and contingently in the case of MCK in the event of her overturning the judge's dismissal of her claim in negligence. MCK, in her turn, seeks to rely on s 14 of the 1980 Act in the event of losing her contingent entitlement to proceed under s 33. Connell J refused the other claimants' applications for permission to appeal the judge's ruling against them g

a on s 14 contingently on this court upholding the respondent's cross-appeal on s 33. They did not renew the application in this court until a late stage in the hearing of the appeal in circumstances that we describe below. The court then granted permission and, accordingly, all the appellants now cross-appeal the judge's ruling against them under s 14.

b INTRODUCTION

[5] From about 1969 to 1990 John Allen operated a number of children's care homes in North Wales which became known, after the name of its first and main home, as 'the Bryn Alyn Community'. Throughout that period he controlled the affairs of the community, assuming the role of chief executive on its transfer to the first defendant, a private company, in 1972. Although the community ended c in financial failure on the liquidation of the company in 1997, it operated successfully for over two decades, employing a large number of staff and in the mid-1980s earning significant profits. Allen's stated aim and that of the community was to provide an alternative to the strict discipline and training regimes of approved schools for children of both sexes who, for various reasons, d were vulnerable and/or unruly and in need of care. He held out the community as providing a flexible, family-type environment, catering for the individual needs of each child.

[6] The vast majority of the community's charges were children who had been placed in the care of local authorities. However, it appears that it offered e more in the way of care than it was equipped to provide. In particular, many of its staff had had little or no experience of residential care work with children before coming to Bryn Alyn or any formal qualifications for the work. And, as will appear, a number of them, including Allen, sexually and/or violently abused some of the children in their charge.

[7] In 1995 Allen was convicted of six offences of indecent assault against f young male residents of the community between 1972 and 1983, for which he was sentenced to six years' imprisonment. He and a number of other employees also became the subject of various allegations of abuse, some of which, in 1997 and 1998, were investigated by the Tribunal of Inquiry chaired by Sir Ronald Waterhouse into allegations of child abuse in a number of residential g establishments in North Wales between 1974 and 1997 (*Lost in Care: Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974 (1999–2001) (HC 201)*) (the Waterhouse Report). All but one of the claims the subject of these appeals, that of JS, were first made in 1998 or 1999, in the wake of the publicity given to the allegations investigated by the tribunal.

h [8] The main issues in the trial material to this appeal were: (i) whether any of the claims were statute-barred after taking into account the claimant's 'date of knowledge' under s 14, and, if so, whether the judge should exercise his discretion under s 33 to disapply the limitation period; (ii) whether, in respect of the abusive conduct relied on, each claimant had proved a breach of the duty of j care having regard to the standards applicable at the time; (iii) whether deliberately abusive conduct was in itself conduct for which the first defendant could be vicariously responsible in negligence and to which an extendable limitation period of three years under s 11, subject to disapplication under s 33 applied, or was conduct to which a non-extendable limitation period of six years under s 2 of the 1980 Act applied; (iv) whether such conduct for which the first

defendant was responsible, and in respect of which the claim was not statute-barred, made a material and, if so, what, contribution to each claimant's psychiatric condition; and (v) the quantum of damages. a

[9] The conduct on which all the claimants founded their claims, calculated from the date they left Bryn Alyn, had occurred long before they made them. Remembering that in all cases they were still minors when they left, any limitation period (and in particular the three-year time limit under s 11 if it applied) did not begin to run until they reached majority. The range of delay to issue of proceedings from the last abusive act and from expiry of the limitation period was respectively from about 24 and 20 years in the case of KR to about eight years and three years in the case of CD. JS was the only claimant agreed between the parties to have been within the six-year ordinary time limit in s 2 of the 1980 Act for actions in tort. b
c

[10] Each claimant gave oral evidence in support of his or her own claim. Mostly, there was no or little other confirmatory evidence of the abuse alleged. And, with some exceptions, there were few of the community's records contemporary with the alleged abuse on which either side could draw as to the truth of the allegations and, if true, as to the community's awareness of them. Many of its records had been destroyed in a warehouse fire in 1996, shortly before the first defendant went into liquidation. d

[11] The alleged abuse varied in form and in duration. But one common feature of all the claims, as Connell J noted ([2001] All ER (D) 322 (Jun) at [15]), was that all the claimants had suffered serious trauma before coming to the community and— e

[e]ven if the care offered to them there had been all that it should have been, it is doubtful that any of them would have escaped significant difficulties in coping on a day to day basis with adult life.'

[12] The first defendant played no part in the trial. The respondent, through counsel, contested each claim, advancing no positive case, save in the claim of JS (where there were more contemporaneous records than usual), and, save for a few concessions, required each claimant to prove his or her claim. It was not able to call much evidence of its own. Some witnesses had died; others had gone abroad or were untraceable; some were in prison; and some, no doubt, were too old or ill or were reluctant to co-operate in connection with allegations of such unpleasant matters so long before. It called only four former employees of Bryn Alyn, namely Keith Evans, Peter Steen, John Jeffreys and Dafydd Vevar, and otherwise limited itself to medical evidence, which was mostly agreed. Two of the principal players, John Allen and David Stanley, had in the meantime been convicted of serious sexual offences involving children in the community. Allen was concerned in seven of the 14 claims and Stanley in one of them. Although both men were available to give evidence, neither was called. f
g
h

[13] There was, as we have indicated, difficulty for the respondent arising from the lack of Bryn Alyn records contemporaneous with the alleged abusive conduct. This was no doubt in part due to the passage of time but also to the destruction of many of them in the warehouse fire. Further difficulties of this sort also flowed from the fact that the first defendant was in liquidation. The result was that there was no Bryn Alyn contemporaneous documentation such as daily logs, incident reports and supporting statements, claimant's reporting files or matron's reports of injuries. j

a [14] The judge had available as background material ch 21 of the Waterhouse Report which dealt with Bryn Alyn. The claimants relied upon parts of the evidence given to the Inquiry between January 1997 and April 1998 and on certain of the tribunal's conclusions. The judge said of this material:

b '[6] ... I have reached my conclusions on the evidence, which I have heard, but nothing that I have heard causes me to doubt the appropriateness of the Waterhouse conclusions. The inquiry did not hear from many of the claimants who gave evidence to me; but their evidence tends to support the accuracy of those conclusions.'

[15] We now turn to the individual issues in the appeal.

c LIMITATION

d [16] In claims for damages for negligence, nuisance or breach of duty, where the damages claimed consist of or include damages in respect of personal injuries, s 11(1) and (4) of the 1980 Act provides a special time limit of three years from the accrual of the cause of action or 'the date of knowledge (if later) of the person injured'. By s 38 of the Act, 'personal injuries' include 'any impairment of a person's physical or mental condition'. The regime for personal injuries claims of this type is, on the face of it, more stringent than the general six-year limitation period provided by s 2 of the 1980 Act for all other actions founded on tort. However, the rigour of the shorter period is mitigated, not only by the provision for its extension by reference to the date of knowledge, which is defined in s 14, but also, in the event of a claimant's failure to bring his action within any such extended period, by s 33, which gives the court a discretion to disapply the limitation period so as to allow the action to proceed.

e [17] The presence of the two provisions, one for extension and the other for disapplication of the limitation period, in personal injury claims has produced the irony that where there are alleged primary and secondary tortfeasors, an employer may be held to account in negligence in respect of his employee's deliberate assault long after the latter has been able to claim the benefit of his unextendable six-year period of limitation. That is because the courts have construed the words in s 11, 'negligence, nuisance or breach of duty', as not including deliberate acts of assault—trespass to the person.

f [18] In addition, as this case exemplifies, the relationship of the two provisions for relaxation of the three-year period in personal injury claims gives rise to particular difficulties in claims in negligence against care homes and the like in respect of their employees' child abuse, where the claims are brought long after the event in respect of physical and/or mental injury at the time and also of later mental impairment. In such cases, as the Law Commission has pointed out in its report, *Limitation of Actions* (2001) (Law Com No 270) paras 4.23–4.33, there may well be difficulty in disentangling the immediate injury from long-term psychiatric injury diagnosed very much later. Each case must, of course, be considered on its own facts. The immediate physical effects will vary, according to the violence and other circumstances of the abuse, from the mild to the very serious. Whatever the seriousness of the physical injury, it is likely to be accompanied by some harmful effect on the mind, for example, distress, humiliation and/or shame. Such effects, depending on the circumstances of the abuse, will vary in their severity and may or may not, at an early stage, deter or disable the victims from bringing a claim within the limitation period for any

immediate or early injury attributable to the abuse. The abuse may also, as Connell J found here, give rise to, and similarly repress or mask, long-term and more serious psychiatric injury. In such circumstances, we have some sympathy for the difficulties facing the judge in identifying and distinguishing where necessary between s 14 and s 33 considerations. Unfortunately, his difficulties were exacerbated by the parties' concentration in the pleadings, evidence and argument on long-term psychiatric injury so as to sideline the immediate physical and mental injuries that all or some of the claimants may have suffered. a
b

[19] The judge did not deal with limitation as a preliminary issue. In his general rulings at the beginning of his judgment and in his treatment of each claim, he ruled on limitation only after he had considered and dealt with all the other issues, namely liability, causation and quantum. As will appear, this order of treatment appears to have affected his reasoning on the limitation issues, particularly those under s 33. c

[20] As we have indicated, the judge considered two separate limitation arguments which he regarded as confined to claims alleging negligence, namely as to the 'date of knowledge' under s 14 and, in the alternative, disapplication under s 33 of the s 11 period of three years. He began by properly characterising the nature of the claims in relation to both issues as primarily one for damages for post-abuse psychiatric injury, consistently with his later treatment of the claims when awarding and assessing damages. He said: d

[23] In every case there are two points on behalf of the claimants. First it is argued that no claimant acquired the requisite knowledge within s 14 until he or she had been advised by the psychiatrist consulted in connection with this claim that the psychiatric problems suffered by the claimant were significant, and that this injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence ... e

[24] Secondly, the claimants submit that in any event the provisions of s 11 ... should not apply in these cases because the court should exercise its discretion under s 33 ... to permit these actions to proceed ... f

[27] ... it is relevant to bear in mind that the claimants seek general damages primarily for psychiatric injury inflicted upon them, rather than for any physical injuries they may have suffered as a result of the assaults alleged ...' g

[21] However, he went on to focus, when dealing with date of knowledge under s 14, on the immediate impact of the alleged abuse, but, when considering disapplication under s 33, on the later psychiatric injury.

Section 14

[22] Sections 11 and 14 provide, so far as material: h

'11.—(1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person ...' j

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) ... below.

a (4) ... the period applicable is three years from—(a) the date on which the cause of action accrued; or (b) the date of knowledge (if later) of the person injured ...

b 14.—(1) ... in [section] 11 ... of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts—(a) that the injury in question was significant; and (b) that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and (c) the identity of the defendant ... and knowledge that any acts or omissions did or did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant ...

c (2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.'

d [23] Thus, in a personal injuries claim as defined in s 11, time runs from the claimant's knowledge, where it is later than the accrual of the cause of action, from the date when he knew 'that the injury in question' was 'significant', namely one that he would 'reasonably' have considered sufficiently serious to justify the institution of proceedings against a compliant defendant who could satisfy judgment; that the injury was attributable to alleged breach of duty; and the identity of the defendant.

e [24] The judge found that every claimant's date of knowledge preceded the three-year period before issue of proceedings and that, therefore, all the claims were statute-barred unless he disappplied the limitation period under s 33. He prefaced his consideration of this issue by again identifying the main thrust of the claims as for damages for subsequently discovered psychiatric injury. He referred (at [28]) to the submission of Mr Robert Owen QC, counsel for the claimants, that—

f 'none of the claimants knew that the injuries suffered whilst living in the community were significant, or that the injuries (and in particular the psychiatric damage) were attributable in whole or in part to the act or omission which is alleged to constitute negligence until so advised by the psychiatrist consulted in connection with the claim.'

g And he noted that the advice as to that psychiatric damage was given in every case within three years of the commencement of the proceedings.

h [25] However, the judge went on to reject Mr Owen's submission, not by reference to the date of knowledge of psychiatric injury, but by reference to the immediate impact on each claimant of the physical act of abuse. In a general ruling on this issue, he drew on dicta relevant to claims for personal injury where its immediate significance is obvious:

j [29] ... The claimants all allege that they were the victims of assaults, either physical, sexual or both. The test to be applied is as described by Bingham MR in *Dobbie v Medway Health Authority* [1994] 4 All ER 450 at 455–456, [1994] 1 WLR 1234 at 1240, viz:

"This test is not in my judgment hard to apply. It involves ascertaining the personal injury on which the claim is founded and asking when the claimant knew of it. In the case of an insidious disease or a delayed result

of a surgical mishap, this knowledge may come well after the suffering of the disease or the performance of the surgery. But, more usually, the claimant knows that he has suffered personal injury as soon or almost as soon as he does so.” a

Here each claimant must have known at the time that he or she was the victim of such an assault which caused at the least some distress and more often profound disquiet, pain and resentment. They knew, in ordinary language, that they had been injured in a manner which could not properly be described as trivial, but which was significant. They also knew, as I conclude, that the distress suffered was attributable to the actions upon which they now rely to found their claims. Their situations were similar to that of the victim, Lesley Stubbings in *Stubbings v Webb* [1993] 1 All ER 322, [1993] AC 498, who had been raped and persistently sexually abused, but who claimed that she did not realise that she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised that there might be a causal link between psychiatric problems suffered in adult life and her sexual abuse as a child. Lord Griffiths said ([1993] 1 All ER 322 at 328, [1993] AC 498 at 506): “I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury.” b c d

[30] In my view, the same applies to a young person who knows that he or she has been assaulted on a regular basis; or who has been buggered, masturbated or fondled in an inappropriate way. Of course the realisation of the extent of the injury may grow with time, as may the injury itself; but in every case I conclude that these unhappy victims had the relevant knowledge before they left the community.’ e

[26] As we have said, when this court began to hear this appeal only MCK challenged that ruling, and then only contingently on the success of her appeal as to liability in negligence and on the success of the respondent’s cross-appeal on the s 33 point. However, after hearing all the original submissions on appeal, having reserved judgment and having begun to write it, we began to feel unease at the judge’s concentration, for the purpose of determining the date of knowledge under s 14, on the immediate effects of the abuse which, for the reasons we have given, appeared not to be the injuries for which they sought damages. We considered that the true question for the judge and for us was, as Croom-Johnson J put it in *Ackbar v CF Green & Co Ltd* [1975] 2 All ER 65 at 68, [1975] QB 582 at 587, in the slightly different context of whether a claim consisted of or included damages for personal injuries, ‘what is the action all about’, a test approved and applied by Stuart-Smith LJ in *Howe v David Brown Tractors (Retail) Ltd (Rustons Engineering Co Ltd, third party)* [1991] 4 All ER 30 at 36 and Auld LJ in *Walkin v South Manchester Health Authority* [1995] 4 All ER 132 at 141, [1995] 1 WLR 1543 at 1552. f g h

[27] This case was all about long-term, post-traumatic, psychiatric injury. Or so it seemed to us from the conduct of the action below and also from the focus of the arguments on appeal. Each of the pleaded claims particularised the injury in respect of which damages were sought, by reference to a psychiatric report prepared many years after the last alleged abusive conduct and which, true to its intention, dealt with the claimant’s later psychiatric condition and its attribution. The judge appears to have given the immediate injury caused by and inherent in the abuse some prominence when dealing with limitation under s 14. However, j

a he does not appear to have considered it sufficiently important to examine it closely for the purpose of determining whether it met all the requirements of s 14(2). Nor, in the main, does he appear to have it in mind when assessing quantum.

b [28] The main issue for the judge under s 14 was as to knowledge of 'significant' injury, not, in the circumstances, of attributability. It did not seem to us that the judge, in applying Lord Griffiths' observation to every claim in the way that he did, can have had sufficient regard to the special and partly subjective meaning of the word 'significant' in s 14(2) or to the confining effect of the words 'the injury in question' in s 14(1)(a), identifying as one of the facts required for the date of knowledge that a claimant knew 'that the injury in question' was 'significant'. In short, of what knowledge and of what injury was the judge speaking when he held that all these claimants 'had the relevant knowledge before they left the community'?

c [29] Because this issue had not been canvassed before us, there being no challenge to the s 14 rulings save as to the absence of one in the case of MCK, we prepared and submitted our judgment to the parties' representatives, making provisional rulings on this issue and to the extent that it affected our rulings on s 33, on that issue too. We invited the parties, through counsel, to consider pleading the point in relation to each claimant and to making submissions on it in writing or orally.

d [30] On the reopening of the appeal to hear further argument, Mr Owen maintained with some emphasis that the case as pleaded and presented throughout covered both the physical and psychological effects of the abuse, and declined the court's invitation to consider amendment of the claimants' pleading to make the position clear. However, with the court's leave, he amended their notices of appeal to add a complaint challenging the judge's ruling against them under s 14, and each of the parties' counsel have prepared a further skeleton argument and appeared before the court on a reopened hearing of the appeal to argue the point. As will appear, that argument engendered a further concern about the judge's apparent failure, when assessing quantum of general damages in each case, to have regard to the abuse itself and its immediate effects. But for the moment, we confine our remarks to our original concern, the judge's treatment of the meaning of 'significant' knowledge of 'the injury in question' for the purpose of s 14.

e [31] For convenience, we repeat the relevant words of s 14(2):

h 'For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.'

i [32] The test was explained by Geoffrey Lane LJ in *McCafferty v Metropolitan Police District Receiver* [1977] 2 All ER 756 at 775, [1977] 1 WLR 1073 at 1081, in terms that the Court of Appeal followed in *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 390, [1993] 1 WLR 782 at 791:

j '... it is clear that the test is partly a subjective test, namely: would this plaintiff have considered the injury sufficiently serious? And partly an objective test, namely: would he have been reasonable if he did not regard it as sufficiently serious? It seems to me that sub-s (7) is directed at the nature of the injury as known to the plaintiff at that time. Taking *that* plaintiff, with

that plaintiff's intelligence, would he have been reasonable in considering the injury not sufficiently serious to justify instituting proceedings for damages?' a

[33] The possibility of more than one candidate for the date of knowledge, depending on the nature of the injuries relied on, did not arise in *McCafferty's* case—a claim for deafness eventually brought on from the claimant's exposure to gunfire in the test firing of firearms. Nor did it arise in *Dobbie v Medway Health Authority* [1994] 4 All ER 450, [1994] 1 WLR 1234, from the passage in the judgment of Bingham MR on which the judge relied. There, the claimant's date of knowledge, shortly after the event, was the same for both the physical and psychological injury in respect of which she claimed 15 years later that her breast had been unnecessarily removed. The point did arise as one of two issues in the Court of Appeal in *Stubbings v Webb* [1991] 3 All ER 949, [1992] QB 197; the other was whether the three-year limitation period in s 11 was capable of applying to intentional as well as unintentional acts. The appellant's claim was for damages for mental illness and psychological disturbance allegedly caused by sexual abuse of her as a child in the 1960s. The court, affirming the decision of the trial judge, found for the claimant on both issues. Only the second, fatally to the claim, was reversed in the House of Lords ([1993] 1 All ER 322, [1993] AC 498). As to the first, we repeat and set out a little more of the passage from Lord Griffiths' speech ([1993] 1 All ER 322 at 328, [1993] AC 498 at 506) with which the other Law Lords agreed and including the extract from it relied upon by the judge, obliquely criticising the Court of Appeal's reasoning: b

"The respondent's case was that although she knew she had been raped by one appellant and had been persistently sexually abused by the other she did not realise she had suffered sufficiently serious injury to justify starting proceedings for damages until she realised there might be a causal link between psychiatric problems she had suffered in adult life and her sexual abuse as a child. The Court of Appeal after considerable hesitation accepted this argument on behalf of the respondent. If it was necessary to decide the point I should not have found it easy to agree with the Court of Appeal. Personal injury is defined in s 38 [of the 1980 Act] as including "any impairment of a person's physical or mental condition" and I have the greatest difficulty in accepting that a woman who knows that she has been raped does not know that she has suffered a significant injury. The Criminal Injuries Compensation Board ... has been making substantial awards to the victims of rape ... and since the enlargement of the scheme in 1979 this has included victims within the family setting. *Sexual abuse that goes no further than indecent fondling of a child raises a more difficult question*, but some of the respondent's allegations are so serious that I should have had difficulty in regarding them as other than significant. *However I do not find it necessary to resolve this difficult issue ...*" (Our emphases.) c

[34] As we have indicated, the judge appears to have placed considerable reliance on this qualified and obiter passage from Lord Griffiths' speech. It is unfortunate that his attention was not drawn—and he did not refer—to the judgments in the Court of Appeal. With respect to Lord Griffiths, we believe that those judgments should be revisited, not only as to lesser and 'consensual' sexual abuse of the sort that he may have had in mind in his qualification, but also as to more serious sexual mistreatment and to physical abuse crossing the line of reasonable discipline of young children in care homes and the like. All the members of the Court of Appeal d

a stressed the importance of the special, partly subjective meaning given by s 14(2) to the word 'significant' in s 14(1) and, in consequence, distinguished between the plaintiff's knowledge at the time of the abuse and that much later when she was an adult and became aware of the long-term psychological problems it had caused.

[35] We summarise the reasoning of Bingham LJ ([1991] 3 All ER 949 at 954–957, [1992] QB 197 at 205–208) with which Nolan LJ and Browne-Wilkinson V-C agreed
b ([1991] 3 All ER 949 at 958–959, 960, [1992] QB 197 at 210–211, 212 respectively). On the facts, the impairment of the claimant's physical condition was not significant in a s 14(2) sense since, although she had suffered distress, humiliation and degradation at the hands of her abusers, their conduct had not caused her physical injury, save for some assaults in about 1972 when she was aged 15 causing her nose to bleed. In the state of society in the late 1970s and early 1980s the claimant would not reasonably
c have considered those assaults sufficiently serious to justify proceedings even 'against an acquiescent and creditworthy defendant'. As to impairment of the claimant's mental condition, she could have sued for the immediate distress caused by the sexual abuse, but the claimant would not, at that stage, have regarded such distress in the absence of any apparent long-term consequence as sufficiently serious
d to justify proceedings nor, on the evidence, did she know within three years before issuing proceedings that the serious impairment of her mental condition was attributable to the abuse.

[36] Bingham LJ acknowledged the particular factual circumstances of the case on which the court was proceeding. Nevertheless, he added the following observation of considerable general importance ([1991] 3 All ER 949 at 956–957,
e [1992] QB 197 at 208) which was echoed by Nolan LJ and Browne-Wilkinson V-C. We respectfully consider that Lord Griffiths' qualified and obiter remark is not an adequate answer to it:

f 'It was argued for the [appellants] ... that the acts alleged against them were of great seriousness and well known to the plaintiff at the date of commission. She had the knowledge necessary to sue on reaching her majority and should have either sued then or not at all. It was not permissible to divide up the conduct complained of and treat the longer-term consequences as in effect giving rise to a different cause of action. I see
g considerable force in this submission but on the facts of this case it is in my view unsound. Sections 11(4)(b) and 14(1)(a) are tailored to meet the case where a plaintiff knows more than three years before bringing his action that he has suffered *some* injury but not an injury which is, within the meaning of s 14(2), significant. Whether a particular injury would reasonably be
h regarded as significant by a particular plaintiff, as the person whose date of knowledge is in question, is a very highly judgmental question. The education of public opinion over the last five years or so, both as to the prevalence of child abuse within families and as to its serious long-term consequences, might well mean that almost any plaintiff would now reasonably regard such conduct (if other than very trivial) as significant in the statutory sense. But before the publicity given to the Cleveland inquiry the
j level of public (and even professional) understanding was much lower and claims by children on reaching their majority against parents and siblings were unknown. Recognition that these acts had caused her serious *long-term* mental impairment could reasonably be seen by the plaintiff as importing a new order of gravity. To distinguish between the immediate impairment of the plaintiff's mental condition caused by these acts, apparently minor and

transient, and the much more serious *long-term* impairment of the plaintiff's mental condition, the attributability of which to the Webbs' conduct was only appreciated later, is not in my judgment to defeat the intention of the legislature but to promote it.' a

[37] Thus, although s 11(1) refers to an action where the damages claimed 'consist of or include damages in respect of personal injuries', it is vital on the facts of each case for the court to determine at what date the claimant first knew, or ought to have known, that 'the injury in question' whether physical or mental, was 'significant' in the sense indicated by the Court of Appeal in *Stubbings*' case. It has been held that where there is more than one form of such significant injury, a judge should have regard to the date of knowledge of the first: see, for example, *Bristow v Grout* (1986) Times, 3 November, in which Jupp J held that the date of knowledge was that of the first of the physical injuries the plaintiff knew to be serious enough for him to institute proceedings, and not to a separate physical injury, albeit arising from the same accident, discovered after settlement of the first claim. b
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[38] We should emphasise that we are concerned only in this appeal with one action. If, on the facts, there is early s 14(2) knowledge of one form of injury, say of a physical nature, and the claimant sues and recovers damages for it, he will then be barred from bringing a further action outside the three-year limit in reliance on later knowledge of some other significant injury arising out of the same facts. That is in part as a result of cause of action estoppel, of which *Bristow*'s case is an example, albeit that there, the bar operated as a result of settlement of an initial claim without action. Although in such a circumstance, there may be a new claim, it is not a new cause of action: see *Letang v Cooper* [1964] 2 All ER 929 at 934–935, [1965] 1 QB 232 at 242–243 per Diplock LJ. It is different if the new claim is made by way of permitted amendment in an existing cause of action. d
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[39] In any s 14 case, it is important to distinguish between the occurrence of initial damage that may itself amount to a significant injury in a s 14(2) sense and that which, although the claimant could have successfully sued for it, does not. It is not apparent from the judge's reasoning in this case that he has done that, either in his general treatment of the provision or in his individual consideration of each claim. We say that for a number of reasons, all of which we should preface by a consideration of how s 14(2) can be made to fit the circumstances of claims like these of child abuse causing immediate physical and mental injury and later long-term psychiatric injury first diagnosed when well into adulthood. f
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[40] Section 14(2) was designed principally to provide for cases of late diagnosis of physical diseases, such as asbestosis or byssinosis, the deadly development of which may be unknown until their symptoms eventually appear. At first sight, it does not fit so readily the circumstances of abused children who, because of their immaturity and vulnerable position, might never consider or seek advice about suing their abusers, or those responsible for them, for damages. The test, properly interpreted, is likely to be somewhat unrealistic in many child abuse cases when applied to claims for immediate injury. Such injury is likely to include, in addition to any physical injury, a mix of emotions and other mental effects, for example, humiliation, distress, shame, guilt and fear of being disbelieved or of disclosure. In such circumstances, depending on the severity of the victim's condition and the dates of the abuse, it could have been unreasonable and unreal to have expected him, as he moved from childhood to three years h
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a beyond majority, to consider recourse to the civil courts for damages for something he just wanted to put behind him. Given the circumstances of the abuse and his subsequent way of life, making such a claim, or seeking advice about it, might reasonably never occur to him. He might have known at the time of the abuse that it was wrong; he might have harboured resentment, great grievance, or even a desire for revenge, perhaps even a wish to report it to the police, but not necessarily to litigate for damages.

b [41] Application of the s 14(2) meaning of 'significance' to child victims of abuse is often the more difficult because many of them, as in the case of these claimants, come to it already damaged and vulnerable because of similar ill-treatment in other settings. For some such behaviour is unpleasant, but familiar. As Mr Owen put it in his supplemental submissions, such misconduct was for many of these claimants 'the norm'; it was committed by persons in authority; and they, the claimants, were powerless to do anything about it. Some victims of physical abuse may have believed that, to some extent, they deserved it. And, in cases of serious sexual abuse unaccompanied by serious physical injury of any permanent or disabling kind, it is not surprising, submitted Mr Owen that they did not see the significance of the conduct in s 14(2) terms, and simply tried to make the best of things.

c [42] However artificial it may seem to pose the question in this context, s 14 requires the court, on a case-by-case basis, to ask whether such an already-damaged child would reasonably turn his mind to litigation as a solution to his problems? The same applies to those, as in the case of many of these claimants who, subsequent to the abuse, progress into adulthood and a twilight world of drugs, further abuse and violence and, in some cases, crime. Some would put the abuse to the back of their minds; some might, as a result or a symptom of an as yet undiagnosed development of psychiatric illness, block or suppress it. Whether such a reaction is deliberate or unconscious, whether or not it is a result of some mental impairment, the question remains whether and when such a person would have reasonably seen the significance of his injury so as turn his mind to litigation in the sense required by s 14(1)(a) and (2) to start the period of limitation running. At this stage the s 14(1)(b) issue of actual or constructive knowledge of attributability becomes more of a live issue than it would have been at or shortly after the abuse, because in some cases it might only be after the intervention of a psychiatrist that a claimant realises that there could have been a causal link between the childhood abuse and the psychiatric problems suffered as an adult, an argument accepted by the Court of Appeal, but which Lord Griffiths found difficult to accept, in *Stubbings'* case.

d [43] The posing of such questions may have become less artificial in recent years as a result of the publicity given to inquiries of the sort conducted by Sir Ronald Waterhouse in 1997 and 1998 and the disturbing increase in the number of criminal prosecutions and civil suits for child abuse, some of it a very long time ago. The momentum of increase in public awareness of such conduct, of which Bingham LJ spoke in 1992 in *Stubbings'* case is likely to have begun to usher in a generation more sensitive to its seriousness and 'significance' in a s 14(2) sense. In that case the court was concerned with sexual and other physical abuse of a child over a 12-year period from 1959 to 1971 when she was between two and 14 years old. Browne-Wilkinson V-C and Nolan LJ agreed with Bingham LJ that the claimant's undoubted knowledge on reaching maturity in the early 1970s of what she had been through and its effect on her physical and

mental condition at the time did not, on the facts of the case and in the climate of the time, amount to knowledge of significant injury for the purpose of s 14(2). As I have said, Browne-Wilkinson V-C and Nolan LJ spoke in similar terms to those of Bingham LJ in the passage from his judgment that we have set out in [36], above, suggesting that it may not have been until the late 1980s that public awareness had become such that abused children were, before or within three years after majority, more likely, depending on the nature of the abuse and other circumstances, to become aware of the significance, in a s 14(2) sense, of what had happened to them. Nolan LJ said ([1991] 3 All ER 949 at 959, [1992] QB 197 at 211):

‘The question posed by the 1980 Act ... is not whether the plaintiff could have sued successfully in 1975, but whether at that time she should reasonably have considered her injuries sufficiently serious to justify proceedings. It may well be argued that, even if her physical injuries were relatively minor, the feelings of outrage, humiliation and despair which she must have experienced if her account is true could hardly have failed to result in mental injury. But in my judgment the available evidence does not show that she should reasonably have regarded her physical or mental injuries at that stage as sufficiently serious to justify the institution of proceedings for damages, even against hypothetically solvent and unresisting defendants. *It has to be borne in mind that until the last few years proceedings of the present kind were unheard of.*’ (Our emphasis.)

[44] Browne-Wilkinson V-C said ([1991] 3 All ER 949 at 959–960, [1992] QB 197 at 212):

‘In ordinary terms, I have no doubt that quite apart from any long-term psychiatric harm the alleged sexual abuse and rape caused significant injury. The gross interference with the physical privacy and integrity of the plaintiff would justify a substantial award of damages in itself, even if no long-term psychiatric damage was caused. But the word “significant” in s 14 does not bear its ordinary meaning. For the purposes of that section, an injury is only “significant” if the plaintiff would “reasonably have considered it sufficiently serious to justify [her] instituting proceedings for damages” against her adoptive father and brother assuming that they would admit liability and be good for the damages. In deciding what [the plaintiff] would “reasonably have considered” one has to have regard to the circumstances obtaining in 1975, when she attained full age. The question is whether, in 1975, the plaintiff acted reasonably in not then suing ... for the serious wrongs alleged to have been done to her. In my judgment it is important not to consider the question by reference to the social habits and conventions of 1991. Over recent years, for the first time civil actions have been brought by victims of adult rape against their assailants. As to actions against child abusers, this is apparently the first case in which the alleged victim has sought to sue her abusers. *In the present climate and state of knowledge it would in my judgment be very difficult, if not impossible, for a plaintiff coming of age in the late 1980s to establish that she acted “reasonably” in not starting proceedings alleging child abuse within three years of attaining her majority. But we are concerned with the reasonableness of the plaintiff’s behaviour in the period 1975–78. At that time civil actions based on sexual assaults were unknown in this country.*’ (Our emphasis.)

a [45] There may be much force in Nolan LJ's general observation at the end of that passage as to the claimants who came of age in the late 1980s. However, it should, in our view, be treated with some caution, particularly in cases, where as in most of these appeals, claimants came to the abuse in question already deeply disturbed and acclimatised by previous ill-treatment and poor backgrounds and moved on after it into a similar culture as an adult. To paraphrase Bingham LJ, b whether a particular claimant would reasonably have not regarded a particular injury from such abuse when it occurred, as significant for this purpose is still likely to be a 'highly judgmental question'. It is a fact-sensitive question that needs to be considered on a case-by-case basis. It is plain that the judge ([2001] c All ER (D) 322 (Jun)) did not do that. First, it looks as if he construed the word 'significant' in s 14(1) without reference to the special meaning given to it in this context by s 14(2). And, second, even if he had its partly subjective meaning in mind, he does not appear to have considered its application on a claim-by-claim basis, in particular as to the nature, condition and circumstances of the individual claimant or to 'the injury in question'. A sure sign of his erroneous approach is d they felt able to credit all of the claimants with 'the relevant knowledge before they left the community', namely at a time when all or most of them were still as or more vulnerable than when they had first arrived there and when each of them had still to go out into the world.

[46] Mr Edward Faulks QC, on behalf of the respondent, acknowledged that, the judge, in the main, did not examine the s 14 issue individually in relation to each claimant, but dealt with it compendiously, including an implicit finding in e each case of some significant physical injury—implicit because of his description (at [27]) of the claims being 'primarily for psychiatric injury ... rather than for any physical injuries' (see [20], above). He urged the court not to go behind the judge's general findings of fact of knowledge of significant injury, relying, conventionally, on the advantage he had over the court in having heard and seen f the claimants and the medical witnesses.

[47] Given the generality and brevity of the judge's treatment of this important issue and the considerable variation in the nature and circumstance of the abuse alleged by each claimant, we do not consider that we can properly take that course. It was for the judge to determine in the case of each claimant g whether, within three years after majority, he or she had significant knowledge within the meaning of s 14(2) and in respect of what injury, whether physical and/or mental. In the case of each claimant, the judge had to consider, among other things, his or her individual history and circumstances, the nature, severity and duration of the abuse, the period of time when it occurred and its physical and/or mental effects evident to the claimant within three years after reaching h majority. He then had to relate them all to the question whether that claimant, given those and any other relevant circumstances, would have considered the injury of which he knew (the injury in question) sufficiently serious to institute proceedings against a solvent and compliant defendant.

j [48] There are no short cuts in such an exercise, such as, for example, that adopted by Mr Faulks of asking each claimant whether they knew at the time that what had happened to them was 'wrong', although, as he submitted to the court, it may be a step on the way to identifying whether any particular claimant had relevant knowledge. Nor did the judge's reliance on Lord Griffiths' qualified and obiter remark in *Stubbings v Webb* [1993] 1 All ER 322 at 328, [1993] AC 498 at 506 for his general conclusion on the matter ([2001] All ER (D) 322 (Jun) at [29] and

[30]) come close to focusing on the true test of significance in s 14(2) or on the case-sensitive nature of the examination that it called for, namely that each claimant— a

‘must have known at the time that he or she was the victim of [a physical and/or sexual] assault which caused at the least some distress and more often profound disquiet, pain and resentment. They knew, in ordinary language, that they had been injured in a manner which could not properly be described as trivial, but which was significant. They also knew, as I conclude that the distress suffered was attributable to the actions upon which they now rely to found their claims. Their situations were similar to the actions of the victim ... in *Stubbings*’ case ...’ b

As we have already indicated, in so expressing himself, the judge did not have the benefit of the basis upon which the Court of Appeal proceeded in that case, namely that, on the facts and for the reasons all three members of the court gave, there was no early knowledge of significant injury. In the climate of public knowledge and awareness at the time of the abuse in question, as Bingham LJ put it ([1991] 3 All ER 949 at 956, [1992] QB 197 at 207): c

‘... in purely physical terms the impairment of the plaintiff’s condition was minor ... there would have been very little to support an indictment of causing actual bodily harm or to plead as particulars of personal injury.’ d

[49] In addition, it should be remembered that it is not normally for a defendant to establish when, if at all, a claimant had the relevant knowledge. It is for the claimant to prove how long he was without it. The issue of limitation having been raised, it was for each claimant to satisfy the court of the date upon which the cause of action accrued and, where relevant, the later date when he first had knowledge of the facts, including as to the significance of the injury within s 14(1) and (2), but possibly not as to constructive knowledge under s 14(3); see *Crocker v British Coal Corp* (1995) 29 BMLR 159 per Mance J; and *Parry v Clwyd Health Authority* [1997] PIQR P1 per Colman J. e

[50] Accordingly, we consider that the judge erred in law and that it falls to this court to determine this issue and its knock-on effect on the s 33 issue in each case on the evidence. f

[51] Mr Owen’s main submission was, as it had been at the trial, that none of the claimants acquired knowledge of a significant injury within the meaning of s 14(1)(a) and (2) until much later when each learned that he or she had suffered and/or was suffering from long-term psychiatric or psychological injury. He said that the judge’s mistake was the same as that of Lord Griffiths in *Stubbings v Webb* in giving the word ‘significant’ in this context its ordinary rather than its statutory meaning, and he relied on the approach of the three members of the Court of Appeal in that case. The result, he submitted, was to cause injustice to all the claimants in two respects: first, their claims became wrongly statute-barred unless discretion to disapply the limitation could properly be exercised in their favour under s 33; and, second, the judge largely confined his assessments of general damages to the long-term psychiatric injury, ignoring all that preceded it. g

[52] Mr Owen submitted that in all the claims the significant injury in question of which the claimant first had knowledge within s 14(1)(a) and (2) was of the long-term psychiatric injury, thereby ‘extending’ and bringing their claims within the limitation period in most of the cases. However, he maintained that h

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a that did not disentitle claimants from also claiming in respect of the same causative conduct, the previous abuse outside the extended period, which in itself would have justified an award of damages. He invited the court to increase the awards made by the judge to reflect the pain and suffering caused by the abuse itself.

b [53] The reopening of the appeal on the issue of s 14 has caused us to look more closely at the evidence in each of the claims and to consider a further submission of Mr Owen in relation to it that clearly found favour with the judge when he came to the s 33 issue. It was that in all or some of the claimant's cases, part of the immediate injury caused by the abuse was of such a disabling character as to prevent them from acquiring s 14(2) knowledge within three years after their majority. Where such disability could be established, the position, he c submitted, would not be so very different from cases of insidious industrial diseases, the developing injury remaining unknown until the appearance of symptoms long after the negligence causing it. Here it could take the form of a slowly developing psychiatric injury or one remaining dormant and only becoming manifest when triggered by some later event or events such as the d publicity given to the work of the Waterhouse Tribunal, consequent police inquiries of the claimant or receipt of medical advice.

[54] Mr Faulks seized on Mr Owen's challenge of the court's provisional view that the claims, as presented below and to the court were largely confined to long-term psychiatric injury. He said that Mr Owen's correction of the court's e understanding amounted to a concession as to the indivisibility of damage in these cases, that is, that the claimants' s 14(2) knowledge on leaving Bryn Alyn of the physical injury they had suffered there served also as knowledge of the psychiatric injury diagnosed long after which triggered their claims. He submitted that it was not, therefore, open to the court to divide the injuries so as to provide a basis for finding in any individual case a later date of knowledge.

f [55] Mr Faulks also drew on the notion of indivisibility of physical and mental injury in cases such as this. He referred to an increasing disinclination of the courts to distinguish in legal terms between physical and mental injury, citing by way of example *Page v Smith* [1995] 2 All ER 736, [1996] AC 155 (as to the test in personal injury claims of foreseeability of personal injury to the plaintiff). He g added, by way of commonplace illustration, that in many, if not most, personal injury cases there is both a physical and a mental element and that the full extent of either element may take time to develop and manifest itself. He said that, where that happens the deterioration does not amount to a different injury because it becomes of greater significance with time, a point that, he maintained, the judge had in mind in observing ([2001] All ER (D) 322 (Jun) at [30]) that a claimant's 'realisation of the extent of the injury may grow with time, as may the h injury itself'. He distinguished such cases from claims in cases of industrial diseases or other complex medical cases where many years may elapse before any symptoms appear.

j [56] We take Mr Faulks' submission to be directed to cases where a judge has correctly found early knowledge of significant physical and/or mental injury in a s 14 sense, which may or may not at that stage have been accompanied by knowledge of significant mental injury giving rise in time to more serious problems. In that context it is an unfortunate, but necessary, consequence of the wording of ss 11 and 14. But Mr Faulks' submission does not help him if the judge wrongly found such early knowledge in the case of any individual claimant. In

that event, the later date of knowledge may save the action in respect of the earlier 'insignificant' injury for this purpose of limitation as well as in respect of the injury of which the claimant later acquired the relevant knowledge. See *Stubbings v Webb* [1991] 3 All ER 949 at 959, 959–960, [1992] QB 197 at 211, 212 per Nolan LJ and Browne-Wilkinson V-C respectively, set out in [43] and [44], above. a

[57] The narrow question to which the courts are confined when a s 14 issue arises is as to the knowledge of the claimant at any material time for the purpose of starting the limitation period. If, as provided by s 11, an action for negligence, nuisance or breach of duty 'includes' a claim for damages for personal injury which, at the material time, he knew to be 'significant' so as to bring it within the limitation period, he may proceed with that claim. He may also proceed with any other claim for damages arising out of the same cause of action—whether previous or subsequent to the injury of which he had significant knowledge, and whether or not for personal injuries. But where an action includes a claim for damages for personal injury which he did not, within the limitation period, know to be significant, that claim will be statute-barred unless the action 'includes' another claim for damages for personal injuries of which he first had significant knowledge within the period. Thus, in the same action, s 14, depending on the circumstances, may preserve or bar the recoverability of damages for the later of two injuries however late the date of knowledge of it, or enable recovery for the earlier of two injuries which, but for the claim for the second, would have been statute-barred. b
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[58] Thus, here, if the judge correctly found in the case of any claimant that he or she had the requisite knowledge within three years after majority, that knowledge would operate to bar not only the claim for damages for the immediate injuries caused by the abuse, but also the long-term psychiatric injury of which he or she first acquired knowledge much later. If the judge was wrong in that finding, the operative date of knowledge would be that of the long-term psychiatric abuse which, if within the limitation period, would enable the claim for both the earlier immediate injuries caused by the abuse and the long-term psychiatric injury. It is thus necessary to consider the case of each claimant individually against the general conclusion of the judge (at [30]) that 'a young person who knows that he or she has been assaulted on a regular basis, who has been buggered, masturbated or fondled in an inappropriate way' has the relevant knowledge and that each of these claimants had it 'before they left the community'. e
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SECTION 33

[59] Section 33 provides, so far as material:

'(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—(a) the provisions of section 11 ... or 12 of this Act prejudice the plaintiff or any person whom he represents; and (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents; the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates ... h
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(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—(a) the length of, and the reasons for, the delay on the part of the plaintiff; (b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by

a the plaintiff or the defendant is or is likely to be less cogent than if the action
had been brought within the time allowed by section 11 ... (c) the conduct
of the defendant after the cause of action arose, including the extent (if any)
to which he responded to requests reasonably made by the plaintiff for
information or inspection for the purpose of ascertaining facts which were or
might be relevant to the plaintiff's cause of action against the defendant;
b (d) the duration of any disability of the plaintiff arising after the date of the
accrual of the cause of action; (e) the extent to which the plaintiff acted
promptly and reasonably once he knew whether or not the act or omission
of the defendant, to which the injury was attributable, might be capable at
that time of giving rise to an action for damages; (f) the steps, if any, taken by
the plaintiff to obtain medical, legal or other expert advice and the nature of
c any such advice he may have received ...

(8) References in this section to section 11 ... include references to that
section as extended by [s 14].'

[60] The judge's treatment of this issue was broadly to follow the scheme of
s 33(3). He dealt first with para (a), the length of and reasons for the claimants'
d delays. He accepted that in all the claims there was an inevitable 'degree of
prejudice' to the defendants and that it increased with the length of the delay,
largely because of the difficulty in testing the accuracy of uncorroborated claims
so long after the alleged abuse. He noted the striking similarity of the claimants'
reasons for delay, which he accepted as true and reasonable. In the cases of
e proved sexual abuse, it was their acute embarrassment and/or a desire to block
the abuse from their minds. And, in the cases of physical abuse, it was the
traumatising nature of the conduct about which they found it very difficult to
talk. He expressed his conclusion under this head by saying:

f '[33] ... (1) ... (b) ... I am entirely satisfied in every case where sexual abuse
has been proved that the main reason for delay on the part of the claimant
has been understandable embarrassment ...

(c) ... In the case of physical abuse the situation was similar. The victims
were traumatised by the treatment they received, and found this very
difficult to talk about. This became easier when they realised they were not
alone; and when they realised they might get their day in court. In my view
g to deprive such claimants of a remedy when their delay has been
understandable as explained would be prejudicial and unjust.'

[61] As to para (b), the effect of the delay on the cogency of the evidence, the
judge referred to the difficulty for the defendants in investigating and testing stale
h allegations and in finding witnesses to refute them, a difficulty aggravated by the
probable destruction of a large number of relevant records in the warehouse fire
in 1996. However, he found that that difficulty was to some extent mitigated in
two respects. The first was the availability of the Waterhouse Report to the
parties and to the court. He said about it (at [33](ii)(b)):

j 'It is agreed that I am not bound by the conclusions of the Tribunal,
although they are relevant for my consideration. When I consider the ability
of this court to conduct a fair trial of these allegations so long after the
relevant events, that ability is in my view significantly assisted by the
Waterhouse Report which contains the detail of so much evidence and
careful investigation.'

The second mitigating factor, he said, was that there had been 'no shortage of evidence' preventing him from forming a fairly detailed and clear picture of life at Bryn Alyn. He referred to the evidence of the 14 claimants and of three (of the four) care workers, the latter, between them, covering a period from 1974 to 1994, and commented:

'[33] ... (ii) ... (c) ... Naturally there have been differences of recollection, but these occur commonly in litigation even when the evidence is fresh, and in my view the evidence placed before me has been sufficiently cogent to enable me to deal in a satisfactory manner with the issues raised on both sides.'

The judge added that, although John Allen and David Stanley, despite their availability, had not been called to give evidence, he doubted whether their absence had handicapped the conduct of the claims implicating them, an assessment that Mr Edward Faulks QC, for the respondents, accepted.

[62] As to the remaining paragraphs of s 33(3) the judge found: (c) obstructive conduct of the defendants—there had been none; (d) the duration of any disability of the plaintiff arising after the accrual of the cause of action—there was no relevant issue; (e) the claimants' conduct on becoming aware of facts that might have founded a good claim against the defendants—they had all acted promptly and reasonably; and (f) the steps taken by the claimants to obtain advice—they had all taken appropriate steps with the result that, in each case, there was medical evidence, mostly undisputed.

[63] The judge (at [33](vi)(b)) concluded the s 33(3) exercise with the following comments on circumstance (f) and with what also appears to be a general finding as to the exercise of his discretion:

'It is of course, for the claimants to show that it would be equitable to disapply the limitation period in any particular case and the onus on the individual claimant is a heavy one. The second defendants have had to deal with stale claims and have been handicapped by the absence of potentially relevant documents after the warehouse fire. None the less they have been able to defend these claims through leading and junior counsel; they have called, or required to be called, relevant evidence from people working at the community at the relevant times, and they have chosen not to call others involved. Mr Owen QC ... has been consistently critical of the fact that the second defendants have suggested to the court that the evidence of individual claimants may be unreliable or may be exaggerated without putting a direct factual challenge to the claimant in cross-examination. I am not impressed by this criticism, since in my view the second defendants have been faced by the difficulty of meeting stale claims relating to circumstances of which they themselves have no direct knowledge. They are fully entitled to put the claimants to proof. This they have done properly and fairly, but notwithstanding their efforts I have been satisfied in each case that each claimant has some proper complaints arising from abusive conduct which he or she suffered at a time of life when what was needed and expected was constructive help and advice. Instead the claimants were assaulted and abused *as I have found*. In my view it would be manifestly unjust now to prevent those who prove their claims to the relevant standard from benefiting from those claims because they have lacked the confidence or ability to talk to others at an earlier stage about their very unhappy and

a embarrassing experiences. I conclude that this injustice far outweighs the prejudice, which these second defendants have suffered through the late presentation of these claims, and I shall exercise my discretion by disapplying the provisions of s 11 in every case.' (Our emphasis.)

b [64] The judge added that, where individual points relating to this exercise of discretion arose in any particular claim he would deal with them. As we have already noted, when dealing with each claim he followed the same order of reasoning, dealing with limitation only after expressing his conclusions on liability, causation and quantum. And, in most cases when dealing with limitation, he referred only to the circumstance in para (a) of s 33(3), the reasons for the claimant's delay in making a claim.

c *Submissions on s 33*

d [65] Mr Faulks, in support of the respondent's cross-appeal on this issue, submitted that, if and in so far as the exercise of discretion under s 33 arises for consideration in this court, the judge erred in the exercise of his discretion in a number of respects. He made two general points. The first was that the judge appears to have treated the claimants' reasons for delay as trumping any countervailing prejudice to the defendants. The second was that, in assessing the degree of possible prejudice to the defendants, he failed to distinguish or distinguish sufficiently between the three different issues in which it arose or could have arisen, namely: (1) whether the alleged abuse had occurred; e (2) whether the first defendant had been negligent in failing to prevent abuse; and (3) causation and attribution of damage. As to the specified circumstances in s 33(3), Mr Faulks' criticisms were as follows. (a) The judge failed to distinguish adequately between cases of pure physical abuse and those involving sexual abuse—embarrassment and/or reluctance to come forward as reasons for delay f being far less potent in the former than in the latter. (b) The judge failed to give sufficient weight to the effect on the cogency of the evidence of the long delays between the alleged abuse and the issue of proceedings, in particular, its contribution to the unavailability of witnesses, the difficulty in rebutting unsupported allegations made by claimants who were potentially highly unreliable witnesses, the 'non-sinister' disappearance of records and other g relevant documents, the liquidation in 1997 of the first defendant and the difficulty, with regard to question of the duty of care, in adducing evidence after all that time as to the standards of the day. He submitted that, except where there has been 'a fairly minimal period' of delay, the limitation period should not be disappplied. (c) The judge also overestimated the value to the respondent in h being represented by leading and junior counsel, since their role was mostly limited to putting claimants to proof of their allegations. (d) The judge placed too much reliance on the work of the Waterhouse Tribunal, which had had a different function and the conclusions of which, on matters on which the claimants relied, were tentative. (e) The judge wrongly held that there had been no prejudice to the respondent resulting from the liquidation of the first j defendant and, in doing so, mistakenly related it to s 33(3)(c) which is concerned with obstructive conduct by a defendant.

[66] Mr Owen put at the forefront of his submissions that, as the respondent had mainly left its challenge on the facts to its counsel's closing submissions and had called little evidence save as to the medical issues, it is bound by the judge's findings as to the facts of the abuse alleged. As to the issue of negligence and the

standards of the day, he relied upon details of the unchallenged evidence relating to each of the claims and its cumulative weight to justify the judge's findings, where he made them, that, whatever the standards of the day, the first defendant had been negligent. He also referred in this respect to: the general support that the judge drew on this issue from the Waterhouse Report; the evidence of former care workers at the community, Keith Evans, Peter Steen and John Jeffreys; and some documents disclosed by the respondent indicating achievable standards of which the first defendant met at different times, but which, on other evidence, were not met in the case of some claimants. Mr Owen submitted that, against that weight of evidence, no further evidence that might have been available to and called by the respondent could have redressed the balance.

[67] As to the judge's conduct of the s 33 exercise, Mr Owen maintained that he went about it correctly, in particular, not overlooking any possible deficiencies in the evidence due to lapse of time. He defended the judge's heavy reliance on the claimants' reasons for delay in seeking advice about their complaints, contending that it was a highly relevant factor against which there was no specific complaint in the respondent's grounds of appeal. Why, he asked rhetorically, should a tortfeasor benefit from the proven consequence of his own tort? As to the cogency of the evidence, he relied on the judge's own assertion, in the passage from his judgment that we have set out in [62], above, of the sufficiency of the evidence before him to enable him to try the various issues fairly. He spoke of the absence of any indication from the respondent as to what documents might have been available but for the fire and if the claims had been tried earlier. He acknowledged that the judge's reference to the balancing exercise, when he dealt with each individual claim, was exiguous, but relied on his general treatment of the subject at the beginning of the judgment.

The nature of the discretionary exercise

[68] The discretion of a judge under s 33 is fettered only to the extent that it provides a non-exhaustive list of circumstances to which he should have regard. However, the matter is not determined simply by assessing comparative scales of hardship: see *Long v Tolchard & Sons Ltd* [2001] PIQR P18. The overall question is one of equity, namely, whether it would be 'equitable' to disapply the limitation provisions having regard to the balance of potential prejudice weighed with regard to all the circumstances of the case, including those specifically mentioned in s 33(3): see *Nash v Eli Lilly & Co* [1993] 4 All ER 383, [1993] 1 WLR 782, and *Whitfield v North Durham Health Authority* [1995] 6 Med LR 32 at 39 per Waite LJ.

[69] The width of the discretion is such that an appellate court should not intervene save where the judge was so plainly wrong that his decision exceeded the ambit within which reasonable disagreement is possible: see *Coad v Cornwall and Isles of Scilly Health Authority* (1996) 33 BMLR 168 at 176, [1997] 1 WLR 189 at 197. That includes the exercise of wrong principles, taking account of irrelevant factors, ignoring relevant factors or the making of a decision that is 'palpably' or 'plainly' wrong: see *Farthing v North East Essex Health Authority* [1998] 2 Lloyd's Rep Med 37, and *Margolis v Imperial Tobacco Ltd* [2000] CA Transcript 611. If the court intervenes on any of those grounds, it should treat the matter as at large and exercise its own discretion in accordance with s 33.

[70] The Court of Appeal has not considered the application of s 33 to claims of long-standing psychiatric injury alleged to have resulted from sexual and/or

a physical abuse in children's homes. Given the width of the discretion, the extent to which the court can give general guidance on the exercise is limited. The task for a judge is particularly difficult and various in cases such as this where he has to decide whether he should attempt to determine and evaluate what happened many years before, often on little more than the uncorroborated and uncheckable assertion of a complainant. Where, as in these appeals, there is a history of pre-care abuse supplemented by a post-care lifestyle each, individually or cumulatively, capable of causing or aggravating psychiatric harm, the further difficulty of determining the fact of injury and its extent and causation is formidable. The judge, in granting the respondent permission to appeal on this issue, did so because he regarded it as in the public interest to enable the Court of Appeal to consider what guidance it could properly give on the matter.

c [71] Claims long after the event for damages for sexual and/or physical abuse of children in homes where they have been placed in care are a relatively recent, but growing, phenomenon. Many claimants, before being taken into care, have had troubled backgrounds, including sexual and/or violent abuse, and arrive in the homes in a highly disturbed state. And, often, after leaving them, their lives deteriorate into alcohol and drug abuse and crime. The claimants who bring these appeals are typical of such case histories. Stripping away legal niceties, the question for the judge under s 33 was whether, given the delays, he could fairly try claims that the first defendant had culpably failed to improve the claimants' physical and/or mental condition and/or had culpably caused it to worsen.

e [72] As Mr Faulks' analysis in argument demonstrated, that exercise required the judge to anticipate a variety of issues to which, if the matter were to proceed to trial, different evidence would go. The nature of the prejudice either way resulting from delay, and the equity in allowing the matter to proceed, may vary according to the issue. As we have said, the judge here had to consider the exercise of his overall discretion in the light of three main issues: first, whether and to what extent each claimant had been abused while at Bryn Alyn; second, whether such abuse resulted from the first respondent's negligent failure to prevent it, an issue that required consideration of the standard of care reasonably expected at the time of the alleged abuse; and third, whether and to what extent the claimant had suffered injury attributable to that abuse.

g [73] The evidence before the judge going variously to those issues consisted of: oral evidence of the claimants of alleged events many years before; second, sparse contemporaneous records of Bryn Alyn and some social services records that shed little light on what happened there; a limited amount of evidence from former care workers at Bryn Alyn; and medical evidence from psychiatrists and psychologists, all of whom correctly deferred to the judge on the important issues as to what, if any, abuse had taken place and whether it could reasonably have been prevented.

Starting points

j [74] We take the following to be well-established and/or uncontroversial starting points for the exercise of the discretion. (i) In multiple claims of this sort, a judge should consider the exercise of his discretion separately in relation to each claim: see *Nash v Eli Lilly & Co* [1993] 4 All ER 383 at 407–409, [1993] 1 WLR 782 at 808–810 per Purchas LJ. (ii) The burden of showing that it would be equitable to disapply the limitation period lies on the claimant and it is a heavy burden. Another way of putting it is that it is an exceptional indulgence to a claimant, to

be granted only where equity between the parties demands it; as the following reminders of Lord Diplock in relation to the statutory predecessor of s 33 in *Thompson v Brown Construction (Ebbw Vale) Ltd* [1981] 2 All ER 296 at 301, 303, [1981] 1 WLR 744 at 750, 752 underline:

'Section 2D empowers the court to direct that the primary limitation period shall not apply to a particular action or cause of action. *This is by way of exception*, for unless the court does make a direction the primary limitation period will continue to apply. The effect of such a direction, and its only effect, is to deprive the defendant of what would otherwise be a complete defence to the action ... for even if he also has a good defence on the merits he is put to the expenditure of time and energy and money in establishing it, while if ... he has no defence as to liability he has everything to lose if a direction is given under the section ... when the court makes a direction under s 2D that the provisions of s 2A should not apply to a cause of action, *it is making an exception to a general rule that has already catered for delay in starting proceedings that is due to excusable ignorance of material facts by the plaintiff* as distinct from his lack of knowledge that the facts which he does know may give him a good cause of action in law. The onus of showing that in the particular circumstances of the case it would be equitable to make an exception lies on the plaintiff; but, subject to that, the court's discretion to make or refuse an order if it considers it equitable to do so is, in my view, unfettered.' (Our emphases.)

(iii) Depending on the issues and the nature of the evidence going to them, the longer the delay the more likely, and the greater, the prejudice to the defendant. (iv) Where a judge is minded to grant a long 'extension' he should take meticulous care in giving reasons for doing so: see *Mold v Hayton* [2000] CA Transcript 957. (v) A judge should not reach a decision effectively concluding the matter on the strength of any one of the circumstances specified in s 33(3), or on one of any other circumstances relevant to his decision, or without regard to all the issues in the case. He should conduct the balancing exercise at the end of his analysis of all the relevant circumstances and with regard to all the issues, taking them all into account: see *Long v Tolchard & Sons Ltd* [2001] PIQR P18 at 26 per Roch LJ. (vi) Wherever the judge considers it feasible to do so, he should decide the limitation point by a preliminary hearing by reference to the pleadings and written witness statements and, importantly, the extent and content of discovery. In *Stubbings v Webb*, for example, the matter was dealt with by the master and the judge as a preliminary issue on affidavit evidence, without cross-examination but with the benefit of discovery. As Bingham LJ commented when the matter was before the Court of Appeal ([1991] 3 All ER 949 at 952, [1992] QB 197 at 202-203):

'This produces an unusual situation, since the facts pleaded by the plaintiff cannot for purposes of this proceeding be assumed to be true, and they are not common ground. In particular, and this must be emphasised, the Webbs deny the allegations against them. We must, it would seem, like the judge, draw such provisional inferences from the evidence before us as appear to be fair.'

It may not always be feasible or produce savings in time and cost for the parties to deal with the matter by way of preliminary hearing, but a judge should strain

- a to do so wherever possible. (vii) Where a judge determines the s 33 issue along with the substantive issues in the case, he should take care not to determine the substantive issues, including liability, causation and quantum, before determining the issue of limitation and, in particular, the effect of delay on the cogency of the evidence. Much of such evidence, by reason of the lapse of time, may have been incapable of being adequately tested or contradicted before him.
- b To rely on his findings on those issues to assess the cogency of the evidence for the purpose of the limitation exercise would put the cart before the horse. Put another way, it would effectively require a defendant to prove a negative, namely, that the judge could not have found against him on one or more of the substantive issues if he had tried the matter earlier and without the evidential disadvantages resulting from delay. (viii) Where a judge has assessed the likely cogency of the available evidence, that is, before finding either way on the substantive issues in the case, he should keep in mind in balancing the respective prejudice to the parties that the more cogent the claimant's case the greater the prejudice to the defendant in depriving him of the benefit of the limitation period. As Parker LJ showed in *Hartley v Birmingham City DC* [1992] 2 All ER 213 at 224,
- d [1992] 1 WLR 968 at 979, 980 such a finding is usually neutral on the balance of prejudice:

‘... in all, or nearly all, cases the prejudice to the plaintiff by the operation of the relevant limitation provision and the prejudice which would result to the defendant if the relevant provision were disapplied will be equal and opposite. The stronger the plaintiff's case the greater is the prejudice to him from the operation of the provision and the greater will be the prejudice to the defendant if the provision is disapplied ... as the prejudice resulting from the loss of the limitation defence will always or almost always be balanced by the prejudice to the plaintiff from the operation of the limitation provision the loss of the defence *as such* will be of little importance. What is of paramount importance is the effect of the delay on the defendant's ability to defend.’

- We should not leave those remarks of Parker LJ without noting that they were qualified in *Nash's* case [1993] 4 All ER 383 at 403–404, [1993] 1 WLR 782 at 804, where this court said that there could be instances of weak claims where
- g disapplication of the limitation provision could cause defendants considerable prejudice in putting them to the trouble and expense of successfully defending them and then not being able to recover costs against impecunious claimants.

The judge's balancing exercise

- h [75] In our view, the judge's exercise of his discretion under s 33 was flawed in a number of respects. The extent to which such flaws affect the outcome of the claim in any individual claim depends: first, on whether the judge correctly found the claim to have been barred under s 14 so as to engage the exercise of his discretion to disapply the limitation period under that provision at all; and
- j second, whether, if he should have found a later date which would still have barred the claim, it would have still been equitable to exercise his discretion in favour of the claimant.

[76] First, under sub-s (3)(a)—length of and reasons for delay—the judge gave undue weight—almost to the exclusion of any other circumstance—to his conclusion that the claimants' reasons for delay were a product of the alleged

abuse that he had found and that, accordingly, it would be unjust to deprive them of a remedy. To the extent that they were a disabling product of that abuse, they might more appropriately call for consideration under s 14 rather than s 33. His reasoning in this respect also suffered from the flaw, to which we refer again below, of an acceptance of the validity of the claims in advance of determining the issue of limitation.

[77] Second, in his individual treatment of the claims, he did not always discriminate sufficiently between instances of sexual and physical abuse when considering the reasonableness of the time taken by the claimants to seek advice; in the latter instances, the claimants' arguments had far less force.

[78] Third, he did not discriminate between claims where the delay was very long—in some cases in the region of 20 or more years from the end of the abuse—and where the delay was much less. Clearly, subject to the variables that we have discussed, the longer the delay in any particular case the less justifiable it is likely to be and the more it is likely to prejudice the defendant. In this connection, Mr Faulks has drawn attention to the House of Lords' decision in *Donovan v Gwentys Ltd* [1990] 1 All ER 1018, [1990] 1 WLR 472. There, the House held that, although s 33(3) did not expressly include delay prior to the expiry of the limitation period as one of the express circumstances to which the court was required to have regard (s 33(3)(b) referring only to the effect on cogency of evidence of delay subsequent to that period), it could nevertheless be a relevant circumstance to which the court should have regard under its general obligation under the provision to have regard to 'all the circumstances of the case'. The circumstances of the case there were a claim in negligence for damages for injury caused by a slip at work when a minor, brought some five years after the alleged accident and five-and-a-half months out of time. No question of a delayed date of knowledge arose, though the bulk of the delay was taken up by minority. The claimant had only notified her employer shortly before the issue of the writ of the alleged accident, and then only inadequately. And she had an unanswerable claim against her solicitor for negligence in failing to issue the writ in time. As the speeches of Lord Griffiths and Lord Oliver of Aylmerton, with which the other Law Lords agreed, indicated, the circumstances were such that the staleness of the claim and the availability of an alternative remedy made it inequitable to require the defendants to meet the claim. Clearly, as Lord Oliver remarked ([1990] 1 All ER 1018 at 1025, [1990] 1 WLR 472 at 479–480) the staleness of a claim, regardless of when the limitation period may have expired, is always likely to be a relevant circumstance. But its weight in the exercise of discretion one way or another under s 33 will depend on all the circumstances of the case of which it forms part, including the length of delay after expiry of the limitation period.

[79] We do not consider it would accord with the broad discretion conferred on the court by s 33 and the fact-sensitive nature of the exercise to suggest some form of tariff for cases such as these. For example, we could not justify in this context a proposition similar to that of Kilner Brown J in *Buck v English Electric Co Ltd* [1978] 1 All ER 271 at 275, [1977] 1 WLR 806 at 810, drawing on the then pattern of decisions in cases of strike-out for want of prosecution, that where there has been a delay of five or six years there is a rebuttable presumption that the defendant will suffer prejudice. Although such a presumption might be thought to be more readily applicable in s 33 limitation cases, where the onus was on the claimant, than in strike-outs for want of prosecution, where the onus is on the defendant, it would, in our view, impermissibly cut down the wide discretion

a in such cases. For the same reason, we would not go so far as Mr Faulks in his suggestion that, except where there has been 'a fairly minimal period of delay', the limitation period should not be disapplied.

[80] Nevertheless, for the reasons we give in the following paragraphs, we consider: (i) that, as a general rule of thumb, the longer the delay after the occurrence of the matters giving rise to the cause of action the more likely it is
b that the balance of prejudice will swing against disapplication; (ii) that in cases of this nature, where issues of liability, causation and quantum can be so difficult with or without delay, the permissible delay in each case is likely to be highly sensitive to the prejudice it causes to the defence notwithstanding good reasons of the claimant for its length; and (iii) that if the date of knowledge test in s 14 is
c properly applied so as to provide a claimant with an extension of the period by reference to it, the weight to be given to his reasons for delay thereafter should, in normal circumstances, be limited. As Lord Diplock observed in *Thompson v Brown* in the passage that we have set out (see [74], above), the law has already catered for his delay in starting proceedings that is due to excusable ignorance of
d material facts as distinct from his knowledge that they may give him a good cause of action in law. The reason why the judge was driven to give the claimants' reasons for delay so much weight under this head may be that in all their cases, he had not properly identified the date of knowledge of *significant* injury under s 14.

[81] As to sub-s (3)(b), the effect of delay on the cogency of the evidence, this
e circumstance was, as Parker LJ put it in *Hartley's* case, of 'paramount importance' in its effect on the defendants' ability to defend. The judge paid insufficient regard to the effect on the overall cogency of the evidence in each claim of the length of delay on the full range of issues on which he had to consider. As we have said, these included, not only the fact of the abuse, but also the existence and
f breach of a duty of care in negligence and the attribution of cause for long-standing psychiatric conditions. The second involved as great as, or greater difficulties than, the first, given the uncertainty of standards that, on *Bolam* principles (see *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582), could reasonably have been expected of those employed in
g children's homes to guard against child abuse at the material times. The third would have been difficult enough without the delay. With it, the inherent uncertainties and nebulous nature of psychiatric or psychological complaints as an injury and its aetiology were far more difficult to resolve. It is noteworthy that
h that there was more *prejudicial* delay to the defendants in most of these claims than in the evidentially less complicated case of *Dobbie v Medway Health Authority* [1994] 4 All ER 450, [1994] 1 WLR 1234 where this court nevertheless exercised its discretion against the claimant (see [92], below).

[82] It should be remembered that the reason for limitation provisions is to protect defendants from the injustice of having to meet stale claims. And a judge, when considering whether to disapply under s 33, particularly where, as here, there is difficulty in testing old and unsupported complaints, should not form a
j concluded view on their validity for the purpose of determining the existence and extent of potential prejudice to claimants of being deprived of a remedy. Such allegations are so easy to make and so difficult to refute that the danger of injustice is acute. Here, the judge had to bear in mind the possibility of them being fabricated or exaggerated for financial gain in the wake of publicity about Bryn Allyn and about other care homes where similar conduct had been alleged.

Yet his findings, both on the substantive issues and the effect of delay on cogency were based mostly on the strength of the claimants' evidence alone and without rigorous testing by way of cross-examination derived from instructions or contemporaneous records, or of possible contradictory evidence that might have been available if the claims and the trial had been earlier. It was, as he acknowledged in his opening remarks on the s 33 issue, an inherently difficult task, involving inevitable prejudice to the defendants in attempting to meet uncorroborated claims of this sort so long after the event. It was doubly difficult because, for one reason or another, most of the claimants were not obviously reliable witnesses. a

[83] The possible value of contemporaneous evidence, if it had been available in each case, was well illustrated in the claim of JS, the earliest one in time. In that case the respondent was able to produce a witness, Vevar, whose evidence the respondent's counsel put to good effect to counter the most serious of her allegations. But, apart from her claim, there was little available evidence to enable the respondent effectively to challenge many of the uncorroborated allegations of the claimants. For example, there were no surviving unit log books or matron's logs of which Keith Evans spoke in evidence. And, as we have indicated, the respondent was severely limited in the availability of persons whom it could interview and, where appropriate, call as witnesses to refute the allegations. b

[84] It may be, as the judge observed and Mr Faulks accepted, that the respondent was not prejudiced in not being able to call John Allen or David Stanley, both of whom were available. But the claims against the defendants were in negligence and, whilst Allen and Stanley and their like would probably have been of little assistance in rebutting specific allegations of abuse, more might have been obtained from other former Bryn Alyn employees as to what, at times material to each claim, had been or should have been known of the abuse and what reasonably should and could have been done to prevent it. On those critical issues, the judge had little or no direct evidence. He was driven to relying upon rumours of John Allen's activities, rumours that the Waterhouse Tribunal had said (para 21.47 of its report) 'did not amount to a great deal' and which did not appear to have been taken seriously. c

[85] In any event, the judge appears to have overlooked the fact that the cogency of the claimants' evidence, to the extent that it favoured their claims, is neutral, as Parker LJ pointed out in *Hartley's* case. He seems to have proceeded on the basis that the stronger the claimants' case, the more the balance of prejudice favoured them. d

[86] We should also say something of the judge's reliance on the Waterhouse Report. As we have indicated, he said that, in assessing his ability to try fairly the claims so long after the events to which they related, he had been 'significantly assisted' by its detailing of the evidence before it and careful investigation. However, as Mr Faulks noted in his submissions, the Waterhouse Tribunal's conclusions were not reached by applying the civil standard of proof and were, in most instances, highly general in nature, and in some instances, tentative. For example, the tribunal stated (para 21.57 of the report): e

'Our conclusions are that (John Allen apart) sexual abuse by members of staff of the community was not rife but that it did occur to a significant and disturbing extent.'

- a See also paras 21.44, 21.45, 21.47, 21.57, 21.73, 21.87, 21.98, 21.105 and 21.130–21.133

[87] In addition, the Waterhouse Tribunal declared itself unable to make findings in relation to many allegations because of the uncertainty and/or conflict of evidence on them—its own inquiry took place long after many of the matters it was investigating. The Waterhouse Report and the evidence before it may have been useful background material: cf *Penney v East Kent Health Authority* [2000] Lloyd's Rep Med 41 at 44 (para 17) per Lord Woolf MR. But the judge should have approached its findings with considerable caution when considering the individual allegations in issue in each of these claims. Moreover, the Waterhouse Report had little or no evidential value in relation to issues of systemic negligence in the only three claims where the *Lister* issue arose (see *Lister v Hesley Hall Ltd* [2001] 2 All ER 769), namely MCK, JS and CD. Certainly, to the extent that the judge relied on this material, it does not give him the support that he claimed to draw from it.

d [88] As to the sub-s (3)(c) circumstance, the conduct of the defendants after the cause of action arose, the judge seems to have considered it in the context of possible prejudice to the defendants and to have concluded that there was none for the reasons he gave. In doing so, he appears to have misunderstood the intended relevance of this circumstance, which is the possible prejudice to a claimant from obstructive behaviour on the part of a defendant. There was no such conduct by the defendants here and, if and to the extent that prejudice to them could be a relevant consideration under this paragraph, the judge appears to have disregarded the obvious disadvantage to them of the intervening insolvency of the first defendant.

f [89] As to the sub-s (3)(e) circumstance, the promptness and reasonableness of the claimants' action after learning of facts, which might give them a claim against the defendants, the judge's finding in favour of all claimants calls for separate consideration in relation to each claim. Some had proceeded with speed; others took years after making statements to the police before issuing proceedings.

g [90] And as to the sub-s (3)(f) circumstance, the steps taken by the claimants to obtain medical, legal or other expert advice, the relevant period of delay for consideration in the circumstances of these claims must be that from the date of knowledge, where appropriate extended by the claimant's date of majority. As we have already noted, the judge's findings here seem to have been a mix of consideration of this circumstance and a general conclusion on the whole s 33 issue. But with regard to this circumstance, he was clearly of the view that it was reasonable for all the claimants, irrespective of the nature of abuse they claimed to have suffered or the length of their delay before coming forward, to have delayed as long as they did, before seeking advice.

j [91] Given the nature of these claims, this circumstance and that in sub-s (3)(a) overlap. Mr Faulks' criticism of the judge's reasoning in relation to it was much the same for both, namely that he appears to have decided that discretion should always be exercised in favour of the claimants, having regard to the nature of their allegations and to their understandable reluctance to come forward. As we have said, Mr Faulks may have overstated the approach of the judge in this respect. But he, Mr Faulks, rightly drew attention to the considerable difficulties for bodies such as local authorities and children's homes in defending stale claims by persons many of whom, for whatever reason, may be highly unreliable. In

such cases, as he noted, there is much danger of fabrication and/or exaggeration of evidence which long delay makes it very difficult to identify and refute. a

[92] Perhaps Mr Faulks' criticism would be better expressed as a reminder of the burden on the claimant, particularly in such difficult cases, to persuade a judge of the equity of disapplication, and of its increasing weight the longer the delay. The heaviness of the burden is well illustrated by the Court of Appeal's approach in *Dobbie's* case. There, the claimant's delay after the negligent medical treatment of which she complained and her date of knowledge under s 14 shortly after was about 15 years. Despite that lapse of time, most of the salient facts were not in dispute, most of the evidence was documentary and the case could have been tried without prejudice to the health authority. Nevertheless, Bingham MR, with whom Beldam and Steyn LJ agreed, said ([1994] 4 All ER 450 at 460, [1994] 1 WLR 1234 at 1244): b
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'I approach this aspect on the basis that the plaintiff is a grievously injured woman who has suffered much and whose claim, if allowed to proceed, might prove to be very strong. But the delay in this case, after the date of actual knowledge is very lengthy indeed. The plaintiff could have taken advice and issued proceeding years before she did. Sympathetic though anyone reading these papers must be to the plaintiff, it would in my judgment (as in that of the judge) be unfair to require the health authority to face this claim arising out of events which took place so long ago.' d

Conclusion e

[93] In our view, in the light of the judge's ruling that all the claims were statute-barred from an early date, the cumulative effect of the judge's defective reasoning in relation to the exercise of his s 33 discretion is such that it was capable of resulting in a plainly wrong decision when applied to each claim. In addition, to the extent that we conclude that claims remain statute-barred, but from a later date of knowledge than that adopted by the judge, it is necessary in those cases to reopen the exercise of the s 33 discretion in any event. Although, as the House of Lords have indicated in *Donovan v Gwentys Ltd* [1990] 1 All ER 1018, [1990] 1 WLR 472, delay before, as well after, expiry of the limitation period may be relevant to the question of prejudice to a defendant, it is still for consideration in each case what weight should be given to each period of delay when considering discretionary exclusion of the time limit. Accordingly, we have decided to treat the matter as at large and to consider for ourselves in relation to each claim whether, if we conclude that it remains statute-barred, it would be equitable to disapply the bar. f
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[94] As we have observed, in our conclusion on the s 14 issue, the result of all this could be that some or all of these claims could proceed as a matter of entitlement under s 14 though it would otherwise have been inequitable to disapply the limitation period under s 33. There is no anomaly in this, since s 33 is there to provide a third, but discretionary, line of protection in such cases to a claimant who has already had the benefit of his entitlement to the delay permitted by the primary limitation period and of any extension of it under s 14. It is true, of course, that the s 14 regime may enable a claimant to pursue his claim long after the primary limitation period despite the seriously prejudicial effect of the lapse of time to the defence, but that is a matter of entitlement granted in the light of a claimant's justifiable ignorance that he has suffered a significant injury h
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a attributable to the defendant's negligent act, not as an exceptional indulgence granted when he has lost that entitlement.

[95] In this respect, psychiatric injury falls to be treated in the same way as a progressive industrial disease the progress of which is slow and secret over decades, only revealing itself and triggering the date of knowledge when it is well advanced, notwithstanding that prosecution of the claim causes well-known difficulties for defendants. Some might say that late developing psychiatric difficulties of the sort that feature in these claims are capable of causing greater difficulties, both in identifying the s 14 threshold and in determining what, if any, further 'extension' would be equitable by way of disapplication under s 33. But at present they are subject to the same regime as other forms of injury and disease. And the Law Commission, in its recent report, *Limitation of Actions* (2001) (Law Com No 270) has not recommended any special treatment of them (see para 3.162). It has also specifically rejected the notion of a long-stop provision of the sort provided for latent damage not relating to personal injuries and in claims under the Consumer Protection Act 1987 (see paras 3.102–3.107).

d [96] Some of these difficulties may be partly mitigated if there is legislation to implement the Law Commission's recommendation (paras 3.45–3.50 of its report) for the amendment of s 14 to substitute a more subjective definition of the date of knowledge. As the Law Commission observed (para 3.164 of its report), that should in turn encourage courts to confine to truly exceptional cases those in which a further 'extension' is sought through the medium of disapplication under s 33:

f 'We have considered whether any restriction should be placed on the use of such a discretion. When the Law Reform Committee first recommended that a discretion to disapply the limitation period be introduced in personal injury cases, they intended the discretion to apply only to exceptional cases. However, it has in practice become generally available. It is arguable that under the regime we recommend this will be unnecessary. The core regime will relax the definition of the date of knowledge in favour of the claimant, by incorporating a more subjective definition of constructive knowledge. In addition, the primary limitation period running from the date of knowledge will be the only limitation period applying to personal injury claims. The claimant will therefore have had three years from the date on which he or she should have discovered the relevant facts, whenever that was, to bring proceedings against the defendant. Once this time limit has expired, it should only be in the most exceptional cases that the court will be justified in allowing a claimant a more generous time period within which to bring a claim.'

THE LISTER POINT

j [97] In the light of the House of Lords' ruling in *Lister v Hesley Hall Ltd* [2001] 2 All ER 769, the first defendant would in the circumstances of these claims be vicariously liable for 'the torts', whether deliberate or negligent, of persons whom it had employed to care for the claimants. In certain of the claims, those of MCK, JS and CD, there is, however, an issue as to what torts were committed by those persons. The claimants assert that all their causes of action are 'for damages for negligence, nuisance or breach of duty ... where the damages

claimed ... consist of or include damages in respect of personal injuries' within s 11 of the 1980 Act. That is important to them because it is only if the causes of action are within s 11 that there may be postponement of the period of limitation by reference to the date of knowledge as defined in s 14. Also, it is only in respect of such actions that s 33 may entitle the court to disapply the limitation period. a

[98] On the authority of *Stubbings v Webb* [1993] 1 All ER 322, [1993] AC 498 (where vicarious responsibility was not in issue, but limitation was) and also of *Lister's* case (where vicarious responsibility was in issue and limitation was not), the respondent contends that, in so far as the claimants rely on deliberate acts of abuse by certain Bryn Alyn employees, their claims are not within s 11. Accordingly, they maintain that the appropriate period of limitation in such claims is six years, one that is neither postponable under s 14 nor capable of disapplication under s 33. The judge upheld that contention in the three claims in respect of which the issue arose. In the case of MCK he held that, since the conduct of John Allen of which she complained was deliberate and there was no negligence by any other member of staff in failing to prevent it, her action must fail. In the case of JS and CD, by a similar process of reasoning, he held that parts of their respective claims were statute-barred. However, in JS's case, as we have said, it seems to have been overlooked that she had brought her action within six years of the abuse, the general period for actions in tort permitted by s 2 of the 1980 Act. b
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[99] The House of Lords did not decide in *Stubbings'* case that deliberate assault was not capable of amounting to negligence, nuisance or breach of duty causing personal injury. It did not need to do so because the factual allegations in that case were confined to deliberate conduct and, as we have said, no question of vicarious responsibility arose. However, it is significant that the House disapproved Diplock LJ's suggestion in *Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232, that the words 'breach of duty' in s 11 could include trespass to the person. Lord Griffiths, with whom the other Law Lords agreed, held ([1993] 1 All ER 322 at 328–329, [1993] AC 498 at 506–507) that Parliament had intended to limit s 2(1) of the Law Reform (Limitation of Actions etc) Act 1954, the statutory predecessor of s 11, to actions for personal injury arising from accidents caused by negligence but not from deliberate conduct such as rape or indecent assault. As an aid to construction, he relied on the *Report of the [Tucker] Committee on the Limitation of Actions* (1949) (Cmd 7740) together with certain extracts from Hansard, and said ([1993] 1 All ER 322 at 329–330, [1993] AC 498 at 508): e
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'Even without reference to Hansard I should not myself have construed "breach of duty" as including a deliberate assault. The phrase lying in juxtaposition with "negligence" and "nuisance" carries with it the implication of a breach of duty of care not to cause personal injury, rather than an obligation not to infringe any legal right of another person. If I invite a lady to my house one would naturally think of a duty to take care that the house is safe but would one really be thinking of a duty not to rape her. But, however this may be, the terms in which this Bill was introduced to my mind make it clear beyond peradventure that the intention was to give effect to the Tucker recommendation that the limitation period in respect of trespass to the person was not to be reduced to three years but should remain at six years. The language of s 2(1) of the 1954 Act is in my view apt to give effect to that intention, and cases of deliberate assault such as we are concerned h
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a with in this case are not actions for breach of duty within the meaning of s 11(1) of the 1980 Act.'

b [100] *Seymour v Williams* [1995] PIQR P470, though concerned with different conduct by two defendants giving rise to the same personal injury, is a logical application of that reasoning. There, the plaintiff issued proceedings against her father and mother, alleging physical and sexual abuse against her father and want of parental care against her mother. The Court of Appeal ruled that the claim against the father, described by Russell LJ (at 471) as 'plainly a claim alleging trespass to the person', was governed by the six-year period of limitation and out of time, but that the claim against the mother, as a claim in negligence, was within s 11 and thus capable of disapplication under s 33. Two members of the court, Millett LJ and Sir Ralph Gibson, referred to the anomaly of there being different periods of limitation as between a perpetrator of abuse and someone negligent in not preventing it and of the potential extension of the limitation period for the latter instead of, as the Tucker Committee had intended, a reduction of the period in such cases. They invited the Law Commission to consider the anomaly. It has done so, recommending that claims for personal injuries, including those of child abuse, whether in trespass to the person or in negligence, should be subject to the same core regime of an extendable three-year limitation period with discretion to disapply: see Law Com No 270, paras 1.5, 3.156, 3.162, 3.169 and App A, Draft Limitation Bill, cl 1, 2, 12 and 38. For what it is worth, we warmly commend such a proposal. Early statutory implementation of it would obviate much arid and highly wasteful litigation turning on a distinction of no apparent principle or other merit.

c [101] Despite the House of Lords' rejection in *Stubbings*' case of the proposition that deliberate conduct could give rise to an action for personal injuries within s 11, Diplock LJ's central reasoning in *Letang v Cooper* [1964] 2 All ER 929, [1965] 1 QB 232 that a cause of injury is not a pleader's label, but simply an allegation of a factual situation the existence of which entitles a person to a remedy, still deserves attention. Thus, it is necessary, when an issue of limitation arises, to consider whether the factual situation alleged fits the s 11 criteria, whether or not it also fits other criteria entitling the bringing of an action. If the alleged factual situation does fit the s 11 criteria, the fact that it may also be characterised as another form of tort, say trespass to the person, does not exclude the shorter, but extendable, limitation in s 11 for breach of duty causing personal injury. For example, in *Morris v CW Martin & Sons Ltd* [1965] 2 All ER 725, [1966] 1 QB 716, Salmon LJ considered that an allegation of conversion might overlap with negligence.

d [102] Where there is an issue of limitation, the critical question is whether the factual situation alleged is capable of falling within the s 11 criteria at all, a question that the Court of Appeal in *Morris*' case and the House of Lords in *Lister's* case did not need to, and did not, consider. If, as in both those cases, and as the judge held in the three claims in question here, there is no independent case in negligence against an employer, he may yet be vicariously responsible for some tortious act that is not in itself negligent. That is plain from the speeches in *Lister's* case, including the differing approaches of Lord Hobhouse of Woodborough and Lord Millett.

e [103] The question that arises for decision on this appeal is whether a claim against a carer who, in the course of his employment, deliberately abuses a child, is an action in negligence or other breach of duty for personal injuries within s 11?

On the face of it, the position of an abusive carer should be no different from that of an abusive parent or other relative, as in *Stubbings'* case and *Seymour's* case. The point could have been, but was not, taken in both those cases that the allegation of deliberate abuse also amounted to one of a breach of a duty of care so as to bring the matter within s 11. However, it is plain from the reasoning in both that, had the point arisen, it would have been most unlikely to succeed. a

[104] As we have said, the point of limitation did not arise in *Lister v Hesley Hall Ltd* [2001] 2 All ER 769 and it was thus unnecessary for their Lordships to examine closely the nature of the tort in respect of which vicarious responsibility was in issue. And as vicarious responsibility is, as Lord Steyn put it (at [14]) a 'legal responsibility imposed on an employer, although he is himself free from blame', the legal nature of an employee's tort does not depend on any contribution to it by the employer. Their Lordships' concern was with the closeness of the connection between the employee's wrongful acts, however characterised as a matter of law, with his job so as to bring his acts within the scope of his employment. More particularly, the House was concerned with the issue of vicarious responsibility for intentional wrongdoing. Thus, Lord Steyn, with whom Lord Hutton agreed, confined himself to the view (at [20]) that the employer was liable for the 'torts' of the employee without further analysis of what the torts were. Lord Clyde said nothing as to the nature of the tort committed by the employee. Lord Hobhouse and Lord Millett both considered the nature of the tort in respect of which vicarious responsibility was sought, but took different routes to holding that such responsibility was established in respect of a deliberate, ie non-negligent act. b
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[105] However, Lord Hobhouse, in the following passage, through the concept of an employer 'entrusting' his duty of care to an employee to protect children in its charge from abuse, appears to have included in that duty his employee's quite separate and general duty as a citizen not to abuse children, breach of which, if closely connected with his employment, also engages his employer's vicarious responsibility. e
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'[54] ... The fact that sexual abuse was involved does not distinguish this case from any other involving the care of the young and vulnerable and the duty to protect them from the risk of harm.

[55] The classes of persons or institutions that are in this type of special relationship to another human being include schools, prisons, hospitals and even, in relation to their visitors, occupiers of land. They are liable if they themselves fail to perform the duty which they consequently owe. If they entrust the performance of that duty to an employee and that employee fails to perform the duty, they are still liable. The employee, because he has, through his obligations to his employers, adopted the same relationship towards and come under the same duties to the plaintiff, is also liable to the plaintiff for his own breach of duty. The liability of the employers is a vicarious liability because the actual breach of duty is that of the employee. The employee is a tortfeasor. The employers are liable for the employee's tortious act or omission because it is to him that the employers have entrusted the performance of their duty. The employer's liability to the plaintiff is also that of a tortfeasor. I use the word "entrusted" in preference to the word "delegated" which is commonly, but perhaps less accurately, used. Vicarious liability is sometimes described as a "strict" liability. The use of this term is misleading unless it is used just to explain that there has been g
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a no actual fault on the part of the employers. The liability of the employers derives from their voluntary assumption of the relationship towards the plaintiff and the duties that arise from that relationship and their choosing to entrust the performance of those duties to their servant.'

b [106] Lord Millett, in the following passages, clearly distinguished between an employee's deliberate wrong sufficiently closely connected with his employment to engage his employer's vicarious responsibility and an employee's delegated or 'entrusted' duty of care:

c ' [82] ... The school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused the special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys. It is not necessary to conduct the detailed dissection of the warden's duties of the kind on which the Supreme Court of Canada embarked in [*Children's Foundation v Bazley* [1999] 4 LRC 327, (1999) 174 DLR (4th) 45] and [*Jacobi v Griffiths* [1999] 4 LRC 348, (1999) 174 DLR (4th) 71] ...

d [84] I would hold the school vicariously liable for the warden's intentional assaults, not (as was suggested in argument) for his failure to perform his duty to take care of the boys. That is an artificial approach based on a misreading of *Morris*' case. The cleaners [in that case] were vicariously liable for their employee's conversion of the fur, not for his negligence in failing to look after it. Similarly, in [*Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, [1980] AC 827] the security firm was vicariously liable for the patrolman's arson, not for his negligence. The law is mature enough to hold an employer vicariously liable for deliberate, criminal wrongdoing on the part of an employee without indulging in sophistry of this kind ...'

e f [107] Before expressing our conclusion as to where *Lister*'s case leaves us on the issue whether s 11 applies to vicarious responsibility for deliberate abusive conduct as distinct from an employee's delegated or 'entrusted' duty of care to prevent such abuse, we should note that Lord Steyn specifically left open the question in a case of sexual abuse whether it might constitute a claim for personal injuries within s 11:

g h j '[29] Having concluded that vicarious liability has been established on the appellants' primary case, it is not necessary to express a view on the alternative argument based on the employee's alleged breach of a duty to report his sexual intentions or the consequences of his misdeeds. Nevertheless, this line of argument may require further consideration. For example, if the employee was aware of a physical injury sustained by a boy as a result of his conduct, it might be said to be part of his duties to report this fact to his employers. If that is so, why should the same not be true of psychological damage caused by his sexual abuse of a boy? In the present case those issues do not need to be decided. Possibly they could arise in other cases, eg where otherwise a limitation issue may arise. I express no view on this aspect.'

It is difficult to conceive in what circumstances, outside the limitation issue here in play, it would be both possible and necessary to deploy such an alternative argument. It could only arise in respect of a tortfeasor's own wrongdoing, in respect of which his employer would be vicariously responsible regardless of any supposed additional duty to report. And to seek to rely on it, presumably just to overcome a limitation problem, as Lord Clyde said (at [32]) would seem 'to be a somewhat artificial basis for the claim'. It would also run contrary to the firm and unanimous reasoning of the House in *Stubbings v Webb*. And, as Lord Millett observed in *Lister's* case (at [84]):

'I would also not base liability on the warden's failure to report his own wrongdoing to his employer, an approach which I regard as both artificial and unrealistic. Even if such a duty did exist, on which I prefer to express no opinion, I am inclined to think that it would be a duty owed exclusively to the employer and not a duty for breach of which the employer could be vicariously liable.'

[108] In our view, the correct approach is as Lord Millett has expressed it. Whether or not s 11 is in play, it is to identify the wrongful act, deliberate or otherwise, in respect of which vicarious responsibility is claimed and to assess the closeness of its connection to the employment in question. If the act is sufficiently closely connected with the employment, there is vicarious responsibility. In such circumstance, and bearing in mind Lord Griffiths' reasoning in *Stubbings'* case (see [99], above), there is no justification or need, for the purpose of establishing vicarious responsibility, to elide the duty in respect of which the employee's deliberate act is a breach with a duty of care delegated or 'entrusted' to him by the employer. The two are quite distinct. Where s 11 is under consideration, it follows that claims for personal injuries in respect of deliberate conduct, whether considered in the context of vicarious responsibility or not, are not caught by its provisions. Accordingly, in the absence of some provable allegation of systemic negligence of the first defendant, we are of the view that its employees' deliberate abuse does not fall within s 11 and is, therefore, governed by a non-extendable six-year period of limitation rather than an extendable three-year period. We would accordingly uphold the judge's finding and ruling to that effect in the case of MCK, JS and CD.

QUANTUM

[109] Before turning to the individual cases we should make some general points as to the three headings of damages claimed and in issue, namely: general damages for pain, suffering and loss of amenity; loss of earnings and cost of therapy.

General damages

[110] Each of the claimants has appealed the award of damages under this head.

[111] All the cases have features in common. In particular, Connell J identified the following ([2001] All ER (D) 322 (Jun) at [14] and [15]): (i) the claimants were all children when the abuse occurred; (ii) they were very needy children when placed in the care of the first defendant; (iii) they were let down badly and their trust was betrayed by individual staff members and also by the child care system operated in the Bryn Alyn Community; (iv) the abuse lasted for

a different periods, but in every case for a significant part of what should have been a special time in the life of the claimants; (v) the impact of the abuse has had a long-term effect in every case; and (vi) with the possible exception of KR (the one appellant who did not pursue his appeal against quantum), all the appellants had suffered abuse to a greater or lesser extent before entering Bryn Allyn.

b [112] All the appellants' pleaded claims were primarily for damages for long-term psychiatric and/or psychological injury, sometimes characterised as post-traumatic stress disorder, and particularised by reference to psychiatric and/or psychological reports. Those reports in the main dealt with the actual abuse simply as part of the narrative giving rise to the long-term psychiatric damage alleged. There was little, if any, focus in the evidence of the claimants on any immediate short-term effects of the physical or sexual abuse suffered while they were at Bryn Allyn. On the contrary, as the judge indicated (at [28]) Mr Owen argued that none of the claimants had known that any injuries suffered while at Bryn Allyn were 'significant' for the purpose of s 14. There was a similar lack of attention to the immediate effect of the abuse in the initial arguments before this court. The appellants' main concern was recovery of adequate damages for the psychiatric or psychological effect on their adult lives and, where applicable, for loss of past and future earnings and cost of therapy. However, as we have said, on the resumed hearing of the appeal Mr Owen insisted, and without demur from Mr Faulks, that the claims had throughout included an element for the abuse itself and its immediate effects. He maintained that neither the judge's nor our initial awards took account of that element, a failure which, for our part, we acknowledge for the reasons we have given. There is no doubt that awards in cases such as this should take account of the nature, severity and duration of the abuse itself and of its immediate effects, as well as of any long-term psychiatric harm that it may have caused, even though the latter may be the primary motivating and much the more serious injury giving rise to the claim. As Buxton LJ observed in *C v A local authority* [2001] EWCA Civ 302 at [69], [2001] 1 FCR 614 at [69] where there had been a similar concentration in argument on psychiatric injury at the expense of the actual abuse and its immediate effects, '[f]urther compensation is due for the events themselves'. This is a matter to which we have had regard in reviewing the adequacy of our initial awards.

[113] The judge looked at the contribution that the Bryn Allyn experience had made to each of the claimants' long-term psychiatric problems. That involved an exercise in apportionment. This is how he put it (at [15]):

h 'With the possible exception of KR, they had all been through a traumatic series of damaging experiences before being placed in the care of the defendants. Even if the care offered to them there had been all that it should have been, it is doubtful that any of them would have escaped significant difficulties in coping on a day-to-day basis with adult life. The emphasis varies from case to case but in no case have I felt that it would be doing justice to the defendants to condemn them for the whole of the psychiatric injury suffered to date by any claimant. In several of the cases the evidence drove me to the conclusion that the damage caused by the first defendants formed a significant but small part of the total injury described by the relevant doctors, leading to small awards. In other cases their treatment at

Bryn Alyn was the cause of more substantial damage. Hence the variation in quantum from case to case.’ a

It is clear from that passage, if nowhere else, that the judge appreciated that the comparison to be made was between how the individual actually turned out and how he or she would have turned out had Bryn Alyn offered a proper standard of care.

[114] Elsewhere in his judgment Connell J stated his intention of following the broad-brush approach adopted by Scott Baker J (as he then was) in an earlier tranche of similar cases, approved by this court in C’s case. Having referred to a passage in the judgment of Mustill J (as he then was) in *Thompson v Smiths Shiprepairers (North Shields) Ltd* [1984] 1 All ER 881 at 910, [1984] QB 405 at 443, Scott Baker J stated: b

‘While I am able to make findings on the issue of causation, there are echoes of the words of Mustill J in *Thompson’s* case in that there is an impossibility of making a precise apportionment between what the defendants’ negligence has caused and what has been caused by other factors. Inevitably I have taken a broad view and done my best to reach a fair conclusion on the whole of the evidence. It is very much a matter of feel.’ d

[115] Mr Owen’s first, if somewhat tentative, submission was that the exercise in apportionment should never have been attempted. Here, so it went, in many if not in all cases it is quite impossible to disentangle the various causes that have gone to make up the eventual psychiatric injury. In such a case, it was argued, any identifiable tortfeasor whose wrongdoing has made a significant contribution to the injury may be held responsible for the whole of the damages. In rejecting that submission we take as our starting point *Clerk and Lindsell on Torts* (18th edn, 2000) p 200 (para 4-101): e

‘Where damage is caused as the result of torts committed by two or more tortfeasors, the tortfeasors may be (1) joint tortfeasors, (2) several tortfeasors causing the same damage or (3) several tortfeasors causing different damage. If one of a number of joint tortfeasors, or of several tortfeasors causing the same damage, is sued alone, he is liable for the whole damage, though he did but a small part of it. In the case of several tortfeasors causing different damage, on the other hand, each is liable only for the damage which he has caused.’ f

[116] Our finishing point is to be found in the judgment of this court in *Hatton v Sutherland*, *Barber v Somerset CC*, *Jones v Sandwell Metropolitan BC*, *Bishop v Baker Refractories Ltd* [2002] EWCA Civ 76 at [36], [2002] 2 All ER 1 at [36], [2002] ICR 613, which in its material part reads as follows: h

‘Many stress-related illnesses are likely to have a complex aetiology with several different causes. In principle a wrongdoer should pay only for that proportion of the harm suffered for which he by his wrongdoing is responsible ...’ j

[117] Mr Owen’s second submission was that, if an apportioned award was appropriate, the approach should have been in accordance with principle and the conclusion supported by reasons. He cited *Allen v British Rail Engineering Ltd* [2001] EWCA Civ 242 at [20], [2001] ICR 942 at [20] for the following:

a 'In our judgment the case law as it now stands establishes five propositions of which the first is concerned with liability and the others with quantifying damages. (i) The employee will establish liability if he can prove that the employer's tortious conduct made a material contribution to the employee's disability. (ii) There can be cases where the state of the evidence is such that it is just to recognise each of two separate tortfeasors as having caused the whole of the damage of which the claimant complains; for instance where a passenger is killed as the result of a head-on collision between two cars each of which was negligently driven and in one of which he was sitting. (iii) However in principle the amount of the employer's liability will be limited to the extent of the contribution which his tortious conduct made to the employee's disability. (iv) The court must do the best it can on the evidence to make the apportionment and should not be astute to deny the claimant relief on the basis that he cannot establish with demonstrable accuracy precisely what proportion of his injury is attributable to the defendant's tortious conduct. (v) The amount of evidence which should be called to enable a judge to make a just apportionment must be proportionate to the amount at stake and the uncertainties which are inherent in making an award of damages for personal injury.'

[118] We, of course, accept those statements of principle and will look to see how they were applied, if at all, in the individual cases. We note also that the fourth statement of principle was picked up by Buxton LJ in *C v A local authority* [2001] 1 FCR 614 at [67] where he said:

f '... this is a case where the usual process of attributing responsibility between various causes to a large extent breaks down, because the initial cause of Miss C's vulnerability is the context in which the defendants have to take particular care. If they did not take that care, in circumstances where it was known and foreseeable what could be the outcome of abuse by persons of trust and in positions of responsibility, then they cannot complain if less weight than otherwise might be the case is given to that original cause. Those considerations therefore entitle—indeed oblige—the judge not to weigh too nicely arguments based on the respective causal effect of the various facts in the history.'

[119] Having said that, it does not escape our notice that *Allen's* case does not assist Mr Owen in his first submission and in its result appears to support the broad-brush approach adopted by the judge. Referring to the appellant's attack on the judgment, the court said (at [31]):

j 'Part of that attack consisted in pointing out the difficulties inherent in doing the apportionment exercise which the judge undertook. We accept that there are difficulties but it is important to recognise that the judge was faced with a choice between awarding nothing to [the claimant] because he had not proved the precise amount of damage attributable to the negligence, doing her best to find out how much of the damage was attributable to the negligence while accepting that the exercise was not perfect and might err at the margins, or holding [the defendant] liable for the consequences of actions which were not negligent. The first and last of these courses certainly involved substantial injustice to one party or the other. The middle course

which she took involved a risk to both parties of a minor injustice. We consider she was right to choose the middle course.’ a

[120] None the less, we accept that it is the duty of a judge, so far as possible, to adopt a principled and logical approach to the difficult question of apportionment. Here it will be necessary to consider how far Connell J did so when we come to look at the individual cases. We note, however, that in accordance with the practice of many judges, including Scott Baker J, the judge eschewed percentages, or at least resisted the temptation to refer to them in terms. That is not something that we criticise provided always that he had gone through the mental exercise of arriving at a global figure before assessing the proportion for which the first defendant was responsible. We have asked ourselves whether there is any objection to the ‘workings out’ being disclosed. We can think of none and would suggest that the better practice would be for judges to show the steps by which the result, however approximate, has been achieved. To this extent we disagree with the sentiment sometimes expressed that the assessment of compensatory damages is a jury question. b

[121] A wrongdoer must take his victim as he finds him. To abuse an already damaged individual may have the result of pushing him over the brink. The possible exponential effect of abuse on children who have already suffered psychiatric damage by reason of previous experiences had been noted by Ward LJ in *C*’s case [2001] 1 FCR 614 at [54]. That Connell J was alive to the point is apparent from his observations (at [14]) where he stated: c

‘I also bear in mind the judgment of Ward LJ in *C*’s case and in particular the whole of para [54], which includes the observation, “the essential element of the damage is the extent to which the injury compounds and multiplies the effect of the pre-existing condition”.’ d

Again when we come to the individual cases it will be necessary to see how far, if at all, he followed his own instruction. e

[122] In arriving at a figure for general damages in each case the judge took into account Judicial Studies Board (JSB) guidelines, assessments made by Potts J in a not dissimilar case and the award upheld by this court in *C*’s case. We agree that all three provide useful pointers to the level of general damages in this class of case. So too does the award made by Connell J in the case of *KR* as an indication of what the judge considered to be appropriate without having to consider any pre-existing disability. f

[123] The JSB Guidelines (6th edn) suggest that in cases of moderately severe psychiatric damage the range for pain, suffering and loss of amenity lies somewhere between £9,500 and £25,000 with most awards coming within the bracket £15,000 to £20,000. For severe post-traumatic stress disorder with long-term sequelae the range starts at £30,000 and reaches £50,000, with somewhat lower awards where there is a reasonably optimistic prognosis. g

[124] In *C*’s case Ward LJ questioned the value of these guidelines in cases of long-term child abuse for reasons that he set out (at [54]). We quite agree that the guidelines do not directly address the kind of problems that confronted the judge in the case of *C* or in the instant cases and are certainly not capable of rigid application. Nevertheless, we do consider that they provide some sort of signpost to the general level of damages that a judge ought to be considering in a case of this kind. h

a [125] In *B v Leicestershire CC* (2 April 1996, unreported) Potts J had first of all to tackle the difficult question of assessing general damages in the case of a woman who as a teenager had suffered serious psychiatric damage as a result of having been abused during a two-year spell in a children's home. He rejected evidence that the main contributor to her eventual condition had been ill-treatment suffered whilst still with her family and concluded that she had left the children's home—

b 'with a damaged identity, extremely poor self-esteem and serious difficulties in emotional control. These consequences of her treatment have continued to the present day and will last into the future.'

c Later with regard to her continuing problems he said:

d 'By far the most serious of these, in my opinion, is her proclivity to self-harm. I accept Dr Clark's evidence that the plaintiff's self-mutilation by cutting is the direct consequence of her treatment at Ratcliffe Road. I am satisfied that given appropriate treatment at Ratcliffe Road it is probable that she would never have self-mutilated. I reject Dr Little's opinion that she would have self-mutilated in any event.'

The judge awarded £50,000 by way of damages for pain, suffering and loss of amenity.

e [126] In another of the claims in that case, JL, Potts J awarded £80,000 to a woman who had been raped, bugged and assaulted whilst at Ratcliffe Road after directing himself in the following terms:

f 'Over a period of some three years she was subject to many rapes, one act of buggery and substantial physical, emotional and mental abuse. She was subject to forced regression. Damages must compensate her for this pain and suffering together with the consequential psychiatric harm which she suffered and will continue to suffer in the future.'

g In that case also there had been some question as to the contribution made by the previous ill-treatment, but the judge was satisfied that the major cause was that described. There is no doubt that the psychiatric harm suffered was very significant, including as it did post-traumatic stress disorder. Moreover the judge seems to have been much influenced by the fact that in *Griffiths v Williams* [1995] CA Transcript 1599, (1995) Times, 24 November, this court declined to interfere with an award of £50,000 by way of compensation for a single act of rape. In neither B nor JL did the Leicestershire County Council appeal. Nevertheless, these were awards of damages made by a judge with vast experience in the field

h and his views are entitled to considerable respect.

j [127] C's case is closer to home. As we have remarked, it was an appeal from an award of damages made by Scott Baker J in a related tranche of cases. C had been taken into care at the age of 14. At the first home to which she was sent she was badly bullied by other girls who tied her to a bed, shaved off her eyebrows and poured cold water over her. On another occasion she was threatened with and cut by a Stanley knife. At her next home she was seriously assaulted by the deputy superintendent in front of other members of staff. On a later occasion she was indecently assaulted. In the result, as Scott Baker J found, she lost her trust in people 'especially those with whom she had any kind of close relationship'. With regard to the impact of the abuse Scott Baker J said:

'Without putting the finding into percentage terms ... I think the ill-treatment at CH and more particularly, at B has had a significant effect on Miss C's later life and employment prospects. But other matters also played their part: the writing was already on the wall when she went into care and there were likely to be ongoing problems. She was drinking, staying out late and leading what looked like becoming and later did become a promiscuous life.

She requires compensation for the events that happened in CH and B ... not least the use of secure accommodation and the indecent assault by H. Additionally she requires compensation for the contribution it has made to her unhappy life after she left and went out into the world. I do not accept that the effect of the abuse had run its course by the time she had left drama school. Its impact continued to be considerable right up until she had and took the opportunity of therapy following an approach by the Waterhouse Enquiry. She is a great deal better now, but still vulnerable to relapse if for example she faces some unexpected crisis in her life. The prognosis is optimistic but guarded. She has, as Mr Owen has pointed out, suffered both trauma and sexual abuse. I assess the figure for pain, suffering and loss of amenity at £35,000.'

[128] This court rejected the attack made on the award. In the course of his judgment Ward LJ said ([2001] 1 FCR 614 at [57]):

'To award her £35,000 for the significant part that abuse played in 20 years suffering, which still leaves her vulnerable to relapse in the years to come, seems to me to be a perfectly proper award. I am wholly satisfied that it is beyond criticism because the judge was, as is conceded, entitled to approach this case with a broad brush, as a jury question, and very much as a matter of feel. Viewed in that light, I conclude that it is impossible to say that he was wrong, still less that he was plainly wrong.'

Buxton LJ agreed, stating (at [71]):

'Putting all those factors together, it is, in my view impossible to say that the judge was so far wrong in his assessment of the level of the general damages owed by the defendants for all these events that this court should interfere.'

It is worthy of note that both Ward and Buxton LJ used language suggesting that they considered the award to be at the upper end of the appropriate bracket.

[129] In the claim of KR in this case Connell J awarded £35,000, about which we shall have more to say at a later stage in this judgment.

[130] After leaving Bryn Alyn some of these claimants have turned to a life of crime. That was said to be a consequence of the psychiatric problems encountered as a result of the abuse, but none of the claimants relying on it had evidence on which the judge could so find. Relying upon a decision of this court in *Clunis v Camden and Islington Health Authority* [1998] 3 All ER 180, [1998] QB 978 and following the approach of Scott Baker J in the earlier case, Connell J said ([2001] All ER (D) 322 (Jun) at [11]):

'As a matter of public policy the court will not lend its aid to a litigant who relies on his own criminal or immoral act, and I make no award to compensate any claimant in respect of any period of imprisonment or any

a loss of earnings during such a period. Further in no case has it been proved that any criminal conviction of any claimant was attributable to abuse suffered in the Bryn Alyn Community.'

b [131] Notwithstanding anything said by this court in *Clunis*'s case an argument may survive that damages are recoverable in respect of tortious acts that have resulted in a law-abiding citizen becoming a criminal. However, there is no appeal with regard to this aspect of the claims either in respect of general damages or under the next head of claim to which we now turn, namely loss of earnings.

Loss of earnings

c [132] In many, but not all, of these cases there is a claim for loss of earnings somewhat loosely referred to in argument as a *Smith v Manchester Corp* award (see *Smith v Manchester Corp* (1974) 17 KIR 1).

[133] The judge's approach is set out at para [12] of his judgment:

d 'Many of the claimants have alleged a loss of earnings in the past and/or a handicap on the labour market in the future which they attribute to the abuse suffered whilst in the Bryn Alyn Community. In a few cases this has led to a detailed claim for loss of earnings (eg KR and PS) and their claims are dealt with in the individual judgments. In the other cases the claims both for past and future loss of earnings are advanced in generalised form without significant detail or particularity. Again I adopt Scott Baker J's approach. If e a claimant proves on the balance of probability that pre-trial he has earned less money than he would have earned if he had not been abused whilst in care of the first defendant, then I have made an award in a round sum to reflect this fact, adopting the broad-brush approach approved by the Court of Appeal at para [58] of the judgment of Ward LJ in the case of *C v A local authority* ... In the case of future loss of earnings I too have applied the f conventional *Smith v Manchester Corp* approach.'

g [134] We have no quarrel with the judge's declared approach but it is necessary to consider whether he applied it in each case. We note, however, that it does not follow that apportionment of loss of earnings must necessarily mirror that in relation to general damages. In this context the 'push over the edge' or cumulative effect of the Bryn Alyn abuse may have made the difference between a claimant being able to work and not being able to work.

Therapy

h [135] Again in most, but not all, cases there is a claim for the cost of treatment. Connell J set out his proposed approach (at [13]):

i 'The need for therapy in each case has been considered by the doctors; and there are few disagreements. In general such need as is proved is a consequence of the claimants' life experiences to date, and not just to abuse at Bryn Alyn. Where the evidence shows this to be the case, I have attempted to strike a fair balance and not to penalise the first defendants for the whole of the anticipated cost of such therapy.'

We consider that this may be somewhat simplistic. The beneficial effects of therapy serve to reduce the respondent's liability in respect of what would otherwise be continuing symptoms. There is no suggestion that the additional symptoms produced by the abuse at Bryn Alyn can be treated independently

from those with a separate cause. It follows that the individual claimant must undergo the whole course of treatment or pass it up altogether. On the judge's approach, some part of the treatment would have to be funded by the claimant himself, and that to achieve a result that would benefit the defendant. In our view, once it is established that the Bryn Alyn experience played a significant part in the need for therapy, the whole of the anticipated cost should be recoverable from the defendant unless it can be clearly shown that the treatment is divisible.

[In [136]–[325] the court considered the facts in each of the individual cases.]

Appeals allowed in part. Permission to appeal refused.

James Brooks Barrister.

a **Green v Governing Body of Victoria Road
Primary School and another**
[2004] EWCA Civ 11

b COURT OF APPEAL, CIVIL DIVISION
PILL, MUMMERY AND MAY LJ
4 DECEMBER 2003, 23 JANUARY 2004

- Education – Community school – Teacher employed by local education authority – Governing body of community school acting in exercise of their employment powers treated as employer – Teacher resigning and claiming unfair dismissal – Proper respondent to action – School Standards and Framework Act 1998 – Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 3(1), 6.*
- c** The claimant was employed as a deputy head teacher at a community school within the meaning of that term in the School Standards and Framework Act 1998 and the Education (Modification of Enactments Relating to Employment) Order 1999. The governing body of community schools had no power to enter into contracts for the employment of teachers and the defendant local education authority was the claimant's employer. Article 3(1)(a)^a of the 1999 order deemed that any reference to an employer under, inter alia, the Employment Rights Act 1996 included a reference to a governing body of a community school 'acting in the exercise of their employment powers' and art 2(2)^b defined references to employment powers as references to the powers of appointment, suspension, discipline and dismissal of staff contained in the 1998 Act. The governing body seconded another deputy head teacher from a different school to work with the claimant. The claimant believed her own situation was untenable and resigned.
- d** She made a claim against the governing body of the school and the local education authority for unfair dismissal under the 1996 Act. It fell to be determined as a preliminary issue whether the local authority was an appropriate respondent to the application, or could be made a party against its will. The employment tribunal held that art 6^c of the 1999 order, which provided that in any application to an employment tribunal in relation to which a governing body were to be treated as if they were an employer by virtue of, inter alia, art 3, the application should be made against the governing body, was perfectly clear, with the result that the governing body was the proper respondent to the claim. The claimant appealed against that decision. The Employment Appeal Tribunal found that the proper respondent to an allegation of constructive dismissal should initially be the local authority, as pursuant to arts 3(1) and 6 of the 1999 order, governing bodies were not the appropriate respondents unless acting in the exercise of their employment powers, which in relation to dismissal included only their exercise of their statutory power to require a local education authority to dismiss a person employed to work at the school. The local authority appealed.
- e**
- f**
- g**
- h**
- j**

a Article 3, so far as material, is set out at [8], below
b Article 2, so far as material, is set out at [7], below
c Article 6, so far as is material, is set out at [12], below

Held – Article 6 of the 1999 order applied to a claim for constructive dismissal brought in an employment tribunal. ‘Employment powers’ in art 2(2) included broad management functions in relation to staff including control over the conduct and discipline of staff and disciplinary rules and procedures. Those powers were sufficiently wide to embrace a claim for constructive dismissal in an employment tribunal. In the instant case, the conduct in relation to staffing of the school which created the circumstances in which the resignation occurred had been conduct in the exercise of the employment powers of the governing body; by virtue of arts 3(1)(a) and 6 the governing body were to be treated as they had been the employer and any application to an employment tribunal claiming unfair dismissal should be made against them. The appeal would, accordingly, be allowed and the local authority would be dismissed from the action (see [20], [23]–[25], [27], [28], [39]–[41], [50], [51], below).

Notes

For schools having a delegated budget in general, for discipline, and for dismissal of staff, see 15(1) *Halsbury’s Laws* (4th edn reissue) paras 204, 210, 213.

The Education (Modification of Enactments Relating to Employment) Order 1999 was revoked and replaced in relation to England only by the Education (Modification of Enactments Relating to Employment) (England) Order 2003 with effect from 1 September 2003.

For the Education (Modification of Enactments relating to Employment) (England) Order 2003, see 6 *Halsbury’s Statutory Instruments* (2003 issue) 745.

Case referred to in judgments

Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA.

Appeal

Kent County Council, a local education authority, appealed from the decision of the Employment Appeal Tribunal (Judge Ansell presiding) on 18 March 2003 ([2003] ICR 713) whereby it allowed an appeal by the respondent claimant Mrs Diane Green from the decision of an employment tribunal released on 17 April 2002 that Kent County Council be dismissed from proceedings issued by Mrs Green against both the Governing Body of Victoria Road Primary School and Kent County Council for unfair dismissal. The facts are set out in the judgment of Pill LJ.

Andrew Clarke QC and *Raoul Downey* (instructed by *Geoff Wild*, Maidstone) for the appellants.

David Bean QC (instructed by *Graham Clayton*) for the respondent.

The governing body was not represented.

Cur adv vult

23 January 2004. The following judgments were delivered.

PILL LJ.

[1] This is an appeal by Kent County Council (the appellants) against a decision of the Employment Appeal Tribunal (EAT), Judge Ansell presiding, on 18 March 2003 ([2003] ICR 713), whereby they allowed an appeal from an

a employment tribunal held at Ashford, Kent, whose extended reasons were sent to the parties on 17 April 2002. Mrs Diane Green (the respondent) had made a claim against the Governing Body of Victoria Road Primary School and the appellants for unfair dismissal. On the trial of a preliminary issue, as to whether they were appropriate respondents to the application, the tribunal dismissed the appellants from the proceedings. The EAT ordered that the appellants be
b reinstated as parties to the application before the employment tribunal.

[2] The respondent was employed as deputy head teacher at Victoria Road Primary School in Ashford from January 1994 until her resignation in 2001. She claims that she was constructively dismissed, her resignation arising from the fact that her professional status had been undermined.

c [3] The issue arises because the school is a community school within the meaning of that term in the School Standards and Framework Act 1998 and the Education (Modification of Enactments Relating to Employment) Order 1999, SI 1999/2256. The 1999 order has now been replaced by the Education (Modification of Enactments Relating to Employment) (England) Order 2003, SI 2003/1964 but there is no material difference.

d [4] The legislation provides a scheme of financial delegation for community schools. By their governing bodies, they exercise budgetary powers. It was, however, the appellants, as local education authority, who were the employers of the respondent, a community school, unlike some of the other types of school contemplated by the 1998 Act, not having power to enter into contracts for the employment of teachers and other staff (see para 3(6) of Sch 10 to the 1998 Act).

e [5] The respondent claims that she was unfairly dismissed. Section 95(1) of the Employment Rights Act 1996 provides that an employee is dismissed by his employer if—

f '(a) The contract under which he is employed is terminated by the employer (whether with or without notice) ... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.'

[6] Section 81(1) of the 1998 Act provides:

g '*Application of employment law during financial delegation.*—(1) The Secretary of State may by order make such modifications in any enactment relating to employment, and in particular in any enactment—(a) conferring powers or imposing duties on employers, (b) conferring rights on
h employees, or (c) otherwise regulating the relations between employers and employees, as he considers necessary or expedient in consequence of the operation of sections 54 and 57(1) to (3), Schedule 16 and paragraph 27 of Schedule 17.'

j [7] The power conferred by s 81(1) of the 1998 Act was exercised in making the 1999 order. The interpretation article in the order (art 2) provides:

'(2) In this Order references to employment powers are references to the powers of appointment, suspension, discipline and dismissal of staff conferred by or under sections 54 and 57(1) to (3) of, and Schedule 16 and paragraph 27 of Schedule 17 to, the 1998 Act.'

[8] Under the heading 'General modifications of employment enactments', art 3(1) provides: a

'In their application to governing bodies having a right to a delegated budget, the enactments set out in the Schedule shall have effect as if—(a) any reference (however expressed) to an employer, a person by whom employment is offered, or a principal included a reference to the governing body acting in the exercise of their employment powers and as if that governing body had at all material times been such an employer, person or principal; (b) in relation to the exercise of the governing body's employment powers, employment by the local education authority at a school were employment by the governing body of that school; (c) references to employees were references to employees at the school in question; (d) references to dismissal by an employer included references to dismissal by the local education authority following notification of a determination by a governing body under paragraph 25(1) of Schedule 16 to the 1998 Act; and (e) references to trade unions recognised by an employer were references to trade unions recognised by the local education authority or the governing body.'

b
c
d

This is clearly a deeming provision. In defined circumstances, the governing body are to be treated as employer. The enactments set out in the Schedule to the order include Pt X, and therefore ss 94 and 95(1), of the 1996 Act.

[9] Chapter III of the 1998 Act provides for the government of maintained schools, a community school being a maintained school by virtue of s 20(7) of the Act. In s 38, the functions of the governing body of such a school are stated broadly: e

'(1) Subject to any other statutory provision, the conduct of a maintained school shall be under the control of the school's governing body. f

(2) The governing body shall conduct the school with a view to promoting high standards of educational achievement at the school.'

[10] Section 54 of the 1998 Act provides that Sch 16 to that Act has effect in relation to the staffing of community schools. Sch 16 sets out in detail the procedures to be followed when a head teacher, a deputy head teacher, other teachers and non-teaching staff are to be appointed. Paragraph 22 is headed 'Discipline' and provides: g

'(1) The regulation of conduct and discipline in relation to the staff of the school, and any procedures for giving members of the staff opportunities for seeking redress of any grievances relating to their employment, shall be under the control of the governing body. h

(2) The governing body shall establish—(a) disciplinary rules and procedures (including such rules and procedures for dealing with lack of capability on the part of members of the staff), and (b) procedures such as are mentioned in sub-paragraph (1); and shall take such steps as appear to the governing body to be appropriate for making them known to members of the staff. j

(3) In determining the capability of members of the staff the governing body shall have regard to any guidance given from time to time by the Secretary of State.

a (4) If the Secretary of State determines that any prescribed rules and procedures are to apply to the school or to any class or description of school to which the school belongs—(a) the governing body shall act in accordance with those rules and procedures in determining the capability of members of the staff; and (b) in the event of any inconsistency, those rule[s] and procedures shall prevail over any rules and procedures established by the governing body under sub-paragraph (2)(a).

b (5) Where the implementation of any determination made by the governing body in the exercise of their control over the conduct and discipline of the staff requires any action which—(a) is not within the functions exercisable by the governing body by virtue of this Act, but (b) is within the power of the local education authority, the authority shall take that action at the request of the governing body.

c [11] Under the heading 'Dismissal, etc', paras 25–28 of Sch 16 set out a procedure by which the governing body may require the local education authority to dismiss a person employed to work at the school and the procedure to be followed before and upon determining 'that any person employed by the local education authority to work at the school should cease to work there' (para 25(1)). Paragraph 29(1) provides: 'The local education authority shall not dismiss a person employed by them to work solely at the school except as provided by paragraph 25.'

d [12] Article 6(1) of the 1999 order provides, in so far as is material:

e '... this article applies in respect of any application to an employment tribunal, and any proceedings pursuant to such an application, in relation to which by virtue of article 3 or 4 a governing body are to be treated as if they were an employer, person by whom employment is offered, or a principal.'

f In those circumstances, art 6(2) provides: 'The application shall be made, and the proceedings shall be carried on, against that governing body.' Article 6(4) creates an entitlement in a local education authority in such circumstances 'to be made an additional party to the proceedings and to take part in the proceedings accordingly'. What is in issue is whether the authority can be made a party against its will.

g [13] It is common ground that the local education authority would have to meet any successful claim against the governing body, subject to a possible right to recoup out of the school's budget. That being so, it would appear that the present issue is of little practical importance and this was suggested to the parties at the hearing. Both parties seek a ruling, however; the local education authority because of the costs they may incur if they are routinely made parties to proceedings such as these, and the claimant so that future claimants may be clear whether or not it is necessary to make the local education authority a party.

h [14] The employment tribunal held that art 6(2), under the heading 'Applications to Employment Tribunals', is 'perfectly clear' with the result that the governing body is the proper respondent to this claim.

j [15] In a carefully reasoned judgment, the EAT came to a different conclusion. They stated ([2003] ICR 713 at 719 (para 14)):

'We are quite satisfied that all references to "dismissal" within the 1999 order refer to dismissal pursuant to a paragraph 25 determination by the school: see article 2(2), article 3(1)(d) and article 4.'

[16] Having drawn attention to the qualifying words 'acting in the exercise of employment powers' in art 3(1)(a) of the 1999 order, the EAT continued (at 719 (para 16)):

'Mr Clayton's [Mrs Green's solicitor] helpful review of the law makes it quite clear to us that the overall purpose was clearly to make the governing body responsible and liable for those actions which they took in pursuance of their statutory powers, as defined by Schedule 16, which include dismissal pursuant to the procedure set out in that Schedule and thus *prima facie* does not include constructive dismissal. It is our view that the proper respondents to an allegation of constructive dismissal should initially be the local authority. It may be that on further examination of the facts of the claim it will be suggested that the constructive dismissal involved possible breaches by the governing body of one or more of their employment powers, in which case application could be made to join them as respondents. Indeed, Mr Clayton was careful to point out that we were not concerned as to whether or not the governing body were properly joined as respondents on the facts of this particular case. We are however quite satisfied it was wrong to dismiss the local authority as respondents to these proceedings.'

Reliance was also placed on the reference back, in art 6(1), to art 3, so that governing bodies are not the appropriate respondents unless 'acting in the exercise of their employment powers' which are defined in Sch 16 to the 1998 Act.

[17] For the respondent, Mr Bean QC supports the reasoning of the EAT. The expression 'acting in the exercise of their employment powers' in art 3(1)(a) and (b) would be mere verbiage unless it contemplated a restriction upon the circumstances in which governing bodies shall be treated as employers for the purposes of s 95 of the 1996 Act. In relation to dismissal, exercise of employment powers is confined to exercise of the powers conferred by Sch 16, para 25, and these do not include constructive dismissal. This is not anomalous, submits Mr Bean, when it is borne in mind that a claim for wrongful dismissal, as distinct from unfair dismissal, must be brought against the local education authority. The legislation contemplates a distinction, it is submitted, between claims under statute arising out of the governing body's exercise of powers, where the 1999 order applies, and other claims where the 1999 order does not apply even if the employment tribunal has jurisdiction.

[18] For the appellants, Mr Clarke QC submits that, by virtue of art 6(1) of the 1999 order, the governing body is the appropriate, and only possible, respondent where a complaint to the employment tribunal falls within an enactment set out in the Schedule to the 1999 order, and that includes a complaint of unfair dismissal under s 95(1) of the 1996 Act. An analysis of the particular complaint, whether it is a para 25 of Sch 16 to the 1998 Act dismissal or constructive dismissal, is not required. Employment powers in art 3 should be given a broad construction. In any event, the generality of the powers of the governing body appears from Sch 16, para 22 which places under the control of the governing body '[t]he regulation of conduct and discipline in relation to the

a staff of the school' and includes, by virtue of sub-para (3), a power to determine 'the capability of members of the staff'.

b [19] Reference was made, without objection, to facts not set out in the decision of either tribunal. A deputy head teacher had been seconded from another school to work alongside the respondent who believed that she was being 'sidelined' as deputy head teacher. She expressed her unease and unhappiness at what she regarded as an 'increasingly anomalous position'. She regarded the situation as untenable and decided to resign. The governors contend that the staff were under extreme pressure and a deputy head from another school was brought in to provide assistance. Thus there are issues as to the circumstances which preceded the resignation, and these fall to be resolved by the employment tribunal in due course.

c [20] I am not able to construe art 6 as narrowly as did the EAT. In art 2(2) of the 1999 order, 'employment powers' are stated to be references to 'powers of appointment, suspension, discipline and dismissal of staff' as conferred by the legislation mentioned, including Sch 16 to the 1998 Act. 'Discipline', in
d of para 22 of Sch 16, appears to me to be widely defined and to include exercises of power which will affect the interests of members of staff. Such exercises of power may lead to disputes and to claims that resignations amount to constructive dismissals.

e [21] The legal concept of constructive dismissal was explained by Lord Denning MR in *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713 at 717, [1978] QB 761 at 769:

f 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

g [22] The concept of constructive dismissal is so linked with that of dismissal that a jurisdictional difference which depended on a distinction between them would need the clearest basis. Both depend on the employer's conduct as employer. I cannot accept that the intention of the legislation was to create a distinction between dismissal and constructive dismissal, making it necessary to classify the circumstances of the departure from employment as between
h s 95(1)(a) and (c) of the 1996 Act before it can be known whether the governing body or local education authority is the appropriate respondent.

j [23] It is clear from art 2(2) of the 1999 order that 'employment powers' are not confined to these in para 25 of Sch 16 to the 1998 Act. Moreover, the presence of the word 'included' in art 3(1)(d) of the 1999 order does not suggest an exclusivity in the para 25 procedure. Employment powers include at least 'Discipline' as set out in para 22 of Sch 16 to the 1998 Act. Paragraph 22 describes broad management functions in relation to staff including control over the conduct and discipline of the staff and disciplinary rules and procedures. The governing body is entitled to determine the capability of members of the staff and shall establish rules and procedures for dealing with lack of capability.

[24] When these powers are exercised, situations are likely from time to time to arise in which resignations occur and constructive dismissal is claimed. To bring a claim for constructive dismissal under s 95(1)(c), the employee must be able to point to 'conduct' of the employer. The conduct in relation to staffing of the school which created the circumstances in which the resignation in this case occurred was in my judgment conduct in the exercise of the employment powers of the governing body. The words conduct and discipline in para 22 of Sch 16 to the 1998 Act should, in the statutory context, be given a broad construction. a

[25] In my view the actions of the governing body in this case were actions in the exercise of their employment powers, and by virtue of arts 3(1)(a) and 6 of the 1999 order they are to be treated as if they were the employer, and any application to an employment tribunal claiming unfair dismissal shall be made against them. b

[26] I am pleased to have been able to reach that conclusion. On a contrary view, before it could be known whether the local education authority or the governing body is the appropriate respondent to a claim for unfair dismissal, there would have to be a detailed analysis, which in some cases would be complex, of the circumstances. c

[27] I would allow this appeal and accede to the appellants' application to be dismissed from the action. d

MUMMERY LJ.

[28] I agree that the appeal should be allowed. The appellant council should not have been joined as a party to Mrs Green's proceedings for constructive unfair dismissal from her post as deputy head of Victoria Road Primary School. The governing body of the school should be the sole respondent. e

[29] The question whether the appellants can be joined in unfair dismissal proceedings against their will turns on the construction of art 6 of the Education (Modification of Enactments Relating to Employment) Order 1999, SI 1999/2256, which relates to applications to employment tribunals. I need not repeat all the relevant articles of the 1999 order, the relevant legislation or the salient facts set out in the judgments of Pill and May LJ, which I have read in draft. f

[30] I have found this narrow procedural question more difficult to decide than Pill and May LJ have. For that reason alone I should attempt to state the legal position in my own words. g

[31] The starting point is that an employer is a necessary party to an application to an employment tribunal for ordinary or constructive unfair dismissal, unless primary or secondary legislation clearly provides otherwise. It is common ground that the appellants employed Mrs Green and that they are liable, by virtue of art 6(3) of the 1999 order, as if an award by the employment tribunal against the governing body were made against the appellants, as the local education authority. h

[32] As stated in art 6(2) of the 1999 order, the general rule as to parties in the case of proceedings concerning community schools is that any application to an employment tribunal shall be made, and the proceedings shall be carried on, against the governing body, even though they are not the employer of the applicant. The appellants, as the local education authority, are entitled under art 6(4)(b) to apply to be joined as an additional party to the proceedings, if they i

a so wish, and to take part in them accordingly. In this case the appellants have made it clear that they do not wish to be a party to the proceedings or to take part in them. Can they be made a party against their will? That is the question.

[33] The provisions in art 6 regarding applications to employment tribunals govern applications 'in relation to which by virtue of article 3 or 4 a governing body are to be treated as if they were an employer ...' The critical question is
b whether the governing body are to be treated as if they were the employer by virtue of art 3 in the case of a constructive unfair dismissal, as they clearly are in the case of an ordinary unfair dismissal. As a matter of general principle one would expect the tribunal procedure, including rules as to joinder of parties, to be the same in the case of ordinary and constructive dismissal, both of which can found applications for unfair dismissal.

c [34] It is, however, necessary to consider carefully the language of art 3, to which art 6(1) cross-refers. Article 3 makes general modifications to the employment enactments set out in the Schedule, including the unfair dismissal provisions in Pt X of the Employment Rights Act 1996. The effect of the modifications made by art 3(1)(a) is that the scheduled enactments take effect
d as if any reference to an employer included a reference to the governing body 'acting in the exercise of their employment powers and as if that governing body had at all material times been such an employer'. Article 3(1)(b) provides that the scheduled enactments have effect as if—

e 'in relation to the exercise of the governing body's employment powers, employment by the local education authority at a school were employment by the governing body of that school.'

[35] What is the effect of the expression 'employment powers'? Assistance
f is available in art 2(2), which provides that references to 'employment powers' are references to the powers of appointment, suspension, discipline and dismissal of staff conferred by or under ss 54 and 57(1)–(3), and Sch 16 and para 27 of Sch 17 to the School Standards and Framework Act 1998.

[36] The common law doctrine of constructive dismissal does not immediately connect with the concept of the 'exercise of employment powers'
g for the dismissal of staff by an actual or deemed employer. Constructive dismissal is sometimes referred to as 'self-dismissal', which would suggest that a claim for constructive unfair dismissal is not based on the exercise of a 'power of dismissal' by the employer or the deemed employer. The doctrine focuses on the decision of the employee, as in the case of Mrs Green, to accept an alleged repudiatory breach of the contract of employment by the employer as
h terminating the employment. Schedule 16 to the 1998 Act, to which express reference is made in art 2(2) for powers of dismissal of staff, does not expressly refer to the case of constructive dismissal.

[37] There is, to my mind, considerable force in the textual arguments advanced by Mr Bean QC on behalf of the appellants in support of the
j submission that the mandatory provisions of art 6(2) of the 1999 order do not apply to all applications to the employment tribunal; that they are expressly confined to those applications arising out of the governing body's exercise of 'employment powers'; and that alleged constructive dismissal does not arise out of the governing body's exercise of 'employment powers', as characterised in arts 2(2) and 3(1) of the 1999 order.

[38] The difficulty with Mr Bean's submission is that it produces a procedural situation which does not make sense and is very unlikely to have been the intended effect of the 1999 order. The evident purpose of the restriction on joinder of respondents in art 6(2) is to avoid, where possible, an unnecessary duplication of parties and to achieve a saving of costs and time of bodies engaged in the discharge of public functions. There is no discernible reason for treating a complaint for constructive dismissal presented to the employment tribunal under s 95(1)(c) of the 1996 Act in a procedurally different way from a complaint of ordinary dismissal under s 95(1)(a) or (b). Indeed, as pointed out by Pill and May LJ, Mr Bean's construction leads to a paradoxical situation in which, on a complaint of constructive dismissal, the employment tribunal would have to decide the substantive question whether there was in fact and in law a constructive dismissal of the applicant before it could rule on the procedural question whether the local education authority could be made a party to the employment tribunal proceedings against its will.

[39] In my judgment, a broad, purposive approach to the construction of the procedural provisions in art 6 is appropriate. Such an approach leads to the conclusion that, in accordance with the mandatory terms of art 6(2), the application by Mrs Green in the employment tribunal for constructive unfair dismissal should be made and carried against the governing body and not against the appellants. By virtue of art 3, the governing body are treated as if they were her employer acting in the exercise of their employment powers. Although the references to 'employment powers' in art 2(2) and the statutory provisions mentioned there, notably Sch 16, do not expressly cover the case of constructive dismissal, it is, in my view, implicit in the scheme of the order and related legislative provisions, read as a whole and with regard to their procedural context and objective, that the governing body are the proper respondent to all employment tribunal applications arising out of the dismissal of staff, whether the result of (a) invoking the procedure for the exercise of an express power of dismissal terminating a contract of employment, or (b) other actions by a governing body in relation to the treatment of staff in the community school, which could lead to the termination of a contract of employment and to alleged unfair dismissal. No sensible purpose would be served by introducing the complication of distinguishing between two types of dismissal in the procedural context of joinder of parties to employment tribunal applications.

[40] For these reasons, I agree that there was no error of law in the decision of the employment tribunal. The appeal should be allowed.

MAY LJ.

[41] I agree that this appeal should be allowed for the reasons given by Pill LJ, whose account of the facts and circumstances I gratefully adopt. I shall not set out at length all the relevant statutory provisions to which he has referred.

[42] Mrs Green alleges constructive dismissal. This is a claim to which s 95(1)(c) of the Employment Rights Act 1996 applies. Section 95 is in Pt X of the 1996 Act.

[43] Victoria Road Primary School is a community school with a scheme of financial delegation. There is no dispute but that Mrs Green was an employee of the appellants, the local education authority. However, speaking broadly,

a the governing body of a school such as Victoria Road Primary School has employment powers under the legislation.

[44] The critical parts of the Education (Modification of Enactments Relating to Employment) Order 1999, SI 1999/2256 are as follows:

b '2. ... (2) In this Order references to employment powers are references to the powers of appointment, suspension, discipline and dismissal of staff conferred by or under sections 54 and 57(1) to (3) of, and Schedule 16 and paragraph 27 of Schedule 17 to, the 1998 Act ...

c 3.—(1) In their application to governing bodies having a right to a delegated budget, the enactments set out in the Schedule shall have effect as if—(a) any reference (however expressed) to an employer, a person by whom employment is offered, or a principal included a reference to the governing body acting in the exercise of their employment powers and as if that governing body had at all material times been such an employer, person or principal; (b) in relation to the exercise of the governing body's employment powers, employment by the local education authority at a school were employment by the governing body of that school ...

d 6.—(1) Without prejudice to articles 3 and 4, and notwithstanding any provision in the Employment Tribunals Act 1996 and any regulations made under section 1(1) of that Act, this article applies in respect of any application to an employment tribunal, and any proceedings pursuant to such an application, in relation to which by virtue of article 3 or 4 a governing body are to be treated as if they were an employer, person by whom employment is offered, or a principal.

e (2) The application shall be made, and the proceedings shall be carried on, against that governing body.

f (3) Notwithstanding paragraph (2), any decision, declaration, order, recommendation or award made in the course of such proceedings except in so far as it requires reinstatement or re-engagement shall have effect as if made against the local education authority.

g (4) Where any application is made against a governing body pursuant to paragraph (2)—(a) the governing body shall notify the local education authority within 14 days of receiving notification thereof; and (b) the local education authority shall, on written application to the employment tribunal, be entitled to be made an additional party to the proceedings and to take part in the proceedings accordingly.'

[45] The Schedule to the 1999 order includes various legislation relating to employment including Pt X of the 1996 Act.

h [46] The effect of art 6 of the 1999 order, if it applies, is that the governing body are to be respondent in an employment tribunal to proceedings such as these; and that the local education authority are not to be respondents unless they make a written application, at their option, to take part in the proceedings. This is entirely sensible economy. I am not able to identify any substantial advantage to an applicant in having both the governing body and the local education authority as separate respondents at the option of the applicant. But Mr Bean QC rightly pointed out that there could be single joint representation if they were both parties; that a single party might just as well be the local education authority as the governing body; and that it was important for potential applicants to know which body is the correct respondent. If the point

is uncertain, an applicant might bring proceedings against the wrong respondent and then find themselves out of time to proceed against the correct respondent. a

[47] Mr Andrew Clarke QC submits that the modification order applies to claims to which s 95 of the 1996 Act applies. Proceedings in an employment tribunal against a governing body can only be brought if art 3(1) applies to effect that modification. Article 6 accordingly comes into play so that the application has to be made against the governing body alone. He submits that this is unquestionably so for a claim based on direct dismissal, and that by necessary and obvious extension a claim for constructive dismissal must also come within art 3(1). b

[48] Mr Bean's main submission is that 'employment powers' in art 3(1) is an expression defined in art 2(2). The definition refers to 'powers of appointment, suspension, discipline and dismissal of staff' conferred by identified provisions of the 1998 Act. The main relevant provisions are those in Sch 16. Although Sch 16 confers powers relating to dismissal on the governing body, there is no power relating to constructive dismissal. Constructive dismissal equates to a breach of contract. Claims for breach of contract amounting to wrongful dismissal are brought in the High Court where the defendant is the true employer, that is, the local education authority. Such claims are only brought in employment tribunals under extension regulations. These regulations do not appear in the Schedule to the 1999 order. This may on occasions be inconvenient, if there is an application to an employment tribunal which encompasses matters both within and without art 3(1). But the inconvenience is an intrinsic part of this convoluted legislation. c d e

[49] Mr Clarke submitted that the matters of which Mrs Green complains may be seen as coming within one or more of the powers in Sch 16. He referred to paras 22 and 10. I did not find this submission persuasive. In my view, it cannot have been the intention of this legislation that the question whether an application should be made against the governing body, the local education authority or both should turn on the uncertainties of a detailed inquisition into precisely what the application alleges. f

[50] I am, nevertheless, persuaded, in agreement with Pill LJ, that the employment powers of a governing body referred to in art 2(2) of the 1999 order are sufficiently wide to embrace a claim for constructive dismissal in an employment tribunal. It cannot, I think, have been the parliamentary intention that the 1999 order should apply to s 95(1)(a) and (b), but not to (c). Nor can it have been the parliamentary intention that the question whether art 6 applies might strictly have to wait until the employment tribunal had made its determination of the application. If a claim for constructive dismissal succeeds, Mr Bean's submission puts it outside art 6. But if the same claim is successfully defended, the matter may well be within art 6. The respondents would have established that they were acting within their employment powers on Mr Bean's submission. Of course there is no employment power written into Sch 16 which empowers a governing body to bring about constructive dismissal. Legislation would never contain an express power to break a contract. But Sch 16 does contain what appears to be a comprehensive collection of the governing body's employment powers under this legislation. No doubt they have other powers to be found elsewhere. Further, the words 'the powers of appointment, suspension, discipline and dismissal of staff' in g h j

- a* art 2(2) are, in my view a legislative signpost, not a definition. The powers of appointment, suspension, discipline and dismissal of staff in fact embrace the entire content of Sch 16 in the order in which they appear in that Schedule. The fact that the list in art 2(2) is a legislative signpost does not of course enlarge the express content of Sch 16. But it does, in my view, enable the legislative purpose to be seen as embracing within art 2(2) the subject matters which
- b* Sch 16 empowers.

- [51] For these reasons, I consider that an allegation of constructive dismissal is to be seen as an allegation based on dismissal and coming within art 3(1)(a) and (b). This does not exclude the local education authority as being the employer under art 3(1)(a) (by virtue of the word 'included'). But it does mean that art 6 applies to a claim for constructive dismissal brought in an
- c* employment tribunal.

Appeal allowed.

Melanie Martyn Barrister.

R (on the application of Roberts) v Parole Board a

[2003] EWHC 3120 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

MAURICE KAY J b

3, 4, 19 DECEMBER 2003

Prison – Release on licence – Life sentence – Mandatory life sentence – Right to liberty and security – Discrimination – Secretary of State putting information about prisoner before Parole Board but not disclosing information to prisoner – Parole board directing disclosure of information to specially appointed advocate – Whether use of special advocate amounting to discrimination – Whether appointment of special advocate fair and proportionate – Human Rights Act 1998, Sch 1, Pt I, art 14 – Parole Board Rules 1997, r 5. c

The claimant was serving mandatory sentences of life imprisonment. During the course of the procedure leading to a review of the claimant's case by the Parole Board, he was transferred from an open to a closed prison in the light of investigations into his alleged involvement in drug dealing and bringing in contraband. The Secretary of State decided that the claimant should remain in a closed prison pending the completion of the Parole Board review, and notified the claimant's solicitor that certain material about the claimant's removal, which would be before the Parole Board, would not be disclosed to the claimant or to his solicitor. The claimant applied for judicial review, and those proceedings were settled on the basis that the Parole Board would decide the form of any disclosure. It was of the opinion that if full disclosure of the material were to be made to the claimant, there would be a real risk to the safety of the sources of the material, and that it had to balance the interests of the public, the claimant, and the sources. It directed that the withheld material should not be disclosed to the claimant, or his legal representatives, but only to a specially appointed advocate acting on the claimant's behalf. The claimant applied for judicial review. He contended, first, that, given that r 5^a of the Parole Board Rules 1997 provided, in relation to discretionary life prisoners, that withheld material should be disclosed to the prisoner's lawyers and contained no provision for the use of special advocates, the use of special advocates for mandatory life prisoners constituted discrimination, contrary to art 14^b of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), in relation to his right to liberty. Second, he argued that the decision to appoint a special advocate was unfair and disproportionate, since, inter alia, the exceptional circumstances in which such an appointment was permitted were limited to matters of national security. d

Held – (1) The Parole Board did not lack the power to direct the appointment of a special advocate in the context of a hearing to consider the release of a discretionary life prisoner. The 1997 rules were not exhaustive of all procedural e

^a Rule 5, so far as material, is set out at [8], below

^b Article 14, so far as material, is set out at [11], below f

- a issues that might arise at such a hearing and the Parole Board had the inherent power to adopt a novel concept in the interests of justice and the public interest. Where the availability of a special advocate enabled justice to be done on the basis of all relevant material, when the alternative was a decision on incomplete relevant material, the Parole Board had the power to resort to that procedure to the same extent in relation to discretionary life prisoners as in relation to mandatory life prisoners. However, it was crucial that the special advocate procedure should remain wholly exceptional. Accordingly, there was no differential treatment (see [13]–[15], below); *Edwards v UK* (2003) 15 BHRC 189 considered.
- b

- (2) Exceptional circumstances were not limited to matters of national security. In the exceptional circumstances of the instant case the appointment of a special advocate had been fair and proportionate. The application would, accordingly, be dismissed (see [16]–[20], below).
- c

Notes

- d For the prohibition of discrimination, and for the duty of the Parole Board to release certain life sentence prisoners, see, respectively, 8(2) *Halsbury's Laws* (4th edn reissue) para 164, and 36(2) *Halsbury's Laws* (4th edn reissue) para 621.

For the Human Rights Act 1998, Sch 1, Pt I, art 14, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 556.

Cases referred to in judgment

- e *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.
Chahal v UK (1996) 1 BHRC 405, ECt HR.
Edwards v UK (2003) 15 BHRC 189, ECt HR.
Lamothe v Comr of Police for the Metropolis [1999] All ER (D) 1154, CA.
- f *R v H* [2003] EWCA Crim 2847, [2003] 1 WLR 3006; *affd* [2004] UKHL 3, [2004] 1 All ER 1269 [2004] 2 WLR 335.
R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, [1996] QB 517, [1996] 2 WLR 305, HL.
R (on the application of Anderson) v Secretary of State for the Home Dept [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.
- g *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
S (children: care plan), Re, Re W (children: care plan) [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
- h *Stafford v UK* (2002) 13 BHRC 260, ECt HR.
Tinnelly & Sons Ltd v UK (1998) 4 BHRC 393, ECt HR.

Application for judicial review

- j The claimant, Harry Maurice Roberts, a prisoner serving mandatory sentences of life imprisonment, applied for judicial review of the decisions of the Parole Board (Sir Richard Tucker) contained in a letter dated 13 June 2003 directing that certain material relating to the Parole Board's review of the claimant provided to the board by the Secretary of State for the Home Department should not be disclosed to the claimant or his legal representatives but only to a specially appointed advocate. The Secretary of State appeared as an interested party. The facts are set out in the judgment.

Tim Owen QC and Alison Macdonald (instructed by *Bhatt Murphy*) for Mr Roberts. *Nicholas Blake QC* (instructed by the *Treasury Solicitor*) as specially appointed advocate. a

Michael Fordham (instructed by the *Treasury Solicitor*) for the Parole Board.

Javan Herberg (instructed by the *Treasury Solicitor*) for the Secretary of State.

MAURICE KAY J. b

[1] Harry Roberts is now aged 67. On 12 December 1966 he was convicted of and sentenced for the murder of three police officers. He received mandatory sentences of life imprisonment. The tariff period was subsequently fixed at 30 years. It expired on 30 September 1996. In June 1999 his case was considered by the Parole Board. It did not recommend release but did recommend a transfer to open prison conditions with a further review two years later. This recommendation was accepted by the Secretary of State and in March 2000 Mr Roberts was transferred to HM Prison Sudbury, an open prison. c

[2] In September 2001 the procedure towards the current Parole Board review began. The usual range of reports was disclosed to Mr Roberts' solicitor, Simon Creighton of Bhatt Murphy. They included relevant reports from within the Prison Service and the Probation Service. The reports were commendatory and recommended release on life licence. About a week later, on 2 October 2001, Mr Roberts was served with a notice from Alistair McMurdo of the Lifer Unit. It was to the effect that he was being removed temporarily from HM Prison Sudbury 'in the light of investigations into your alleged involvement in drug dealing and in bringing contraband into prison'. Since that date, Mr Roberts has remained in closed prisons. He has never been charged with any offence in relation to the alleged drug dealing and contraband, nor have there been disciplinary proceedings relating to such matters. In February 2002 further allegations were made against Mr Roberts and they were responded to by his solicitor on 11 March 2002. However, on 22 April 2002 the Secretary of State decided that Mr Roberts should remain in closed conditions pending the completion of the current Parole Board review. At the same time, it was indicated that— d e f

'certain material about the Sudbury removal to be included in the dossier will not be disclosed to your client in line with prison service policy on the withholding of information.' g

A dossier compiled on this basis was disclosed to Mr Creighton on 14 May 2002. On 29 May 2002 Mr Creighton wrote to the Parole Board protesting that material in the dossier provided by the Secretary of State to the Parole Board had not been disclosed to Mr Roberts or his solicitors. The undisclosed material came to be known as 'the Flag C material'. h

[3] Over the next few months there were two strands to the dispute between Mr Roberts' advisors and the Secretary of State about non-disclosure. The first strand took place within the Parole Board where the deputy chairman was considering the matter. Before he had reached a conclusion, the claimant commenced an application for judicial review (the first judicial review application). That application was resolved by a consent order dated 18 October 2002 which referred to three issues: (a) whether material to be relied on by the Secretary of State before the Parole Board should be disclosed; (b) the form of disclosure of any such material; and (c) whether some other process should be j

a applied in relation to any such material. It was agreed that the three issues should be decided by the Parole Board. It was further agreed:

b 'In the event that the Parole Board considers that disclosure should not be made to [Mr Roberts'] legal representative but should be made to a special advocate acting in the interests of [Mr Roberts] in similar manner to special advocates appearing before the Special Immigration Appeals Commission, the Secretary of State will fund the costs of the appointment of and representation by the special advocate.'

The second strand culminated in the deputy chairman of the Parole Board (Scott Baker LJ) making a decision on 15 November 2002. The relevant parts read as follows:

c '... there is no absolute principle whether disclosure should be ordered in any particular context or case and ... the various interests involved must be weighed. Both parties refer to the triangulation of interests i.e. risks to the public, the interests of the prisoner and the interest of the source or sources of information. Having considered the sensitive material, in my view the way ahead is as follows. It should in the first instance be disclosed to a special advocate agreeable to both parties. This would be on the basis that it would not be disclosed to Roberts, his lawyers, or anyone else without the consent of the Parole Board. The special advocate procedure is I think a statutory one in other fields (SIAC) but I can see no reason why it should not be used in the present circumstances and it does not prejudice Roberts provided other options remain open to argument thereafter. I think a hearing then should take place before the legal chairman of the panel that is to hear Roberts' case ... There can then be argument both as to the law and as to disclosure, including any issues such as whether some of the sensitive material might be disclosed and what, if any, broad information Roberts might be given about the nature of the withheld material.'

g [4] On 9 May 2003 the Parole Board in the form of Sir Richard Tucker held a directions hearing. Mr Roberts was represented by Mr Creighton in the open part of the hearing and Mr Nicholas Blake QC as specially appointed advocate (SAA). It seems that Sir Richard was then under the impression that Mr Roberts had consented to his interests being represented by an SAA, although this was not the correct interpretation of the consent order. So far as the issue of disclosure was concerned, Sir Richard found:

h '(1) ... the fears of the source or sources are genuine and held on reasonable grounds ... (2) if full disclosure of [the Flag C material] were to be made to Mr. Roberts, there would be a real risk to the safety of the source or sources; (3) in making directions on disclosure the Board must balance the interests of the various parties involved. These are (a) the public ... (b) the prisoner ... and (c) the source or sources of the sensitive material.'

j Sir Richard directed that the Flag C material should not be disclosed to Mr Roberts, his solicitor or any counsel instructed by him but should be disclosed only to an SAA.

[5] Mr Creighton took issue with Sir Richard's decision and on 30 May 2003 Sir Richard held a further hearing at which Mr Roberts was represented by Miss Phillippa Kaufmann of counsel, instructed by Mr Creighton, in relation to 'open' matters and by Mr Blake as SAA in relation to 'closed' matters.

Sir Richard's decision in relation to this further decision was communicated in a letter dated 13 June 2003. The misunderstanding as to the interpretation of the consent order was resolved on the basis that, correctly construed, it meant that the SAA procedure was available in principle but that the board was obliged to consider all other procedural options and should only adopt the SAA procedure if the triangulation of interests required it in exceptional circumstances.

[6] In the decision letter of 13 June which was addressed to Mr Creighton, Sir Richard stated:

‘... it is said that you have acted for Mr. Roberts for a very long time and are therefore particularly familiar with his affairs and qualified to represent his interests. The Board fully accepts this and again asserts that there is no question about the integrity of Mr. Roberts’ legal representatives. The Board is however quite satisfied that disclosure of the sensitive material to Mr. Roberts’ representatives would lead to real risk of inadvertent disclosure to Mr. Roberts by his representatives, having regard to the circumstances of the case and the unusual pressures that would be placed upon them. This finding, that there was objective justification for the source’s fear should disclosure be made to Mr. Roberts’ representatives, was what lay behind the Board’s direction in its decision of 14 May ... In her further submissions ... Miss Kaufmann sets out two respects in which she argues that Mr. Roberts would be prejudiced by the SAA procedure being adopted: (a) The Board has already found that there can be no disclosure of even a gist to Mr. Roberts. Mr. Roberts cannot therefore in any sense whatever answer the case against him. (b) It is fair to assume that the material is being placed before the Board because it has an important bearing on Mr. Roberts’ alleged dangerousness. If the Board accepts the source’s evidence and does not direct Mr. Roberts’ release as a result, the prejudice to Mr. Roberts will not end there. Just as the Board cannot disclose the gist to him now, it will not be in a position to do so when it comes to provide reasons for its decision. Mr. Roberts will continue to be detained on the basis of allegations about which he remains completely ignorant. He will not therefore be able to address the concerns underlying his continued detention or take any steps to reduce risk. It is true that it will be the task of the SAA to represent the interests of Mr. Roberts, but he is in that respect at a serious disadvantage to yourself, who have acted for Mr. Roberts for a very long period ... The Board accepts that there is very considerable force in Miss Kaufmann’s arguments and that if the SAA procedure is adopted this will result in prejudice to Mr. Roberts in the respects identified by Miss Kaufmann.’

In the course of her submissions Miss Kaufmann had suggested that the position is analogous to the criminal trial process in which the prosecution may have to elect whether to proceed with trial and disclose sensitive material or to offer no evidence so as to protect the source. Sir Richard stated:

‘The Board does not accept the analogy with the criminal process. Although the Board’s deliberations will undoubtedly affect the liberty of the subject, the Board is not conducting a criminal trial and the presumptions and procedures that attend the criminal process have no direct application. In the end the Board cannot avoid its duty to balance the three interests—of the public, the prisoner and the source—and it must reach its own

a assessment of Mr. Roberts' dangerousness, without being bound by the fact that Mr. Roberts is currently detained in a category C prison.'

[7] Mr Blake had provided an advice in writing and had also made oral submissions to the effect that the SAA procedure was unnecessary and inappropriate. To this, Sir Richard responded:

b 'Although the Board generally accepts Mr. Blake's reasoning, the Board is satisfied the SAA procedure does have a place outside the immediate context of terrorism and intelligence gathering (it may be that Mr. Blake himself accepts that) and that it may have a part to play in cases like the present where the public interest, balanced against the other interests, may require it. Despite the possibility of prejudice to Mr. Roberts in making
c representations to the Board and having taken carefully into account all the points made on Mr. Roberts' behalf, the Board is entirely satisfied that the balance of interest is firmly in favour of the appointment of a Specially Appointed Advocate to represent Mr. Roberts in relation to the sensitive material. The Board is also satisfied that with the cooperation of all parties the appointment of [an] SAA can secure acceptable standards of fairness for
d Mr. Roberts.'

Accordingly, Sir Richard repeated the directions which he had made on 14 May that the Flag C material should not be disclosed to Mr Roberts or his legal representatives but should be disclosed only to the SAA. It is the decision
e contained in the letter of 13 June 2003 which is challenged in the present application for judicial review. On 3 December 2003 I heard 'open' submissions from Mr Owen QC on behalf of Mr Roberts, Mr Fordham on behalf of the Parole Board, Mr Herberg on behalf of the Secretary of State and Mr Blake as SAA. On 4 December I sat in private and heard submissions on the 'closed' material from Mr Blake as SAA on behalf of Mr Roberts and from Mr Fordham and Mr Herberg.
f This judgment is concerned only with 'open' matters. I shall hand down a separate judgment in private in relation to 'closed' matters.

THE STATUTORY FRAMEWORK

[8] The Parole Board derives its authority from s 32 of the Criminal Justice Act 1991. Section 32(3) requires the board to deal with cases on consideration of
g (a) any documents given to it by the Secretary of State and (b) any other oral or written information obtained by it. Section 32(5) enables the Secretary of State to make rules with respect to proceedings of the board. Pursuant to that provision he has promulgated the Parole Board Rules 1997. Rule 5 is in the
h following terms:

j '(1) Within eight weeks of the case being listed, the Secretary of State shall serve on the Board and, subject to paragraph (2), the prisoner or his representative—(a) the information specified in Part A of Schedule 1 to these Rules, (b) the reports specified in Part B of that Schedule, and (c) such further information that the Secretary of State considers to be relevant to the case.

(2) Any part of the information or reports referred to in paragraph (1) which in the opinion of the Secretary of State should be withheld from the prisoner on the ground that its disclosure would adversely affect the health or welfare of the prisoner or others shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.

(3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall nevertheless be served as soon as practicable on the prisoner's representative if he is—(a) a barrister or solicitor, (b) a registered medical practitioner, or (c) a person whom the chairman of the panel directs is suitable by virtue of his experience or professional qualification; provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or any other person without the authority of the chairman of the panel.' a
b

The 1997 rules apply to discretionary life prisoners but not to mandatory life prisoners such as Mr Roberts. They require consideration in the present case because it is submitted on behalf of Mr Roberts that he is a victim of discrimination when compared with discretionary life prisoners in a similar situation. c

GROUNDS OF CHALLENGE

[9] On behalf of Mr Roberts, Mr Owen advances wide-ranging submissions. It is convenient to consider the grounds of challenge under two headings. First, it is suggested that the application of the special advocate procedure to Mr Roberts' case breaches his convention rights because it is discriminatory by reference to art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), coupled with art 5(4). Mr Owen now puts this at the forefront of his submissions. Secondly, he submits that, one way or another, the decision to appoint an SAA is unfair and/or disproportionate by reference respectively to domestic and convention law. d
e

Ground 1: Discrimination

[10] Article 5(4) of the convention provides: f

'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

It is common ground that the lawfulness of the continued detention of Mr Roberts at this stage depends on whether he continues to pose an unacceptable danger to life or limb (see *Stafford v UK* (2002) 13 BHRC 260). At present, dangerousness falls to be decided by the Parole Board as a result of the change in policy announced by the Secretary of State on 17 October 2002 following *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837. Mr Owen's discrimination point can be put in this way. If Mr Roberts were a discretionary life prisoner, the Flag C material would be disclosed to his solicitor and counsel pursuant to r 5(2) and (3). They would then be under an obligation not to disclose it to him pursuant to the proviso to r 5(3). Rule 5 does not include the possibility of resort to an SAA. Because he is a mandatory life prisoner, Mr Roberts' case is not covered by r 5. To deny him the procedure contemplated by r 5(2) and (3) and to impose upon him the SAA procedure is discriminatory within the meaning of art 14 of the convention. g
h
j

[11] Article 14 is headed 'Prohibition of discrimination'. It provides:

a 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

The case for Mr Roberts is that he is a victim of discrimination in the enjoyment of his rights under art 5(4) by reason of his status as a mandatory life prisoner.

b [12] A crucial legal point lies at the heart of this ground of challenge. It is whether, as a matter of law, the Parole Board would have been able to take the same course and appoint an SAA in the case of a discretionary life prisoner in the same circumstances. Mr Owen submits that the Parole Board would have no such power in the case of a discretionary life prisoner. It would have to deal with the situation under r 5(2) and (3). It is in those provisions that the Secretary of State has set out what he considers to be the limit of acceptable departure from the normal requirements of procedural fairness and equality of arms. In his skeleton argument and opening submissions Mr Owen sought to rely on *Lamothe v Comr of Police for the Metropolis* [1999] All ER (D) 1154. That case arose out of a civil action against the police for damages. A central issue in the case was whether police officers had had reasonable grounds for believing that a particular person was on certain premises at the material time. At an interlocutory stage, a judge sitting in the county court entertained an application made on behalf of the defendant without any notice to the claimant. Having heard the application, he ordered:

e '... at the time the defendant's officers entered ... 56 Pym House they had reasonable grounds for believing that ... Joseph Williams was on the premises ... at the trial of this matter the claimants [shall] be prohibited from asking any questions of the defendant's witnesses, the answers to which may reveal the grounds for their belief that Joseph Williams was on the premises.'

f Thus, the judge had decided the central issue in the case in what Lord Bingham of Cornhill CJ described as 'procedurally extraordinary' circumstances. Plainly such a procedure was not permitted by the CPR. Lord Bingham CJ stated:

g 'What happened here ... is in my judgment something which cannot on any showing be regarded as acceptable since it violated fundamental rights of the claimants and cannot be allowed to stand.'

Mr Owen submits that, notwithstanding the different factual circumstances, *Lamothe's* case supports his submission that, in a case concerning a discretionary life prisoner, the Parole Board could not go outside r 5 and appoint an SAA. He further seeks to rely on *Re S (children: care plan)*, *Re W (children: care plan)* [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, which was concerned with the powers of a family court to supplement the procedural provisions of the Children Act 1989. The Court of Appeal had considered elements in the way in which care orders were made and implemented were incompatible with the rights of parents and children under arts 6 and 8 of the convention. Accordingly it had resorted to s 3 of the Human Rights Act 1998 in an attempt to procure a compatible interpretation. The House of Lords reversed that decision and held that the 1998 Act reserves the amendment of primary legislation to Parliament and that any purported use of s 3 to produce a result which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. Lord Nicholls of Birkenhead identified the issue as being 'whether the courts [had the] power to introduce into

the working of the 1989 Act a range of rights and liabilities not sanctioned by Parliament'. (See [2002] UKHL 10 at [35], [2002] 2 All ER 192 at [35], [2002] 2 AC 291.) The House of Lords answered the question in the negative. In a written submission, Mr Owen now contends:

'... What the Court of Appeal could not do in *Re S* via s 3 of the 1998 Act, the Parole Board cannot do in the present case by recourse to its inherent power to create whatever new procedure it considers necessary to protect the rights of the source.'

[13] In my judgment, neither *Lamothe's* case nor *Re S* is determinative of the powers of the Parole Board in relation to a discretionary life prisoner. *Lamothe's* case concerned the situation in which the court purported to deal with the central issue in the case in the absence of and without notice to the claimant. In *Re S* the issue was the extent of the power of the court under s 3 of the 1998 Act in relation to the interpretation of primary legislation. These situations bear little semblance to a hearing of the Parole Board to consider the release of a discretionary life prisoner. Although the Parole Board Rules 1997 apply to such hearing, I do not consider that they are exhaustive of all procedural issues which may arise. Indeed, this appears to be acknowledged by r 13(3) which provides that the parties shall be entitled to appear and be heard and take part in the proceedings 'as the panel thinks proper'. If the facts of Mr Roberts' case were to occur in the context of a discretionary life prisoner, I do not consider that the Parole Board would lack the power to direct the appointment of an SAA. The concept of an SAA is of recent origin. Following the Strasbourg decisions of *Chahal v UK* (1996) 1 BHRC 405 and *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393 legislation was introduced providing for the appointment of special advocates in the Special Immigration Appeals Commission Act 1997 and the Northern Ireland Act 1998. The context of the 1997 Act is one of national security. In Auld LJ's report 'A Review of the Criminal Courts in England and Wales' (September 2001) there was a recommendation for the extension of the special advocate procedure to public interest immunity hearings in criminal cases. The recommendation has not been the subject of legislation but there is an implicit approval of it by the Strasbourg court in *Edwards v UK* (2003) 15 BHRC 189. In the recent case of *R v H* [2003] EWCA Crim 2847, [2003] 1 WLR 3006 Rose LJ questioned the generality of Auld LJ's extra judicial recommendation but accepted an exceptional common law power of a criminal court to appoint a special advocate in extreme cases. I understand that the House of Lords is to consider an appeal in that case next month ([2004] UKHL 3, [2004] 1 All ER 1269 [2004] 2 WLR 335).

[14] In my judgment, when the Parole Board is carrying out its very important public function in relation to a discretionary life prisoner, it is entitled, in exceptional circumstances, to resort to the SAA procedure. It has the inherent power to adopt a novel concept in the interests of justice and in the public interest. It is crucial that SAAs should remain wholly exceptional and not become the norm. On the other hand, where their availability enables justice to be done on the basis of all relevant material when the alternative is a decision on incomplete relevant material, I consider that the Parole Board has the power to resort to the procedure to the same extent in relation to discretionary life prisoners as is relation to mandatory life prisoners.

[15] In these circumstances I accept the submission of Mr Fordham that the art 14 discrimination claim falls at the first hurdle. There is no differential treatment.

Ground 2: Fairness and proportionality

a [16] I now turn to a consideration of the decision to appoint an SAA in Mr Roberts' case. It is common ground that any decision of the Parole Board in this area must satisfy the criteria of fairness and proportionality. There is another important piece of common ground. It is that the Parole Board has inherent powers to control its own proceedings in relation to mandatory life prisoners and that, in exceptional circumstances, these may permit the appointment of an SAA. However, Mr Owen's first submission in relation to that proposition is that 'exceptional circumstances' should be limited to matters of national security. I do not agree. Whilst I accept that the exceptional must remain exceptional and not become the norm, I am not persuaded that the constraints which may justify the appointment of an SAA in the context of national security cannot be matched by comparable constraints in other contexts. As was said by the Strasbourg court in *Edwards' case*, in the context of criminal proceedings ((2003 15 BHRC 189 at 202 (para 53))):

d '... there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.'

e Whilst the present case does not concern criminal proceedings, similar competing interests arise in the form of interest of the detainee, the interest of the detainee and the public interest in having the assessment of dangerousness by the Parole Board decided on the fullest possible material. Mr Owen observes that, in criminal proceedings, if the point is reached where the judge directs the prosecution to disclose information that the prosecution feels unable to disclose it will decline to disclose and take the consequences of not proceeding with the prosecution. That is the specific dilemma which arises in those circumstances. In my judgment it does not arise in that form here. What I have to consider is whether, in seeking to balance the competing interests to which I have referred, the Parole Board has reached a decision that satisfies the tests of fairness and proportionality in the circumstances of this case. In seeking to contend that it has not, Mr Owen makes the following submissions. First, he challenges the risk of 'inadvertent disclosure' referred to by Sir Richard Tucker in his decision. Secondly, he seeks to draw a real distinction between the SAA procedure and the procedure under r 5(2) and (3), which apply to discretionary life prisoners and which, it is suggested, should be the model adopted here. Mr Owen accepts that disclosure to Mr Roberts himself would be inappropriate. Thirdly, he complains that, by reason of the Secretary of State having undertaken to the source that the material will only be relied upon if the SAA procedure is followed, the Secretary of State has pre-empted the decision of the Parole Board.

j [17] Mr Fordham accepts that, in considering these submissions, the approach of the court is not tied to a *Wednesbury* review (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). I propose to review at a level of the utmost intensity on the basis of Lord Steyn's illustrations of a proportionality exercise as set out in *R v Secretary of State for the Home Dept, ex p Daly* [2001] UKHL 26 at [27], [2001] 3 All ER 433 at [27], [2001] 2 AC 532:

'First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, ex p Smith* [1996] 1 All ER 257 at 263, [1996] QB 517 at 554, is not necessarily appropriate to the protection of human rights.'

With that in mind I now turn to the specific matters raised by Mr Owen.

INADVERTENT DISCLOSURE

[18] It will be recalled that Sir Richard Tucker was—

'quite satisfied that disclosure of the sensitive material to Mr. Roberts' representatives would lead to a real risk of inadvertent disclosure to Mr. Roberts by his representatives, having regard to the circumstances of the case and the unusual pressures that would be placed upon them.'

Sir Richard accepted that there is no question about the integrity of Mr Roberts' legal representatives. Mr Creighton has vast experience of dealing with prison and Parole Board cases. He has coped with the pressures of r 5(2) and (3) in cases concerning discretionary life prisoners and it is not suggested that he has ever acted with anything other than the utmost propriety. To understand 'the circumstances of the case and the unusual pressures', it is necessary to have regard to the closed material. I shall do that in my second judgment. All that I propose to say here is that I am entirely satisfied that Sir Richard's conclusion and reasoning on the subject of inadvertent disclosure satisfies a review of the utmost intensity.

THE RELATIVE MERITS OF AN SAA AND THE RULE 5 PROCEDURE

[19] Sir Richard accepted that the SAA procedure would result in prejudice to Mr Roberts. However, having considered the three interests of the public, the prisoner and the source, he concluded:

'Despite the possibility of prejudice to Mr. Roberts in making representations to the Board, and having taken carefully into account all the points made on Mr. Robert's [sic] behalf, the Board is entirely satisfied that the balance of interests is firmly in favour of the appointment of an SAA to represent Mr. Roberts in relation to the sensitive material. The Board is also satisfied that with the cooperation of all parties the appointment of an SAA can secure acceptable standards of fairness for Mr. Roberts.'

It is plain that Sir Richard took the view that, whilst this solution was not the best for Mr Roberts, it was the best in the light of the triangulation of interests which fell for consideration. Mr Owen observes (as indeed Sir Richard expressly accepted) that Mr Creighton has acted for Mr Roberts for some ten years and has become particularly familiar with his affairs and specially qualified to represent his interests. It is suggested that Mr Creighton may have accumulated knowledge which would assist in refuting the allegations in the Flag C material and/or he would be better placed to carry out independent investigations into that material. Whilst I do not discount these points as worthless they have to be viewed in context. The SAA is none other than Mr Blake whose experience and

a expertise are unquestioned. It is open to Mr Creighton to place before Mr Blake everything which he has on paper and which conceivably could be relevant. That could amount to his entire file, supplemented if necessary by his most recent thoughts which could be committed to paper. If Mr Blake considers that investigation is necessary, he has the good offices of a solicitor from the Treasury Solicitor at his exclusive disposal. Of course, Mr Blake could not take instructions b from Mr Roberts but neither could Mr Creighton at this stage if the r 5 procedure were being adopted. Once again, I am satisfied that, following a review of the utmost intensity, Sir Richard committed no error in his balance of the competing interests or in his conclusion that the appointment of an SAA 'can secure acceptable standards of fairness' in the circumstances of this case. I consider such a course to be fair, proportionate and, indeed, correct.

c PRE-EMPTION

[20] This, too, has to be considered in context. In his first decision of 9 May 2003, which was repeated in the ultimate decision letter of 13 June 2003, Sir Richard found—

d 'the fear of the source or sources are genuine and held on reasonable grounds ... if full disclosure of the contents ... were made to Mr. Roberts, there would be a risk to the safety of the source or sources.'

e It is implicit in his decision that he found that the same would apply in the event of disclosure to Mr Roberts' legal representatives alone because of the further risk of inadvertent disclosure to Mr Roberts. I accept the submission of Mr Herberg on behalf of the Secretary of State that it is not right to characterise the undertaking given by the Secretary of State to the source as amounting to pre-emption or a fait accompli. The Secretary of State is in possession of relevant f but sensitive material from the source. It is relevant to the performance of the Parole Board's function. The Secretary of State wishes to place it before the Parole Board and to rely upon it. There is no sensible way in which that could be done save for the way that has been pursued. I accept that the fears of the source are both subjectively and objectively justified. It had been suggested to g Sir Richard that the proceedings might take the conventional form but that the Secretary of State or the Parole Board might subpoena the source pursuant to CPR 34.4 or the Secretary of State might put the allegations before the panel by way of written material alone without calling the source to give direct evidence. In either case, however, given the finding of risk of inadvertent disclosure, the risk to the source would not be avoided. If the SAA procedure had been refused, h it seems that the Secretary of State would not seek to rely on the material. That might raise issues as to whether the Parole Board, which is in possession of the material, might nevertheless be able to rely upon it pursuant to s 32(3) of the Criminal Justice Act 1991 which requires the board to consider '(a) any documents given to it by the Secretary of State; and (b) any other oral or written j information obtained by it'. I do not need to decide that hypothetical issue. In my judgment, it was entirely proper for the Secretary of State to place the material before the Parole Board and to submit that, in the exceptional circumstances which exist, the appropriate course would be to adopt the SAA procedure. In turn, given those exceptional circumstances, it was fair and proportionate for Sir Richard to accede to that suggestion. I do not find Mr Owen's complaint to be sustainable.

CONCLUSION

[21] It follows from what I have said that the grounds of challenge advanced by Mr Owen do not persuade me. In stating that conclusion, I necessarily also have in mind my conclusions on the closed submissions which are provided in a separate, closed judgment. I therefore approve the deployment of the SAA procedure in this case. Looking further ahead, I have considered the situation which might arise if Mr Blake, as SAA, were to conclude that any adverse decision by the Parole Board were to be legally flawed. He would be unable to inform Mr Roberts' legal representatives of his detailed views and they in turn would lack the specifics necessary to mount a challenge. It seems to me that, if that were to eventuate (and there is no reason to suppose that it will) the appropriate course would be for Mr Blake to seek the directions of this court as to what may or may not be done to mount such a challenge. I shall grant a liberty to apply within these proceedings lest such circumstances should arise. In the first instance, it would be appropriate for application to be made on notice to the Parole Board and the Secretary of State only.

Application dismissed.

Martyn Gurr Barrister.

a **Customs and Excise Commissioners v
Barclays Bank plc**
[2004] EWHC 122 (Comm)

b QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
COLMAN J

16, 17 DECEMBER 2003, 3 FEBRUARY 2004

c *Bank – Duty of care – Freezing order – Claimant serving on bank freezing orders prohibiting disposals from clients' accounts – Clients transferring money from accounts after claimant serving orders on bank – Bank writing letters to claimant confirming that it would comply with order and seeking reimbursement of costs – Claimant receiving letters after money transferred from accounts – Whether bank owing duty of care to claimant to prevent payment of money from accounts.*

d The Customs and Excise Commissioners obtained freezing orders against two companies in respect of outstanding value added tax. Both orders expressly prohibited the disposal of funds in current accounts held by the companies with the defendant bank. Those accounts were in credit at all material times. The commissioners duly served copies of the orders on the bank. Two hours or so after the service of each of the orders on the bank, the companies effected direct transfers of substantial sums from their accounts. The bank failed to stop the transfers. After the funds had been released, the commissioners received letters from the bank, stating that it would comply with the orders and that it was entitled to reimbursement of the costs incurred in handling them. The letters also explained the kind of work likely to be involved, quantified the bank's costs

f to that point, asked for early remittance of those sums and requested confirmation that the bank should be immediately advised of the amendment or discharge of the orders. The commissioners subsequently obtained default judgments against the companies. As a result of the transfers, however, the amount remaining in credit in each account was considerably less than the outstanding indebtedness to the commissioners. In subsequent proceedings for negligence

g against the bank, the commissioners sought to recover as damages the sums that had been paid out of the accounts. On the hearing of a preliminary issue, tried on the assumption that the facts alleged in the particulars of claim were true, the court was required to determine whether the bank had owed a duty of care to the commissioners to prevent the payments.

h **Held** – Where a bank had been served with a freezing order prohibiting the disposal of funds in a client's account, it did not owe to the party which had obtained the order a duty of care to prevent payments out of the account unless the bank had, by its conduct, objectively assumed responsibility to that party to

j take reasonable care to prevent disposal of its customer's funds in accordance with the order. A defendant against whom such an order had been made did not thereby occupy a relationship of proximity vis-à-vis the claimant, unless there was super-added to the relationship conduct amounting to an assumption of responsibility by the defendant. The claimant's sole remedy against that party, ineffective though it might be, was to bring proceedings for contempt. It would be completely inconsistent with that analysis that, although a defendant given

notice of a freezing order owed no duty of care to the claimant, by application of the threefold test ((i) foreseeability of damage, (ii) proximity between the claimant and the defendant, and (iii) that it should be fair, just and reasonable to impose a duty), a bank holding the defendant's assets, upon being given notice of the same order, by that very notice, did owe a duty of care to the claimant. There was nothing in the bank's relationship with the claimant that so enhanced the element of proximity above that of the defendant as to provide a foundation for a duty of care by application of the threefold test. Nor was there anything in that relationship which made it any more fair, just or reasonable that the bank should owe a duty of care in circumstances that did not engage such a duty on the part of the defendant customer. It followed in the instant case that the bank could be under no liability in negligence unless, prior to the release of the funds from its customers' accounts, it had, by its conduct, objectively assumed responsibility to the commissioners to take reasonable care to prevent disposal of its customers' funds in accordance with the orders. If the bank's letters had been received by the commissioners before the release of the funds, they would have amounted to relevant assumptions of responsibility. The relationship arising from the letters would have been sufficiently analogous to a contract to fall within the assumption of responsibility methodology. Once the commissioners had received those letters, they would have been justified in relying on the bank to act in accordance with them. In the event, however, they arrived too late, and could operate only as assumptions of responsibility giving rise to a duty of care in respect of the remaining funds in the accounts. Accordingly, the bank was under no relevant duty of care to the commissioners on the facts pleaded in the particulars of claim (see [73], [74], [78]–[82], below).

Business Computers International Ltd v Registrar of Companies [1987] 3 All ER 465 and *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833 applied.

Notes

For the test for determining duty of care and for economic loss, see 33 *Halsbury's Laws* (4th edn reissue) paras 604, 613.

Cases referred to in judgment

Al-Kandari v JR Brown & Co (a firm) [1988] 1 All ER 833, [1988] QB 665, [1988] 2 WLR 671, CA.

Anns v Merton London BC [1977] 2 All ER 492, [1978] AC 728, [1977] 2 WLR 1024, HL.

Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse [1998] BCC 617, CA.

Business Computers International Ltd v Registrar of Companies [1987] 3 All ER 465, [1988] Ch 229.

Candler v Crane Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164, CA.

Cann v Wilson (1888) 39 Ch D 39.

Caparo Industries plc v Dickman [1990] 1 All ER 568, [1990] 2 AC 605, [1990] 2 WLR 358, HL.

Cheltenham & Gloucester Building Society v Ricketts [1993] 4 All ER 276, [1993] 1 WLR 1545, CA.

Connolly-Martin v Davis [1999] Lloyd's Rep PN 790, CA.

Dean v Allin and Watts (a firm) [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249.

Elgouzouli-Daf v Comr of Police of the Metropolis, McBreaarty v Ministry of Defence [1995] 1 All ER 833, [1995] QB 335, [1995] 2 WLR 173, CA.

- a *Hall (Arthur JS) & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon (a firm)), Harris v Scholfield Roberts & Hill (a firm)* [2003] 3 All ER 673, [2002] 1 AC 615, [2000] 3 WLR 543, HL.
- Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, [1963] 4 WLR 101, HL.
- Henderson v Merrett Syndicates Ltd, Hallam-Eames v Merrett Syndicates Ltd, Hughes v Merrett Syndicates Ltd, Arbuthnott v Feltrim Underwriting Agencies Ltd, Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.
- Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53, [1988] 2 WLR 1049, HL.
- c *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, [1970] 2 WLR 1140, HL.
- Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174, [2001] 3 WLR 1, CA.
- Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, [1970] 2 WLR 802, CA.
- d *Peabody Donation Fund (Governors) v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529, [1985] AC 210, [1984] 3 WLR 953, HL.
- Perl (P) (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161, [1984] QB 342, [1983] 3 WLR 769, CA.
- Phelps v Hillingdon London BC, Anderton v Clywdd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504, [2001] 2 AC 619, [2000] 3 WLR 776, HL.
- e *Reeman v Dept of Transport* [1997] 2 Lloyd's Rep 648, CA.
- Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360, [1999] 3 WLR 363, HL.
- Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch 297, [1979] 3 WLR 605.
- Rowling v Takaro Properties Ltd* [1988] 1 All ER 163, [1988] AC 473, [1988] 2 WLR 418, PC.
- f *Smith v Eric S Bush (a firm), Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831, [1989] 2 WLR 790, HL; *rvsg* [1988] 1 All ER 691, [1988] QB 835, [1988] 2 WLR 1173.
- Smith v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party)* [1987] 1 All ER 710, [1987] AC 241, HL.
- g *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.
- Standard Chartered Bank v Pakistan National Shipping Corp (No 2)* [2000] 1 All ER (Comm) 1, CA; *rvsd* [2002] UKHL 43, [2003] 1 All ER 173, [2003] 1 AC 959, [2002] 3 WLR 1547.
- h *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, Aust HC.
- Welsh v Chief Constable of Merseyside Police* [1993] 1 All ER 692.
- White v Jones* [1995] 1 All ER 691, [1995] 2 AC 207, [1995] 2 WLR 187, HL.
- Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, HL.
- j *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.
- Yianni v Edwin Evans & Sons* [1981] 3 All ER 592, [1982] QB 438, [1981] 3 WLR 843.
- Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1988] AC 175, [1987] 3 WLR 776, PC.
- Z Bank v D1* [1994] 1 Lloyd's Rep 656.
- Z Ltd v A* [1982] 1 All ER 556, [1982] 1 QB 558, [1982] 2 WLR 288, CA.

Cases referred to in skeleton arguments

Acrow (Automation) Ltd v Rex Chainbelt Inc [1971] 3 All ER 1175, [1971] 1 WLR 1676, CA. a

Adam Phones Ltd v Goldschmidt [1999] 4 All ER 486.

Digital Equipment Corp v Darkcrest Ltd [1984] 3 All ER 381, [1984] Ch 512, [1984] 3 WLR 617.

Donoghue (or M'Alister) v Stevenson [1932] AC 562, [1932] All ER Rep 1, HL. b

Fletcher Sutcliffe Wild Ltd v Burch [1982] FSR 64.

Kent v Griffiths [2000] 2 All ER 474, [2001] QB 36, [2000] 2 WLR 1158, CA.

Lampleigh v Brathwait (1615) Hob 105, 80 ER 255.

Murphy v Brentwood DC [1990] 2 All ER 908, [1991] 1 AC 398, [1990] 3 WLR 414, HL.

Perre v Apand Pty Ltd [2000] 3 LRC 537, (1999) 198 CLR 180, Aust HC. c

Searose Ltd v Seatrain (UK) Ltd [1981] 1 All ER 806, [1981] 1 WLR 894.

Stansbie v Troman [1948] 1 All ER 599, [1948] 2 KB 48, CA.

Preliminary issue

By order of Tomlinson J made on 11 July 2003, the court was required to determine a preliminary issue arising in proceedings for negligence brought by the claimants, the Commissioners for Customs and Excise, against the defendant, Barclays Bank plc. The preliminary issue was whether, on assumed facts (being those alleged in the particulars of claim), the Bank owed the commissioners a duty of care in tort. The facts are set out in the judgment. d

Philip Sales and Daniel Stilitz (instructed by *HM Customs and Excise*) for the commissioners. e

Michael Brindle QC and Richard Handyside (instructed by *Lovells*) for the Bank.

Cur adv vult

3 February 2004. The following judgment was delivered. f

COLMAN J.

INTRODUCTION

[1] The preliminary issue now before the court raises a hitherto unexplored and undecided point in relation to freezing injunctions. The issue only has to be stated for it to be seen that it also goes to the very heart of the law of negligence. g

[2] In outline the claimants obtained freezing injunctions in respect of outstanding value added tax (VAT) against two companies both of which held current accounts with the defendant (the Bank) which were at all material times in credit. The two orders each specifically prohibited disposal of or dealing with the debtor company's assets up to a stated amount including in particular any money in identified accounts at the Bank. After the orders were made, the claimant's solicitors gave notice of them to the Bank, sending a copy of the orders by fax. h

[3] Some two hours later, each of the two debtor companies effected direct transfers of substantial sums from their respective accounts by use of the Bank's so-called Faxpay system by which a customer can send direct payment instructions to the Bank's payment centre as distinct from the customer's branch. The Bank failed to stop these transfers. In the result the amounts remaining in credit in each of the two debtor's accounts were considerably less than the j

a outstanding indebtedness to the claimants. The claimants now claim damages for negligence against the Bank on the basis that they are now unable to enforce judgments which they have subsequently obtained against the debtor companies as fully as if there had been no transfers out of their respective accounts at the Bank.

b [4] It is admitted by the Bank that the withdrawals were permitted, in the case of one debtor company, due to operator error and, in the case of the other company, because the Faxpay system was set up to bypass the Bank's control facility. The Bank, however, denies that it owed a duty of care to the claimants to prevent these payments. That is the issue that by order dated 11 July 2003 Tomlinson J ordered to be tried as a preliminary issue on the assumption that the facts alleged in the particulars of claim were true.

c THE ASSUMED FACTS

[5] The two debtor companies were Brightstar Systems Ltd (Brightstar) and Doveblue Ltd (Doveblue) both of which were by the beginning of 2001 heavily indebted to the claimants in respect of VAT.

d [6] As to Brightstar, on 26 January 2001 Pitchford J granted a freezing injunction up to a value of £1.8m. It provided specifically:

e 'The defendant must not remove from England and Wales or in any way dispose of or deal with or diminish the value of any of its assets which are in England and Wales whether in its own name or not and whether solely or jointly owned up to the value of £1,800,000. This prohibition includes the following assets in particular, namely any money in the accounts numbered 01311633 at HSBC Bank, and account number 70845302 at Barclays Bank Plc.'

f [7] Under the heading 'guidance notes' there appeared the following:

g '1. Effect of this order: It is a contempt of court for any person notified of this order knowingly to assist in or permit a breach of this order. Any person doing so may be sent to prison, fined or have his assets seized. 2. Set off by banks: This injunction does not prevent any bank from exercising any right of set off it may have in respect of any facility which it gave to the defendant before it was notified of this order. 3. Withdrawals by the defendant: No bank need inquire as to the application or proposed application of any money withdrawn by the defendant if the withdrawal appears to be permitted by this order.'

h [8] This is the standard wording for such freezing injunctions. Having recited that the judge had accepted the undertaking set out in Sch B to the order, the order included in Sch B the following undertaking:

j 'The claimants will pay the reasonable costs of anyone other than the defendant which have been incurred as a result of this order including the costs of ascertaining whether that person holds any of the defendant's assets and if the court later finds that this order has caused such person loss, and decides that such person should be compensated for that loss, the claimants will comply with any order the court may make.'

[9] The claimants served a copy of the Brightstar order on the Bank by fax at 12.33 on 29 January 2001.

[10] By letter to the claimants dated 29 January 2001, but bearing a 'Letter Opened' stamp dated 31 January 2001, Ms Julie Fisher, legal adviser at the Bank, stated: a

'We confirm that the Bank will abide by the terms of the order and would be grateful if all future correspondence concerning this matter could be forwarded to this Office quoting our reference shown above. Substantial costs are incurred in handling Freezing Orders. You will no doubt be aware that we are entitled to reimbursement and would direct your attention to the Practice Direction dated 28 October 1996 [*Practice Direction (Mareva and Anton Piller orders: forms)*] [1997] 1 All ER 288, [1996] 1 WLR 1552], made by the Lord Chief Justice with the concurrence of the President of the Family Division. Please find enclosed a schedule of the work typically involved, for your information. In this case our costs to date amount to £150 and we shall be pleased to receive your early remittance in settlement. Cheques should be made payable to "Barclays Bank Plc". Where further work is required, for example on an amended Order, we reserve the right to claim reimbursement of any additional costs incurred.' b
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d

[11] At about 14.30 on that same day the Bank permitted three payments out of the Brightstar account and further debited the account with charges relating to two such payments overseas. The total paid out and debited was £1,240,570. When the Bank discovered what had happened, it informed the claimants by letter dated 31 January 2001, which explained these three substantial payments by reference to 'operator error'. e

[12] On 8 May 2001 the claimants obtained judgment in default against Brightstar for £2,285,788.98. On 30 July 2001 they obtained a garnishee order absolute against the Bank in the sum of £563,124.46. That was all that remained in the Brightstar account. The shortfall on the judgment debt exceeded the sum of £1,240,570, which had been paid out of the account. Brightstar has paid nothing. The claimants claim this latter sum plus such interest as would have accrued on that amount between the date when it was erroneously paid out and the date of the garnishee order. f

[13] With regard to Doveblue, on 30 January 2001 Cresswell J granted to the claimants a freezing injunction to a maximum amount of £3,928,130. Like the Brightstar order, this injunction specifically prohibited disposal of funds in the Doveblue account with the Bank. It also included similar provisions and undertakings to those set out at [6]–[8], above. It was served on the Bank by fax at about 11.38 on 30 January 2001. g

[14] At about 14.00 on 30 January 2001 the Bank permitted payments out of the Doveblue account which with charges totalled £1,064,289. h

[15] By letter dated 31 January 2001, the day after the order had been served, Ms Julie Fisher on behalf of the Bank wrote to the claimants acknowledging that the freezing order had been received and confirming that the Bank would abide by the terms of the order. The letter contained identical paragraphs relating to the Bank's handling costs to those in relation to Brightstar and stating similarly that the Bank's costs in the case of Doveblue amounted to £150 and asked for early remittance. However, the letter continued: j

'Unfortunately a problem arose, shortly after the service of the Order, which we have been unable to resolve. The Order was served by fax at 11.38 am on 30 January 2001. Doveblue had the use of the Bank's "Faxpay"

a system, enabling it to make direct transfers without reference to the branch. Steps were taken to amend the instructions on that system so that Doveblue could no longer make such transfers. However, at approximately, 2.00 pm, before the amendment could be put in place, funds were transferred from Doveblue's account under the "Faxpay" system. The Bank took immediate steps to recall the payments. A number of discussions took place with the
 b recipient Banks. Unfortunately, the recipient Banks were unwilling to repay the sums transferred on the grounds that payments were in the ordinary course of their customers' businesses.'

[16] On 23 February 2001 the claimants obtained judgment in default against Doveblue for £3,944,095·85. Doveblue has failed to pay any of this debt. On
 c 31 May 2001 the claimants obtained a garnishee order absolute against the Bank for £130,630·81, which was all that remained in Doveblue's account after the transfers out on 30 January 2001. The shortfall of that amount from the judgment debt far exceeded £1,064,289 paid out of the account. The claimants claim this latter amount together with interest that would have accrued on it from the date of notice of the injunction to the date of the garnishee order.

d PRELIMINARY MATTERS

[17] Before considering the question whether the Bank owed a duty of care to prevent these payments out of the two accounts it is necessary to have in mind the nature of a freezing injunction of the kind now before the court. The purpose
 e of such an order is to prevent the party alleged to be liable for a debt or damages making itself judgment-proof by putting its assets out of the reach of the claimant. The making of such an order creates no proprietary interest in the assets to which it relates, whether they consist of choses in action or tangible assets. The effect is to preserve their availability for execution in case the claimant obtains a judgment against the defendant. In making an order of that kind the court is
 f therefore protecting the enforceability of such judgments as it might in future make.

[18] Where therefore a defendant against whom such an order has been made contravenes it by disposing of assets covered by the order, it does not cause to the claimant any loss of a personal right to property: it merely reduces the assets
 g available for execution should the claimant or anyone else become a judgment creditor of the defendant in the future.

[19] Breach of a freezing injunction therefore causes no immediate loss to the claimant: it merely increases the chance that if he ever becomes entitled to levy execution against the defendant he will be unable to do so as effectively as if the breach had not occurred. Whether he ultimately suffers any financial loss as a
 h result of the breach by disposal of assets will depend on whether he ultimately becomes a judgment creditor and whether the defendant's remaining assets are sufficient to satisfy his debt as well as those of any other competing creditors.

[20] The court having made an order against the defendant restraining the disposal of his assets, the claimant has hitherto been regarded as having no
 j remedy for a breach of that order except to bring proceedings for contempt of court. Such proceedings are punitive in nature. A bank or other third party which holds assets on behalf of the defendant and which is given notice of the freezing injunction will equally be in contempt of court if it knowingly disposes of the assets contrary to the court's order (see generally *Z Ltd v A* [1982] 1 All ER 556 at 561–562, [1982] 1 QB 558 at 572 per Lord Denning MR). To do so would be to obstruct the course of justice. The claimant who obtained the freezing

injunction, although able to initiate proceedings for contempt of court against a third party who has acted in breach of the order, is not provided by the contempt procedure under the CPR with any direct means of obtaining compensation against the contemnor. A company in contempt of court may have acted with a greater or lesser degree of culpability and the court has a discretion to impose punishment commensurate with that culpability, although some penalty is likely to be appropriate unless the contempt has been casual or accidental or unintentional or subsequently purged. In the course of my judgment in *Z Bank v D1* [1994] 1 Lloyd's Rep 656 at 668 I said:

'That, however, does not mean that there are no cases of negligent contempt where a penalty in the form of committal or sequestration would be appropriate. For example, where a contemnor had committed an isolated breach of a *Mareva* injunction due to the negligence of those responsible for giving appropriate orders to junior staff or perhaps due to having received negligent legal advice and had attempted to purge the contempt by restoring the status quo as far as possible, it might well be quite unnecessary for the protection of the administration of justice for any penalty to be imposed. Where by contrast there has been a very culpable degree of negligence which has resulted in numerous breaches of the Court's order involving the abstraction of large sums of money, it will often be appropriate to impose not merely a nominal penalty but one which will be recognized as reflecting the serious view taken by the Court of the failure to comply with its orders.'

[21] In that case there was a substantial level of culpability on the part of the defendant bank. It was therefore held to be appropriate that a sequestration order be made against the bank providing for the sequestration of funds equivalent to the amount which had been transferred in breach of the court's order. However, such an order would not be a direct source of compensation for the claimant. It could only be used as a lever to enforce the court's original freezing order. Thus, in that case leave was given to issue a writ of sequestration with a stay of execution for a limited period within which the defendant bank was given the opportunity to replace the funds which it had transferred in breach of the original order. By that indirect means the court was therefore able to restore the security, which it had been the purpose of the freezing order to provide to the claimant. However, the availability and extent of any such penalty would depend in each case on the degree of culpability as proved to the criminal trial standard of proof and not merely on the presence of negligence proved on the balance of probabilities in failing to comply with the court's order. In particular, the sanction imposed by the court might not be co-extensive with the asset-deficiency caused by the breach of the court's order. Nor might the sanction of sequestration of assets or imprisonment proposed by the court prove to be an effective means of inducing compliance with the original order. The party in breach might already have disposed of the assets which it would have used to comply with the order. The claimant would have no enforceable judgment for damages against a third party asset-holder who had failed to comply with the order, but merely the opportunity that if the court's punishment for contempt were imposed, that might yet induce compliance with the order.

[22] It is against this background that I turn to the parties' submissions.

THE MAIN SUBMISSIONS

a [23] On behalf of the claimant commissioners Mr Philip Sales's submissions may be summarised as follows.

(a) The appropriate test for the existence of a duty of care on the facts of the present case is the so-called 'threefold test' of (a) foreseeability of damage, (b) proximity between the claimant and the defendant and (c) that it should be fair, just and reasonable to impose a duty. The foundations for this test are formulated by Lord Griffiths in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514 at 536, [1990] 1 AC 831 at 865 and by Lord Bridge of Harwich in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618.

c (b) Although the test of duty of care by reference to whether there has been a voluntary assumption of responsibility by the defendant as derived from *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575 at 583 per Lord Reid, at 594 per Lord Morris of Borth-y-Gest, at 598, 601 per Lord Hodson and at 610–611 per Lord Devlin, [1964] AC 465 at 486–487 per Lord Reid, at 502–503 per Lord Morris, at 510, 514 per Lord Hodson, and at 528–529 per Lord Devlin has been applied relatively recently in such cases as *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506 at 521–522, [1995] 2 AC 145 at 180–181 per Lord Goff of Chieveley and *White v Jones* [1995] 1 All ER 691 at 710, [1995] 2 AC 207 at 268 per Lord Goff, in the latter case where there was no direct dealing between the solicitor and plaintiff intended beneficiaries under the will, it is a less appropriate test for the circumstances of the present case than the threefold test. In this connection reliance is placed on the observations advanced in *Clerk & Lindsell on Torts* (18th edn, 2000) pp 291–293 (paras 7-22–7-23). Further, the test of assumption of responsibility is particularly apposite in cases where there has been a negligent misrepresentation or the negligent provision of professional services which by being relied upon have caused purely economic loss, as distinct from financial loss attributable to physical loss or damage, and in relation to which there is need for a restriction as to the extent of an assumption of responsibility to an identifiable individual or group, as explained by Lord Goff in *Henderson's case* [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181.

g (c) A further test, identified by Sir Brian Neill in *Bank of Credit and Commerce International (Overseas) Ltd (in liq) v Price Waterhouse* [1998] BCC 617 at 631–634 as the incremental approach, which involved ascertaining whether the factual situation in question was closely analogous to that found in cases where a duty of care had been held to exist, was not treated as an independent test but rather as a cross-check or reference system by which to measure the extent to which a proposed extension of the scope of duty of care would be justifiable.

h (d) That the assumption of responsibility test is not appropriate in the present case is demonstrated by the fact that this is not a case where the Bank gave negligent advice or information to the commissioners nor where there has been consequential economic loss of the type sustained in the *Hedley Byrne* case. In both cases there was a specific fund in the account which, but for the Bank's negligence in permitting payment out, would have been available to the commissioners as a means of enforcing their judgment debts. These facts differ materially from those found in cases where the assumption of responsibility test has been applied.

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(e) As regards application of the threefold test, foreseeability of loss if a freezing order is ignored, is self-evident. This is not challenged on behalf of the Bank. a

(f) As to proximity, the commissioners reasonably relied on the Bank to protect their interest in as much as, having applied to the court for the orders, they had served them on the Bank. They had, by the act of obtaining the order and serving it, undertaken to pay the Bank's charges, as provided for in Sch B (see [8], above). The Bank knew that the commissioners were relying on it to preserve the companies' assets. Indeed, the Bank was familiar with the operation of freezing injunctions as shown by its responding to service of the orders by sending standard form letters to the commissioners which referred expressly to *Practice Direction (Mareva and Anton Piller orders: forms)* [1997] 1 All ER 288, [1996] 1 WLR 1552. b
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(g) The combination of the Bank's knowledge that the commissioners were relying on it to protect their rights of enforcement and that only the Bank could provide that protection in respect of those assets against the background of the Bank's duty to the court to comply with the order were sufficient to create proximity. d

(h) Further, the commissioners and the Bank had a relationship closely akin to that of a contract. Even had there been no express undertaking to pay the Bank's reasonable expenses, such an enforceable undertaking would arise by implication, as indicated by Lord Denning MR in *Z Ltd v A* [1982] 1 All ER 556 at 564, [1982] 1 QB 558 at 575.

(i) It is further submitted on behalf of the commissioners that although, on the facts of this case, an assumption of responsibility by the Bank does not have to be established, the Bank nevertheless did assume responsibility for compliance with the orders by the very fact of its carrying on a public banking service in a jurisdiction in which freezing orders against customers' accounts are commonplace and/or by its sending out its letters of acknowledgment in response to service of the order. In this connection as regards the order against Brightstar, the Bank had already sent its letter of acknowledgment before it released the funds, whereas as regards the Doveblue order, although it had acted internally in an attempt to comply with the order, the letter of acknowledgment was not sent out until the funds had already been released. It is submitted that there was objectively an assumption of responsibility in both cases, responsibility being assumed as a necessary incident of the Bank's business and subsequently acknowledged in its letter of 31 January 2001. e
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(j) The fact that the Bank was under a duty to the court to comply with its order could not in itself preclude the existence of the necessary proximity. In this connection the commissioners rely on the recent decision of the House of Lords in *Arthur JS Hall & Co (a firm) v Simons*, *Barratt v Ansell (t/a Woolf Seddon (a firm))*, *Harris v Scholfield Roberts & Hill (a firm)* [2003] 3 All ER 673, [2002] 1 AC 615 in which it was held that the fact that an advocate owes a duty to the court in the conduct of civil litigation no longer provides justification for his owing no duty of care in negligence to his client. The materiality of this approach is that the existence of a parallel but non-conflicting duty as a matter of professional ethics does not preclude the existence of an overlapping duty of care owed to a person who is sufficiently proximate. The commissioners also relied on *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833, [1988] QB 665 as exemplifying the court's preparedness to find a duty of care on the part of someone (in that case a defendant's solicitor) who undertook to act in a particular capacity to the plaintiff h
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a and possibly to the court (namely as custodian of the plaintiff's children's passports), notwithstanding the solicitor's professional duty of care to the defendant client. In further support of the argument that, where there is foreseeability of loss and sufficient proximity, a duty of care can arise owed by a solicitor advising a client borrower as to security for a loan and the lender upon whom it was the purpose of the advice to confer adequate security, the
 b commissioners rely on *Dean v Allin and Watts (a firm)* [2001] EWCA Civ 758, [2001] 2 Lloyd's Rep 249. In this connection, Mr Sales, on behalf of the commissioners, draws attention to the concept expressed in *X and ors (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353 at 367–371, [1995] 2 AC 633 at 735–739 per Lord Browne-Wilkinson that a duty of care can arise from a relationship in respect of which a statutory
 c duty exists by reference to the threefold test, provided always that there is no inconsistency between the common law duty and the statutory duty and that there would be no risk that the existence of a common law duty of care would tend to prejudice performance of the statutory duty.

(k) Finally, the commissioners submit that it would be fair, just and reasonable
 d for a duty of care to be imposed on the Bank. Firstly, but for such a duty, the party obtaining the freezing injunction would have no remedy for its breach other than the availability of proceedings for contempt, which would not necessarily provide an effective remedy, as explained at [21], above. Secondly, the
 e magnitude of the risk of damage to the claimant having the benefit of a freezing order would be very great compared with the relatively light task of exercising reasonable care which such a duty would impose on a bank, particularly having regard to the fact that banks appear to have in place systems which, if properly operated, enable banks to comply with freezing injunctions and banks are entitled to be reimbursed the cost of compliance. Additionally a bank could insure against its liability arising from negligent operation of its blocking facilities.
 f The standard of care required to comply with such a duty would overlap with that required to avoid non-compliance for the purposes of contempt proceedings. Thirdly, the fact that Brightstar and Doveblue by their conduct in triggering the bank's transfer machinery directly brought about the commissioners' losses is not a reason for concluding as a matter of what is fair, just and reasonable that the Bank should be under no duty of care because (i) the Bank had an independent
 g duty to the court to comply with the order and (ii) that duty extended to taking all reasonable steps necessary to prevent its customers from failing to comply. Analogous duty situations were exemplified by *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, *Al-Kandari's case* and *Reeves v Comr of Police of the Metropolis* [1999] 3 All ER 897, [2000] 1 AC 360 where the House of Lords held
 h there to be a duty of care owed to a person held in police custody to prevent him from committing suicide. Neither the existence of an overlap nor, conversely, the lack of co-extensiveness between what was required of the Bank in its performance of its duty to the court and what would be required of it were there to be a duty of care would be a reason for excluding a duty of care. This was
 j supported by *Al-Kandari's case*, *X's case*, and also by *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, as to the incidence of a duty of care on a reference-giver in circumstances capable of being covered also by defences to claims for defamation.

[24] The submissions advanced by Mr Michael Brindle QC on behalf of the Bank may be summarised as follows.

(a) The claim by the commissioners is for purely economic loss.

(b) Based on the observations of Sir Brian Neill in the *Bank of Credit and Commerce International (Overseas) Ltd* case [1998] BCC 617 at 634, the appropriate course for ascertaining whether there is a duty of care, at least in an economic loss case, is to look at any new set of facts by using each of the three approaches in turn, namely the threefold test, voluntary assumption of responsibility and the incremental test: '... if the facts are properly analysed and the policy considerations are correctly evaluated the several approaches will yield the same result.'

(c) As to the threefold test, the relationship between the commissioners and the Bank was not one of adequate proximity because service of the court's orders on the Bank imposed on it an automatic duty of compliance as to which the Bank had no choice.

(d) Further, the context in which the Bank's duty to the court arose was that of contentious litigation and, although the Bank was not a party to the underlying litigation between the commissioners and its customers, it occupied a position analogous to a party on the opposite side to the commissioners. In that context, the relevant principle was that one litigant does not in general owe a duty of care to an opposing litigant as to the way in which the litigation is conducted. Thus, in *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465, [1988] Ch 229 a winding-up petition having been served at an address which was not that of the plaintiff's registered office, and nobody having appeared at the hearing, a winding-up order was made against the plaintiff company which then sued in negligence in respect of the losses it alleged to have been sustained as a result of the order. The claim failed, Scott J holding that it was not just and reasonable that a duty of care should be imposed. He said ([1987] 3 All ER 465 at 472, [1988] Ch 229 at 239–240):

'Is it just and reasonable that a plaintiff should owe a duty of care to a defendant in regard to service of the originating process? I do not think that it is. The plaintiff and the defendant, the petitioner and the respondent, are antagonists. The plaintiff, or the petitioner, is seeking a legal remedy in an adversarial system. The system stipulates the rules and requirements that must be observed by the two parties. The plaintiff must issue his process and must serve it on the defendant. If there is default in service the process must be struck out. If an order is obtained without the prescribed rules or regulations having been observed, the order may be discharged or set aside, sometimes by an application at first instance, sometimes on appeal. The prosecution of the action or of the petition is subject throughout its career from institution to final judgment to judicial control. Service of process is a step, and usually an essential step, in the prosecution. It must usually be proved before an order can be obtained against an absent defendant. The proposition that a duty of care is owed by one litigant to another and can be superimposed on the checks and safeguards that the legal system itself provides is, to my mind, conceptually odd. The safeguards against ineffective service of process ought to be, and I think must be, found in the rules and procedures that govern litigation. The rules and procedures require that, save on ex parte applications, proof of service be shown before an order is made against an absent party. If the proof of service is false, be it through negligence or design, an order may be made that should not have been made. The injured party's remedy is to have the order set aside. An action for damages cannot be based on the falsity of the proof of service.'

a Nor, in my judgment, can the adequacy of the efforts made to effect service be subjected to a tortious duty of care.'

[25] He concluded his judgment with the following ([1987] 3 All ER 465 at 473, [1988] Ch 229 at 241):

b 'In my judgment, there is no duty of care owed by one litigant to another as to the manner in which the litigation is conducted, whether in regard to service of process or in regard to any other step in the proceedings. The safeguards against impropriety are to be found in the rules and procedure that control the litigation and not in tort. I am therefore of opinion that the plaintiff's statement of claim does not disclose a reasonable cause of action against the second defendant and ought to be struck out.'

c [26] In this connection Mr Brindle further relies on *Connolly-Martin v Davis* [1999] Lloyd's Rep PN 790 where the issue was whether one party's counsel who had advised it that it was not bound by an undertaking that he had given that money would be paid into a joint account owed a duty of care to the opposite party who had suffered loss in consequence of such payment not having been made and of the counsel's party having gone into liquidation. It was held by the Court of Appeal (at 795 per Brooke LJ) that the authorities did not support the proposition—

d 'that counsel for one party may in the absence of circumstances evidencing a voluntary assumption of responsibility to that other party owe a legally enforceable duty of care to that party.'

e On the basis of these authorities, it is submitted that if, instead of assets covered by a freezing injunction being in the custody of a bank as here, they were under the control of a solicitor for the defendant and the solicitor negligently allowed them to be discharged after he had full knowledge of the injunction, there would be no cause of action in negligence against him, the only course open to the claimant being proceedings for contempt to be pursued with the purpose of giving the solicitor the opportunity of purging the contempt if the court considered that a punishment were warranted.

f [27] (e) It is argued that the commissioners did not rely on any conduct on the part of the Bank as regards the preservation of the companies' assets. What they relied on was the order of the court and the automatic effect of its being served on the Bank. To this effect the letters sent by the Bank added nothing material to the existence of a duty of care. They were, in effect, no more than receipts or acknowledgments of the service of the court's order and of the existence of the Bank's pre-existing duties to the court.

g [28] (f) The commissioners' undertakings to pay the Bank's reasonable charges was merely their undertaking to the court. It did not amount to a promise, much less an enforceable promise, to pay the Bank which the Bank had a personal right to enforce by action. Its only remedy was to invite the court to enforce the undertaking. Thus in *Cheltenham & Gloucester Building Society v Ricketts* [1993] 4 All ER 276 at 281, [1993] 1 WLR 1545 at 1551, Neill LJ in setting out the salient principles relating to cross-undertakings as to damages included the following:

'(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described

as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to any party enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so.'

[29] With specific reference to Mareva injunctions Peter Gibson LJ recognised ([1993] 4 All ER 276 at 286, [1993] 1 WLR 1545 at 1556) that, although it might normally be the case that when the defendant successfully applied for such an injunction to be discharged, the court would make an order for an inquiry as to damages, the making of such an order was a matter of discretion and not of right. It is thus agreed that the undertaking to the court to pay the Bank's expenses in enforcing the order and its repetition to the Bank itself does not operate in a manner relevant to whether it is fair just and reasonable that a duty of care should be imposed on the Bank.

(g) As to whether there was a voluntary assumption of responsibility, objective analysis of the Bank's conduct demonstrated that there was none. In this connection the Bank relies on certain observations of Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830. In that case the relevant issue was whether the defendant managing director and principal shareholder of a franchising company was under a duty of care to the plaintiffs who had entered into a franchising agreement with the company in reliance on a brochure which referred to the managing director's experience and on certain financial projections in the preparation of which the managing director had played a major part. In the course of his judgment, with which Lord Goff, Lord Clyde and Lord Hutton agreed, Lord Steyn said ([1998] 2 All ER 577 at 581, [1998] 1 WLR 830 at 834):

'My Lords, a great many precedents were cited at first instance, in the Court of Appeal and in the printed cases lodged for the purpose of the present appeal. It is unnecessary to embark on a general review of the authorities. The sole purpose of the citation of precedent is, or ought to be, the identification of a legal principle or rule which covers, or may arguably cover, the issue in the case to be decided. And that is how I hope to approach the problem under consideration. In this case, the identification of the applicable principles is straightforward. It is clear, and accepted by counsel on both sides, that the governing principles are stated in the leading speech of Lord Goff of Chieveley in *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145. First, in *Henderson's* case it was settled that the assumption of responsibility principle enunciated in the *Hedley Byrne* case is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended *Hedley Byrne* principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended *Hedley Byrne* principle, there is no need to embark on any further inquiry whether it

a is "fair, just and reasonable" to impose liability for economic loss (see [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181). Thirdly, and applying *Hedley Byrne*, it was made clear that—"reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect) ..." (See [1994] 3 All ER 506 at 520, [1995] 2 AC 145 at 180.) Fourthly, it was held
b that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect.'

[30] And ([1998] 2 All ER 577 at 582, [1998] 1 WLR 830 at 835):

c "Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of *Hedley Byrne*, which requires the existence of a special relationship between plaintiff and tortfeasor, it is not sufficient that there
d should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself.'

[31] Then Lord Steyn observed:

e "Two matters require consideration. First, there is the approach to be adopted as to what may in law amount to an assumption of risk. This point was elucidated in *Henderson's* case [1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181 by Lord Goff of Chieveley. He observed: "... especially in a context
f concerned with a liability which may arise under a contract or in a situation 'equivalent to contract', it must be expected that an objective test will be applied when asking the question whether, in a particular case, responsibility should be held to have been assumed by the defendant to the plaintiff ..." The touchstone of liability is not the state of mind of the defendant. An objective test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously,
g the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification, the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the
h franchisor company, and the director. In such cases where the personal liability of the director is in question, the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the
j director assumed personal responsibility towards the prospective franchisees.'

(h) Against that background it is submitted on behalf of the Bank that for reasons already summarised above, there was no assumption by the Bank of responsibility for giving effect to the court's orders, for all that crossed the line in each case was an acknowledgment that it had been served and nothing more. In

particular the Bank thereby assumed no responsibility to the commissioners. The necessary relationship between the Bank and the commissioners was simply never created by any conduct on the part of the Bank. a

THE APPROPRIATE METHODOLOGY

[32] As appears from my description of the consequences that flowed from the failure of the Bank to comply with the freezing injunction, this is a case of pure economic loss, the commissioners having been deprived of the means of enforcement of such judgments as they eventually obtained against the two companies. There can be no doubt that in many factual situations involving negligent misstatements or the negligent provision of services to the claimant the question whether there exists a duty of care can be conclusively determined by asking whether the defendant has by his conduct directly or indirectly represented to the claimant that he assumes the responsibility of due care for the accuracy of the statement or the quality or sufficiency of the service. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 is the seminal example and, more recently in *Henderson's* case and *Williams's* case, the House of Lords has deployed what has been described as the 'extended *Hedley Byrne* principle' as the appropriate analytical methodology to test for a duty of care in cases where the conduct directly or indirectly tendered to the claimant is said to have caused economic loss. If the defendant's conduct represents to an identifiable person or group that the defendant accepts responsibility for the carefulness of his statement or the quality of the service by words or deeds which, in the words of Lord Steyn in *Williams's* case [1998] 2 All ER 577 at 582, [1998] 1 WLR 830 at 835, have directly or indirectly 'cross[ed] the line' between the claimant and the defendant, there is the basis of a sufficiently proximate nexus between the parties. b c d e

[33] In other words the defendant's conduct must in the circumstances have been brought home to the claimants and invited the claimant's reliance on the care with which the information has been provided or the service provided. It is this justifiable reliance in the particular circumstances by an identified representee which engenders the duty of care. It is in this context that it is meaningful to analogue by phrases such 'akin to contract'. f

[34] There may however, be factual situations where the defendant's conduct has caused the claimant economic loss but where the nexus between the claimant and the defendant does not in any real sense bear comparison with a contract because the defendant's conduct does not tender advice or a service to the claimant but to some other party in circumstances where the accuracy of the advice or the quality of the service can confidently be expected to be relied upon by the claimant. Because there is such an oblique nexus between the parties, to attempt to adopt an extended assumption of responsibility methodology which invites investigation of whether representations have 'crossed the line' may not, in my judgment, be a helpful process in all such cases because it is likely to constrict liability for pure economic loss within unduly narrow confines. That is not to say that there may not be cases of a tripartite relationship, such as one finds in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831, where there is a very close nexus between the defendant and the claimant because the service provided is one for the benefit of the claimant. g h j

[35] It is with these considerations in mind that it is necessary to consider the effect of *Smith's* case and the threefold test methodology which was there approved by the House of Lords on the facts of that case and of *Harris v Wyre*

a Forest DC in which the appeal was heard at the same time. The relevant issue in Smith's case was whether the building society's independent contractor valuer was under a duty of care to a potential mortgagor who had paid an inspection fee to the building society, to whom a copy of the report was sent and who, in reliance on that report, purchased the house without further survey. In Harris's case the question was whether a duty of care was owed by a valuer employed in-house by a local authority to potential purchasers who had paid an inspection fee and who, in reliance on an offer of a mortgage on the house by the local authority, had purchased it and taken out a mortgage, never having seen the valuer's report. The local authority was under a statutory duty to value the house before offering a mortgage. Its valuer carelessly carried out that function. The local authority acted upon it by making its offer. The purchasers relied on that offer in buying the house. In Harris's case, therefore, the relationship between the valuer and the purchasers was significantly more distant than in Smith's case where the valuer's report was predictably sent on to the potential purchaser.

b [36] Lord Griffiths, with whose speech Lord Keith of Kinkel and Lord Brandon of Oakbrook agreed, observed ([1989] 2 All ER 514 at 534, [1990] 1 AC 831 at 862) with regard to the decision of Park J in *Yianni v Edwin Evans & Sons* [1981] 3 All ER 592, [1982] QB 438, the correctness of which had been doubted by Kerr LJ in the Court of Appeal ([1988] 1 All ER 691 at 701, [1988] QB 835 at 851-852):

c 'Counsel for the council and Mr Lee drew attention to the doubts expressed about the correctness of this decision by Kerr LJ in the course of his judgment in the Court of Appeal, and submitted, on the authority of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465, that it was essential to found liability for a negligent misstatement that there had been "a voluntary assumption of responsibility" on the part of the person giving the advice. I do not accept this submission and I do not think that

d voluntary assumption of responsibility is a helpful or realistic test for liability. It is true that reference is made in a number of the speeches in the *Hedley Byrne* case to the assumption of responsibility as a test of liability but it must be remembered that those speeches were made in the context of a case in which the central issue was whether a duty of care could arise when there had been an express disclaimer of responsibility for the accuracy of the advice. Obviously, if an adviser expressly assumes responsibility for his advice, a duty of care will arise but such is extremely unlikely in the ordinary course of events. The House of Lords approved a duty of care being imposed on the facts in *Cann v Wilson* (1888) 39 Ch D 39 and in *Candler v Crane Christmas & Co* [1951] 1 All ER 426, [1951] 2 KB 164. But, if the surveyor in *Cann v Wilson* or the accountant in *Candler v Crane Christmas & Co* had actually been asked if he was voluntarily assuming responsibility for his advice to the mortgagee or the purchaser of the shares, I have little doubt he would have replied: "Certainly not. My responsibility is limited to the person who employs me." The phrase "assumption of responsibility" can only have any real meaning if it is understood as referring to the circumstances in which the law will deem the maker of the statement to have assumed responsibility to the person who acts on the advice.'

[37] He then referred to the fact that in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 233 both Lord Denning MR

and Salman LJ—

‘rejected the argument that a voluntary assumption of responsibility was the sole criterion for imposing a duty of care for the negligent preparation of a search certificate in the local land charges register.’

[38] Later (([1989] 2 All ER 514 at 536, [1990] 1 AC 831 at 864–865) Lord Griffiths said:

‘I have come to the conclusion that *Yianni*’s case was correctly decided. I have already given my view that the voluntary assumption of responsibility is unlikely to be a helpful or realistic test in most cases. I therefore return to the question in what circumstances should the law deem those who give advice to have assumed responsibility to the person who acts upon the advice or, in other words, in what circumstances should a duty of care be owed by the adviser to those who act on his advice? I would answer: only if it is foreseeable that if the advice is negligent the recipient is likely to suffer damage, that there is a sufficiently proximate relationship between the parties and that it is just and reasonable to impose the liability. In the case of a surveyor valuing a small house for a building society or local authority, the application of these three criteria leads to the conclusion that he owes a duty of care to the purchaser. If the valuation is negligent and is relied on damage in the form of economic loss to the purchaser is obviously foreseeable. The necessary proximity arises from the surveyor’s knowledge that the overwhelming probability is that the purchaser will rely on his valuation, the evidence was that surveyors knew that approximately 90%, of purchasers did so, and the fact that the surveyor only obtains the work because the purchaser is willing to pay his fee. It is just and reasonable that the duty should be imposed for the advice is given in a professional as opposed to a social context and liability for breach of the duty will be limited both as to its extent and amount. The extent of the liability is limited to the purchaser of the house: I would not extend it to subsequent purchasers. The amount of the liability cannot be very great because it relates to a modest house. There is no question here of creating a liability of indeterminate amount to an indeterminate class. I would certainly wish to stress, that in cases where the advice has not been given for the specific purpose of the recipient acting on it, it should only be in cases when the adviser knows that there is a high degree of probability that some other identifiable person will act on the advice that a duty of care should be imposed. It would impose an intolerable burden on those who give advice in a professional or commercial context if they were to owe a duty not only to those to whom they give the advice but to any other person who might choose to act on it.’

[39] Lord Templeman, with whose speech Lord Keith of Kinkel and Lord Brandon also agreed, cited ([1989] 2 All ER 514 at 521, [1990] 1 AC 831 at 845) Lord Denning MR’s dissenting judgment in *Candler v Crane Christmas & Co* [1951] 1 All ER 426 at 434, [1951] 2 KB 164 at 181 where he observed in relation to an accountant’s duty to those to whom it was known that the accounts were to be shown:

‘I do not think, however, the duty can be extended still further so as to include strangers of whom they have heard nothing and to whom their employer without their knowledge may choose to show their accounts ...

a The test of proximity in these cases is: Did the accountants know that the accounts were required for submission to the plaintiff and use by him?’

b [40] Lord Templeman then cited Lord Devlin in the *Hedley Byrne* case [1963] 2 All ER 575 at 610, [1964] AC 465 at 528–529. He then cited without comment ([1989] 2 All ER 514 at 522, [1990] 1 AC 831 at 846) those passages from the judgments of Lord Denning MR and Salman LJ in the *Ministry of Housing and Local Government* case [1970] 1 All ER 1009 at 1018–1019, 1027–1028, [1970] 2 QB 223 at 268 and 279 respectively, to which Lord Griffiths referred and, in concluding that the valuers owed a duty of care in both cases, Lord Templeman observed ([1989] 2 All ER 514 at 522–523, [1990] 1 AC 831 at 847):

c ‘I agree that, by obtaining and disclosing a valuation, a mortgagee does not assume responsibility to the purchaser for that valuation. But in my opinion the valuer assumes responsibility to both mortgagee and purchaser by agreeing to carry out a valuation for mortgage purposes knowing that the valuation fee has been paid by the purchaser and knowing that the valuation will probably be relied on by the purchaser in order to decide whether or not
d to enter into a contract to purchase the house.’

and later:

e ‘In the present appeals the statutory duty of the council to value the house did not in my opinion prevent the council coming under a contractual or tortious duty to Mr and Mrs Harris who were cognisant of the valuation and relied on the valuation.’

f [41] It is important to appreciate that: (i) the House of Lords clearly regarded the statements as to the appropriate methodology in the *Ministry of Housing and Local Government* case as correctly qualifying or supplementing the references to voluntary assumption of responsibility in the *Hedley Byrne* case; (ii) that qualification was at the foundation of the submission on behalf of the purchasers in *Harris v Wyre Forest DC* [1990] 1 AC 831 at 835 that in an economic loss case, in spite of the fact that there was no direct contact (not ‘contract’ as printed in the report) between the provider of the information and the recipient of it, there
g could be sufficient proximity to impose a duty of care provided that the ultimate recipient was identifiable and was somebody who would foreseeably suffer loss if the information were inaccurate; (iii) the applicability of the assumption of responsibility methodology to the facts in *Harris’s* case, in which the valuer’s report was at no time shown to the potential purchasers, who simply relied on having received an offer of a mortgage from the local authority, would be
h appropriate only if that assumption were deemed to exist not because the facts were in any real sense ‘akin to contract’ but because the law imposed a duty of care on the valuer having regard to the nature of his relationship with the purchasers, foreseeability of loss if the information were inaccurate and, as a general control mechanism what was fair, just and reasonable; in their words the
j threefold test.

[42] Although Lord Templeman certainly considered that the relevant relationships could be described as ‘akin to contract’ (see [1989] 2 All ER 514 at 522, [1990] 1 AC 831 at 846), both Lord Griffiths and Lord Jauncey of Tullichettle ([1989] 2 All ER 514 at 541, [1990] 1 AC 831 at 871) with whom Lord Keith and Lord Brandon agreed, considered that this was not a helpful analogy and both considered that in that type of factual situation ‘assumption of responsibility’ was

useful only if the assumption were deemed because the general law imposed a duty of care in the circumstances. a

[43] The significance of this decision for present purposes is that it establishes that in some factual situations the methodology appropriate for ascertaining whether a duty of care exists in cases of pure economic loss does not require an analysis of the facts as akin to contract. Once one removes this comparative reference analogy one is left with the question what leads to the assumption of responsibility being 'deemed'? That problem was solved both by Lord Griffiths and Lord Jauncey by adopting an approach which in substance was closely similar to that of Lord Denning MR and Salmon LJ in the *Ministry of Housing and Local Government* case. The latter is a case of pure economic loss where the facts did not remotely lend themselves to the 'equivalent to contract' analogy or to any ordinary use of the words 'assumption of responsibility' unless 'assumption' is synonymous with 'imposition'. In that case no information was directly or indirectly tendered to the Ministry by the local land charges registrar or by the clerk in his office who carelessly conducted the search of the land charges register. The clean certificate was issued to the intending purchasers and in their possession it was, as a matter of law, conclusive evidence under the Land Charges Act 1925, s 17(2) as against any person such as the Ministry claiming to rely on a charge or the existence of that charge. The duty of care was imposed on the registrar and his clerk because of the foreseeability of loss in the context of their proximity or neighbourhood relationship with the Ministry, this notwithstanding the parallel statutory duty of the registrar and his clerk to issue an accurate certificate. The Ministry was simply an identifiable sufferer of economic loss if the recipient of the certificate relied on it as a defence to a claim to enforce the charge. b
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[44] In *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618 Lord Bridge of Harwich, with whose speech the other members of the House of Lords expressly agreed, observed: f

'But since [*Anns v Merton London BC* [1977] 2 All ER 492, [1978] AC 728] a series of decisions of the Privy Council and of your Lordships' House, notably in judgments and speeches delivered by Lord Keith, have emphasised the inability of any single general principle to provide a practical test which can be applied to every situation to determine whether a duty of care is owed and, if so, what is its scope: see *Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1984] 3 All ER 529 at 533–544, [1985] AC 210 at 239–241, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705 at 709–712, [1988] AC 175 at 190–194, *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163 at 172, [1988] AC 473 at 501, *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238 at 241, [1989] AC 53 at 60. What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other. But it is implicit in the passages referred to that the concepts of proximity and fairness embodied in these additional ingredients are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to g
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a the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope. Whilst recognising, of course, the importance of the underlying general principles common to the whole field of negligence, I think the law has now moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes. We must now, I think, recognise the wisdom of the words of Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44, where he said: “It is preferable, in my view, that the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a prima facie duty of care restrained only by indefinable ‘considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed’.” One of the most important distinctions always to be observed lies in the law’s essentially different approach to the different kinds of damage which one party may have suffered in consequence of the acts or omissions of another. It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another to avoid causing others to suffer purely economic loss.’

[45] Lord Roskill said ([1990] 1 All ER 568 at 581–582, [1990] 2 AC 605 at 628):

e ‘But subsequent attempts to define both the duty and its scope have created more problems than the decisions have solved. My noble and learned friends have traced the evolution of the decisions from *Anns v Merton London BC* [1977] 2 All ER 492, [1978] AC 728 until and including the most recent decisions of your Lordships’ House in *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, ([1990] 1 AC 831). I agree with your Lordships that it has now to be accepted that there is no simple formula or touchstone to which recourse can be had in order to provide in every case a ready answer to the questions whether, given certain facts, the law will or will not impose liability for negligence or, in cases where such liability can be shown to exist, determine the extent of that liability. Phrases such as “foreseeability”, “proximity”, “neighbourhood”, “just and reasonable”, “fairness”, “voluntary acceptance of risk” or “voluntary assumption of responsibility” will be found used from time to time in the different cases. But as your Lordships have said, such phrases are not precise definitions. At best they are but labels or phrases descriptive of the very different factual situations which can exist in particular cases and which must be carefully examined in each case before it can be pragmatically determined whether a duty of care exists, and, if so, what is the scope and extent of that duty. If this conclusion involves a return to the traditional categorisation of cases as pointing to the existence and scope of any duty of care, as my noble and learned friend Lord Bridge, suggests, I think this is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty. This conclusion finds strong support from the judgment of Brennan J in the High Court of Australia in the passage cited by my noble and learned friends (see *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44). My Lords, I confess that like Lord Griffiths in *Smith v Eric S Bush* [1989] 2 All ER 514 at 534, ([1990]

1 AC 831 at 862), I find considerable difficulty in phrases such as “voluntary assumption of responsibility” unless they are to be explained as meaning no more than the existence of circumstances in which the law will impose a liability on a person making the allegedly negligent statement to the person to whom that statement is made, in which case the phrase does not help to determine in what circumstances the law will impose that liability or, indeed, its scope.’

[46] Lord Oliver of Aylmerton identified the possibility of different methodologies being appropriate to different factual situations and in particular the appropriateness of ‘guidelines’ being applicable to cases of negligent statements (see [1990] 1 All ER 568 at 587, [1990] 2 AC 605 at 635):

‘Perhaps, therefore, the most that can be attempted is a broad categorisation of the decided cases according to the type of situation in which liability has been established in the past in order to found an argument by analogy. Thus, for instance, cases can be classified according to whether what is complained of is the failure to prevent the infliction of damage by the act of the third party (such as *Home Office v Dorset Yacht Co Ltd* [1970] 2 All ER 294, [1970] AC 1004, *P Perl (Exporters) Ltd v Camden London BC* [1983] 3 All ER 161, [1984] QB 342, *Smith v Littlewoods Organisation Ltd (Chief Constable, Fife Constabulary, third party)* [1987] 1 All ER 710, [1987] AC 241 and, indeed, *Anns v Merton London Borough* [1977] 2 All ER 492, [1978] AC 728, itself), in failure to perform properly a statutory duty claimed to have been imposed for the protection of the plaintiff either as a member of a class or as a member of the public (such as *Anns’s case, Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 223, *Yuen Kun-yeu v A-G of Hong Kong* [1987] 2 All ER 705, [1988] AC 175) or in the making by the defendant of some statement or advice which has been communicated, directly or indirectly, to the plaintiff and on which he has relied. Such categories are not, of course, exhaustive. Sometimes they overlap as in the *Anns* case, and there are cases which do not readily fit into easily definable categories (such as *Ross v Caunters (a firm)* [1979] 3 All ER 580, [1980] Ch 297). Nevertheless, it is, I think, permissible to regard negligent statements or advice as a separate category displaying common features from which it is possible to find at least guidelines by which a test for the existence of the relationship which is essential to ground liability can be deduced.’

[47] He also approached the phrase ‘voluntary assumption of responsibility’ as going no further than expressing factual relationship with reference to which the law has imposed a duty of care (see [1990] 1 All ER 568 at 589, [1990] 2 AC 605 at 637).

[48] In *Henderson v Merrett Syndicates Ltd*, *Hallam-Eames v Merrett Syndicates Ltd*, *Hughes v Merrett Syndicates Ltd*, *Arbuthnott v Feltrim Underwriting Agencies Ltd*, *Deeny v Gooda Walker Ltd (in liq)* [1994] 3 All ER 506, [1995] 2 AC 145, it was not suggested that there were no factual situations involving economic loss in which it would be appropriate to apply the threefold test methodology. Lord Goff’s speech ([1994] 3 All ER 506 at 521, [1995] 2 AC 145 at 181) goes no further than indicating that in a case such as that before him it was appropriate to apply the assumption of responsibility test and unnecessary to apply the threefold test, for where objectively analysed one person provided services to another in circumstances in which it could be said that the relationship was equivalent to

a contract it was unnecessary to investigate whether it was fair, just and reasonable that liability for economic loss should, be imposed.

[49] The view that assumption of responsibility is not necessarily definitive because '[i]t is not so much that responsibility is assumed as that it is recognised or imposed by the law' was expressed by Lord Slynn of Hadley in *Phelps v Hillingdon London BC, Anderton v Clywdd CC, Jarvis v Hampshire CC, Re G (a minor)* [2000] 4 All ER 504 at 518, [2001] 2 AC 619 at 654.

b [50] The authorities on duty of care were comprehensively and illuminatingly analysed by May LJ in *Merrett v Babb* [2001] EWCA Civ 214, [2001] QB 1174, [2001] 3 WLR 1. That was a case where there was a claim against a qualified surveyor who was an employee of a firm of valuers instructed by a building society to value a house in response to a mortgage application by the claimant.

c The valuation report was never provided to the claimant and was held to have negligently failed to take account of certain defects. It was thus a case very similar on its facts to *Harris's* case, and the essential issue was whether, in the light of Lord Steyn's review of the authorities in *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577, [1998] 1 WLR 830, there being no assumption of

d responsibility by the valuer, there was no duty of care. It was held by a majority that such a duty of care should be imposed. May LJ, with whom Wilson J agreed, considered that the methodology deployed in *Harris's* case should apply. He said ([2001] QB 1174 at [45]):

e 'The decisions of *Williams v Natural Life Health Foods Ltd* ([1998] 2 All ER 577) [1998] 1 WLR 830 and *Standard Chartered Bank v Pakistan National Shipping Corpn (No 2)* ([2000] 1 All ER (Comm) 1) do not, in my view, help Mr Babb. They were each dealing with relationships and circumstances

f where the principal defendant was a limited company and the question was whether the director of the company had also assumed a personal responsibility. In those circumstances it was necessary to look for overt

g dealings between the director personally and the claimant sufficient to give rise to a personal liability which would otherwise not arise, since normally the director of a company is not personally liable for the actions of the company. But in many cases where *Smith v Eric Bush* ([1989] 2 All ER 514) [1990] 1 AC 831 applies, including the present cases, there is no direct dealing at all between the valuer and the purchaser. Yet the law recognises that in those circumstances there is a duty of care without the need to find any direct overt dealings between the valuer and the purchaser.'

[51] In my judgment, these authorities do not support the proposition that in every case where there has been negligent provision of a service which is said to

h have caused the claimant pure economic loss there has to be a relationship akin to contract before a duty of care can be imposed. If, objectively analysed, the relationship is too oblique or indirect to bear that analogy there can be an assumption of responsibility only in the artificial sense that a responsibility is imposed as a matter of law. However, when one comes to the void at which Lord

j Oliver arrived in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 588–589, [1990] 2 AC 605 at 637, the methodology appropriate to a relationship akin to contract has to be replaced and in those circumstances it is the threefold test which provides a broad analytical guideline towards the existence of a duty of care. However, there may be novel factual situations where it is appropriate to supplement application of the threefold test by reference to other comparable situations in which the courts have imposed or, as the case may be, declined to

impose a duty of care. This supplementation has been explained by Phillips LJ in *Reeman v Dept of Transport* [1997] 2 Lloyd's Rep 648 at 677:

'When confronted with a novel situation the Court does not ... consider these matters [foreseeability, proximity and fairness] in isolation. It does so by comparison with established categories of negligence to see whether the facts amount to no more than a small extension of a situation already covered by authority, or whether a finding of the existence of a duty of care would effect a significant extension to the law of negligence. Only in exceptional cases will the Court accept that the interests of justice justify such an extension ...'

DISCUSSION

[52] In the present case the relevant duty to the court arose automatically upon service of the order on the Bank. Because of the sequence of events relating to the Doveblue account, from which the Bank released the funds *before* writing to the commissioners and to the Brightstar account, where no conduct of the Bank appears to have been brought home to the commissioners before release of the funds, it is first necessary to investigate whether a duty to the commissioners arose at the time of service of the order as distinct from the time of sending and receipt of the letters.

[53] Since foreseeability of loss is conceded, the starting point is proximity.

[54] The substance of the relationship between the Bank and the commissioners was quite different from that to be found in cases such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465 or *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest DC* [1989] 2 All ER 514, [1990] 1 AC 831 or *Henderson's case*. The commissioners have not acted to their detriment in reliance on the provision of any information, professional advice or professional services. Rather, they have sustained economic loss in being deprived of the ability to enforce their judgments. In this respect, they have been placed in a position which is materially similar to the position of the Ministry in *Ministry of Housing and Local Government v Sharp* [1970] 1 All ER 1009, [1970] 2 QB 233. In both cases the carelessness of a third party (in that case the registrar of land charges and his employee and in this case the Bank) has deprived the claimant of a financial benefit in circumstances where it was a foreseeable consequence of the third party's conduct that a particular individual could suffer precisely the loss that had been suffered. The obvious distinction between the two cases is that in the *Ministry of Housing and Local Government* case the registrar was under a statutory duty whereas in the present case the Bank was under a duty arising out of the procedure of the court and the making of the court's order. A further distinction, which I shall have to consider later in this judgment, is that in that case the loss was irremediable unless the registrar's or his clerk's conduct could be analysed as breach of a duty of care giving rise to liability in damages, whereas in the present case it *might* be possible by means of the invocation of the court's punitive jurisdiction to force the Bank to replace the assets which it failed to protect (see the discussion of *Z Bank v D1* [1994] 1 Lloyd's Rep 656, at [21], above).

[55] Freezing injunctions have in the course of the last thirty years become an extremely prevalent incident of the conduct of the business of a clearing bank in this country. A substantial bank such as Barclays clearly receives notice of such injunctions very frequently: so frequently in fact that it has a standard form letter which it sends out in response to notices. It follows that upon receipt of notice of such an order the Bank knows that: (i) the court has taken the view that there is

- a a real risk that, absent such an order, the customer will remove his assets otherwise than in the ordinary course of business with the effect of avoiding execution of a judgment; (ii) it is not unlikely that the party who has obtained the freezing injunction will obtain judgment against the customer; (iii) if the customer is permitted to remove funds from the account without the permission of the court there is a serious risk that such judgment as may be obtained will go
- b unsatisfied, thereby causing economic loss to the party who has obtained the injunction; (iv) the party who has obtained the injunction undertakes to the court and impliedly undertakes to the bank to pay the bank's expenses in administering the order (see *Z Ltd v A* [1982] 1 All ER 556 at 564, [1982] 1 QB 558 at 575 per Lord Denning MR); (v) if the bank were mistakenly to release funds covered by the
- c injunction it would be exposed to proceedings for contempt of court which might, but would not necessarily, result in the sequestration of its assets unless it purged its contempt by restoring the availability of such funds as it had released, although this might be difficult in practice.

- [56] As to (v) I have already drawn attention to the fact that the court's contempt jurisdiction is punitive, its purpose being to protect the integrity of its
- d own procedure, and further that, since the sanction which it imposes on the contemnor depends on the gravity of the contempt and not on the objective of compensating the party who has obtained the injunction, the punishment if any which the court regards as appropriate may not facilitate the restoration of the benefit of the injunction to the party who has obtained it. The gravity of the offence
- e may not justify sequestration of an amount of the Bank's assets equivalent to the amount covered by the injunction. Further, replacement by the Bank of an equivalent amount of assets in the account from which the transfer out had been permitted would not be an available device because there would be no justification for causing the Bank to bestow a windfall credit balance on the customer. Further, it is not easy to see how, consistently with current contempt
- f procedure, the Bank could be forced to make good the loss of security, although it might be possible to make an order similar to that in the *Z Bank* case sequestrating assets unless the Bank within a limited time paid an appropriate sum into a joint account of itself and the party having the freezing injunction.

- [57] In summary, therefore, the Bank knows as soon as it receives notice of a
- g freezing injunction that if it mistakenly releases assets in breach of the order, the party in whose favour the order was made may suffer loss irremediable by operation of the contempt procedure.

- [58] These considerations set out in the last three paragraphs clearly provide at least a provisional foundation for the proposition that as between the Bank and
- h the commissioners there existed a neighbourhood or proximity relationship. Is that conclusion disturbed by the fact that the Bank was under a duty to the court to comply with its orders made in the course of litigation and in particular by a general principle that non-compliance with a court order should be dealt with only within the remedies and sanctions of the rules of procedure?

- j [59] This issue should probably arise at the fair, just and reasonable stage of the threefold test. However, there is a sustainable argument that it goes to proximity because its effect is to exclude the bank from the possibility of a relationship of sufficient proximity because it has become involved in the conduct of the litigation. So, although the effect of service on a bank of an order of the court is in many ways similar to the imposition of a statutory duty which is not necessarily inconsistent with a duty of care, is there some intrinsic characteristic

of such a court order which precludes a proximity relationship or renders it otherwise than fair, just and reasonable that a duty of care should be imposed? a

[60] In testing this point it is necessary to separate a number of different strands to the problem.

[61] Firstly, there is the fact that the duty to act in accordance with the court's order arises from the fact that the court has made the order and from receipt by the Bank of notice of that order. In this connection, it must be remembered that when the court makes a freezing injunction it is exercising statutory powers, under s 37 of the Supreme Court Act 1981. A party to whom notice of such an order has been given who knowingly disregards it at the request of the party enjoined facilitates a breach of the court's order by the principal offender and thereby becomes liable for contempt as a secondary offender. The true nature of the Bank's duty to the court is therefore a duty to do nothing to facilitate breach of the order made by its customer. It follows that the Bank is in a position analogous to a party in a contractual or other relationship with another where the latter is under a statutory duty vis-à-vis a third party. If the first party facilitates breach of that statutory duty by the person who owes it and that is a criminal offence the first party will be a secondary party to the offence by the party who is in breach. b
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[62] There is clear authority that the mere fact that a parallel statutory duty rests on a party does not necessarily preclude a relationship of proximity or duty of care to a person to whom the statutory duty is owed. Apart from the *Ministry of Housing and Local Government* case, the *Caparo Industries* case was a typical example of parallel duties. In *X and ors (minors) v Bedfordshire CC*, *M (a minor) v Newham London BC*, *E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633 it was laid down by the House of Lords that application of the threefold test to a relationship in which one party owed a statutory duty to another could give rise to a duty of care in parallel with the statutory duty (see, for example *Lord Jauncey* [1995] 3 All ER 353 at 362–363, [1995] 2 AC 633 at 729). *Lord Browne-Wilkinson* observed ([1995] 3 All ER 353 at 371, [1995] 2 AC 633 at 739): e
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'If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed (eg the running of a school) the question whether or not there is a common law duty of care falls to be decided by applying the usual principles, ie those laid down in *Caparo Industries plc v Dickman* [1990] 1 All ER 568 at 573–574, [1990] 2 AC 605 at 617–618. Was the damage to the plaintiff reasonably foreseeable? Was the relationship between the plaintiff and the defendant sufficiently proximate? Is it just and reasonable to impose a duty of care? See *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163, [1988] AC 473; *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, [1989] AC 53. However the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done. The position is directly analogous to that in which a tortious duty of care owed by A to C can arise out of the performance by A of a contract between A and B. In *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, ([1995] 2 AC 145) your Lordships held that A (the managing agent) who had contracted with B (the members' agent) to render certain services for C (the names) came under a duty of care to C in the performance of those services. It is clear that any tortious duty of care owed to C in those circumstances g
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a could not be inconsistent with the duty owed in contract by A to B. Similarly, in my judgment, a common law duty of care cannot be imposed on a statutory duty if the observance of such common law duty of care would be inconsistent with, or have a tendency to discourage, the due performance by the local authority of its statutory duties.'

b [63] In the present case, if a duty to the court is taken to be analogous to a duty under statute, it is impossible to say that imposition on a bank of a duty of care not to facilitate breach of the court's order by its customer would be inconsistent with its duty to the court or could diminish or discourage performance by the bank or its customer of their duties to the court.

c [64] Secondly, in the context of statutory duties, the fact that non-compliance may be a criminal offence for which penalties may be imposed is not a reason for precluding a civil action for breach of a duty of care arising out of the same facts. Thus actions for negligence (as distinct from breach of statutory duty) on facts amounting to an offence under s 33 of the Health and Safety at Work etc Act 1974 are commonplace. It is not suggested that exposure of an employer to criminal proceedings and a penalty precludes a common law duty of care.

d [65] Thirdly, the position of a party such as the Bank who is put on notice of a freezing injunction is not the same as that of a party who gives an undertaking to the court. If there is a breach of the undertaking, the party in breach will be directly in contempt. Whether a party having notice of an injunction is in contempt will depend on whether its conduct has been such as knowingly to facilitate breach of the injunction by the party against whom the order has been made.

e [66] Fourthly, adverse parties to litigation are not in a position of proximity with regard to the conduct of the litigation or at least it is not fair, just or reasonable that they should assume a duty of care. In *Business Computers International Ltd v Registrar of Companies* [1987] 3 All ER 465, [1988] Ch 229 the issue was whether there could be a duty of care owed to a party who had caused a plaintiff company to be put into liquidation by negligently serving a winding-up petition at the wrong address thereby leaving the plaintiff in ignorance of the winding-up proceedings and allegedly causing it damage. Scott J held that there was no duty of care. His reasoning is set out at [24], above. This judgment was relied upon as correct by the Court of Appeal in *Al-Kandari v JR Brown & Co (a firm)* [1988] 1 All ER 833 at 835-836 [1988] QB 665 at 672 per Lord Donaldson of Lymington MR with whose judgment Dillon LJ agreed ([1988] 1 All ER 833 at 838 [1988] QB 665 at 675). Bingham LJ approached the issue in the latter case with the following statement of principle ([1988] 1 All ER 833 at 838-839, [1988] QB 665 at 675).

h 'In the ordinary course of adversarial litigation a solicitor does not owe a duty of care to his client's adversary. The theory underlying such litigation is that justice is best done if each party, separately and independently advised, attempts within the limits of the law and propriety and good practice to achieve the best result for himself that he reasonably can without regard to the interests of the other party. The duty of the solicitor, within the same limits, is to assist his client in that endeavour, although the wise solicitor may often advise that the best result will involve an element of compromise or give and take or horse trading. Ordinarily, however, in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent.'

[67] Mr Sales, on behalf of the commissioners, relied heavily on that case and in particular the following passage from the judgment of Bingham LJ ([1988] 1 All ER 833 at 839, [1988] QB 665 at 676):

'In so holding the passport the defendants were not acting as solicitors and agents of Mr Al-Kandari, their client, but as independent custodians subject to the directions of the court and the joint directions of the parties. I have no doubt that in this situation the defendants owed the plaintiff a duty of care, since the purpose of holding the passport at all was to protect her lawful rights. The judge defined the duty as—"a duty to take reasonable care that the passport should not leave the possession of themselves or, where relevant, their agents. They owed her, in my judgment, the further duty to take all reasonable steps to prevent harm coming to her from any failure to comply with or any agreed relaxation of the undertaking." (See [1987] 2 All ER 302 at 307, [1987] QB 514 at 522.) I would put it very slightly differently. In my view the defendants in all the circumstances owed the plaintiff a duty to take reasonable care to keep the passport in their possession (save as the plaintiff might otherwise agree) and to inform the plaintiff if for any reason it ceased to be in their possession. I rather doubt whether the defendants should be treated as having themselves given any undertaking to the court (although plainly they could not connive at any breach by their client), but whether they should or not I regard their duty to the plaintiff as something separate and different.'

[68] Mr Sales submits that Bingham LJ has there proceeded on the express assumption that, even if (which he doubted) the defendant solicitors as distinct from their client had given an undertaking to the court, they owed a duty of care to the plaintiff. So, it is argued, here is an example of the imposition of a duty of care on a party who is independent of the adverse parties to the litigation.

[69] In my judgment, it is clear that both Lord Donaldson of Lymington MR ([1988] 1 All ER 833 at 838, [1988] QB 665 at 675) and Bingham LJ in the passage cited above proceeded on the basis that by its conduct the defendant firm had in effect undertaken, as part of the settlement of the proceedings, not to part with the passport, not only to the court, but also to the plaintiff personally. I do not therefore regard this case as supporting the proposition that, where there is nothing more than an undertaking to the court or, by analogy, notice of an injunction, a duty of care can be imposed on the party to whom such notice is given.

[70] The approval by the Court of Appeal in *Al-Kandari's* case of the judgment of Scott J in the *Business Computers International Ltd* case, is further reflected in the more recent decision of the Court of Appeal in *Connolly-Martin v Davis* [1999] Lloyd's Rep PN 790 (see [26], above). In that case, having reviewed the relevant authorities, Brooke LJ observed (at 795):

'None of these English decisions, in my judgment, go anywhere near establishing a proposition that counsel for one party may in the absence of circumstances evidencing a voluntary assumption of responsibility to that other party owe a legally enforceable duty of care to that other party. Nor do the two New Zealand cases to which we were referred.'

[71] In *Welsh v Chief Constable of Merseyside Police* [1993] 1 All ER 692 it was held that a prosecuting solicitor owed a duty of care to the defendant in criminal proceedings to inform a magistrates' court that certain offences had been taken

a into consideration when the defendant was sentenced by the Crown Court. This duty arose because of the solicitor's express assumption of responsibility. In *Elguzouli-Daf v Comr of Police of the Metropolis*, *McBrearty v Ministry of Defence* [1995] 1 All ER 833 at 841–842, [1995] QB 335 at 348–349, Steyn LJ explained that in *Welsh's* case there had been an assumption of responsibility within the *Hedley Byrne* principle. In the absence of such assumption of responsibility the Crown Prosecution Service owed no duty of care to a defendant on remand to act with reasonable expedition in analysing available evidence.

b [72] The effect of these authorities is, in my judgment, that, absent an assumption of responsibility by an adverse party's legal representative, application of the threefold methodology does not in any circumstances give rise to a duty of care to the opposite party in civil proceedings. Similarly, an adverse party owes no duty of care to the opposing party in civil proceedings unless there is an assumption of responsibility. If there is such an assumption of responsibility there may be sufficiently enhanced proximity to give rise to a duty of care. In this context, the authorities are clearly using assumption of responsibility not in its sense of deemed or imposed responsibility, but rather in its narrower connotation of words or conduct which 'cross the line' and bring home to the opposing party that the other party accepts the risk of negligence as to the information or service provided.

c [73] This analysis therefore leads unavoidably to the consequence that, where a freezing injunction has been obtained, the defendant against whom the order has been made does not thereby occupy a relationship of proximity vis-à-vis the claimant, unless there is super-added to the relationship conduct amounting to an assumption of responsibility by that party. The claimant's sole remedy against that party, ineffective as it may be, is to bring proceedings for contempt. It would be completely inconsistent with this analysis to conclude that, although a defendant given notice of a freezing order owed no duty of care to the claimant, by application of the threefold test, a bank holding the defendant's assets, upon being given notice of the same order, by that very notice, did owe a duty of care to the claimant. There is nothing in the bank's relationship with the claimant which so enhances the element of proximity above that of the defendant as to provide a foundation for a duty of care by application of the threefold test. Nor is there anything in that relationship which makes it any more fair, just or reasonable that the Bank should owe a duty of care in circumstances which did not engage such a duty on the part of the defendant customers.

d [74] It therefore follows that unless, prior to the release of the funds from its customers' accounts, the Bank had by its conduct objectively assumed responsibility to the commissioners to take reasonable care to prevent disposal of its customers' funds in accordance with the injunction, it could be under no liability in negligence. In order to ascertain whether there has been an assumption of responsibility it is necessary to apply the analysis identified and explained by Lord Steyn in *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 at 582, [1998] 1 WLR 830 at 835. Has the defendant bank by words or conduct which has 'crossed the line' between it and the claimant represented that it assumes responsibility and has the claimant's loss been caused by his reliance on that assumption?

e [75] In this connection, it is obviously essential that the representation of assumption of responsibility should 'cross the line' at a point of time *before* that conduct by the Bank which is said to have caused loss to the commissioners. Were it otherwise, it could not be said that the commissioners had justifiably

relied on the Bank to comply with any assumption of responsibility: all that could be relied upon was the Bank's duty to the court. There must be adequate proximity by assumption of responsibility to comply with the injunction before the Bank's duty to the commissioners could be engaged. a

WAS THERE AN ASSUMPTION OF RESPONSIBILITY BY THE BANK?

[76] It is necessary to consider separately the position of the two customers, Brightstar and Doveblue. b

[77] As to Brightstar, the letter dated 29 January 2001 which the commissioners rely upon as the Bank's words or conduct giving rise to an assumption of responsibility (see [10], above) bears the same date as that on which the Bank released the funds. There is no evidence that it was sent by fax. However, the letter bears a 'mail opened' stamp dated 31 January 2001. If the commissioners are to establish that the Bank owed them a duty of care relevant to their claim against the Bank it is incumbent on them to plead and establish an assumption of responsibility by the Bank, yet the particulars of claim include no allegation that the letter was received by the commissioners before the funds were released. This is not a fact which I can infer from what is pleaded. On the contrary, the inference is that, whenever that letter was posted, it was not delivered to the commissioners until *after* the Bank had already released the funds. Accordingly, if the letter were capable of amounting to an assumption of responsibility so as to super-add a duty of care to the commissioners in addition to the Bank's duty to the court, it crossed the line too late to have any such effect, save in respect of the funds which remained in the account after the Bank's release of the payments on 29 January 2001. c
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[78] If the letter had been received by the commissioners before release of the funds, would it have amounted to a relevant assumption of responsibility? I consider that it would. The expression of confirmation of compliance with the court's order was volunteered by the Bank: it could have said nothing. Instead, it chose to make contact with the commissioners not merely to inform them that a copy of the freezing injunction had been received, but also (i) to confirm that it would be complied with by the Bank; (ii) to express the principle that its costs were to be reimbursed; (iii) to explain the kind of work which service of such an injunction was likely to involve; (iv) to quantify its costs so far incurred at £150; (v) to call for early remittance of that sum; and (vi) to request confirmation that the Bank should immediately be advised of the amendment or discharge of the order. f
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[79] The relationship arising from that letter would, in my judgment, be sufficiently analogous to a contract to fall within the assumption of responsibility methodology. Once the commissioners had received that letter they would be justified in relying on the Bank to act in accordance with it. It would in such circumstances also be fair, just and reasonable that the Bank should in such circumstances owe a duty of care, if such be relevant where there has been an assumption of responsibility. h

[80] I therefore conclude in relation to Brightstar that unless the 29 January 2001 letter from the Bank were delivered to the commissioners before the funds were released, the Bank undertook no relevant assumption of responsibility and therefore owed no relevant duty of care to the commissioners. It did, however, undertake a sufficient assumption of responsibility and owed a duty of care in respect of what remained in Brightstar's account. i

- a [81] As to Doveblue, the letter of 31 January 2001 was written (and delivered) after the Bank had already discovered that it had failed to comply with the court's freezing injunction. The first page of the letter being in identical terms to that relating to Brightstar, there would have been a relevant assumption of responsibility if it had been received before the funds were released. In the event it arrived too late and could operate only as an assumption of responsibility giving
- b rise to a duty of care in respect of the funds still remaining in Doveblue's account.
- [82] I therefore conclude that on the facts pleaded in the particulars of claim in relation both to the Brightstar account and the Doveblue account, the Bank was under no relevant duty of care to the commissioners.

Order accordingly. Permission to appeal granted.

James Wilson Barrister (NZ).

Re Holy Trinity, Bosham

CHICHESTER CONSISTORY COURT

CHANCELLOR HILL

24 NOVEMBER, 10 DECEMBER 2003

Ecclesiastical law – Faculty – Jurisdiction – Faculty for exhumation and reinterment of human remains – Investigation of putative grave of King Harold – Whether cogent and compelling evidence existing for legitimacy of proposed research displacing presumption against exhumation.

The incumbent and churchwardens of the parish of Holy Trinity, Bosham sought a faculty for the archaeological investigation of two grave sites in the nave of that church. The objective of the proposed excavation was to establish whether one of the graves contained the remains of King Harold. It involved opening his putative coffin and removing a sample of bone for carbon dating testing and destructive DNA testing. At the hearing the court heard evidence: (i) that the vast preponderance of academic opinion pointed to the king having been buried at another site; (ii) that if bone were found the prospect of recovering the relevant chromosome material was between 10% and 30%; (iii) that DNA samples from men claiming direct descent from King Harold had provided no common chromosome comparator and the prospect of obtaining one remained speculative; and (iv) that the margin of error in carbon dating testing could produce only an inconclusive result.

Held – The Christian doctrine that burial in consecrated land was final and permanent created a presumption against any disturbance of human remains which had been interred there. Only if special circumstances could be shown for making an exception to the norm could departure from that presumption be justified. An applicant might be able to demonstrate a matter of great national, historic, or other importance concerning human remains or demonstrate the value of particular research or scientific experimentation which proved a cogent and compelling case for the legitimacy of the proposed research so as to make out special circumstances. In the instant case, although there might well be a legitimate national historic interest in identifying the final resting place of King Harold, the prospect of a meaningful result was so remote that the presumption against disturbance was not displaced. Nor was there sufficient reason to permit the opening of the coffin for visual inspection without scientific investigation. The petition would, accordingly, be dismissed (see [30]–[33], [36], [42], below).

Re Blagdon Cemetery [2002] 4 All ER 482 applied.

Notes

For faculty for removal of human remains from consecrated ground, see 10 *Halsbury's Laws* (4th edn reissue) para 1125.

Cases referred to in judgment

Atkins, Re [1989] 1 All ER 14, sub nom *Re Church Norton Churchyard* [1989] Fam 37, [1989] 3 WLR 272, Con Ct.

- a* *Blagdon Cemetery, Re* [2002] 4 All ER 482, [2002] Fam 299, [2002] 3 WLR 603, Arches Ct.
Druce v Young [1899] P 84, Con Ct.
Locock (dec'd), Re Rev(2003) 7 Ecc LJ 237.
Makin (dec'd), Re (2002) 6 Ecc LJ 414.
Pope, Re (1851) 15 Jur 614, Con Ct.
- b* *R v Tristram* [1898] 2 QB 371, DC.
St Mary Magdalene, Lyminster, Re (1990) 9 Consistory and Commissary Court Cases 1.
Walker, Re (2002) 6 Ecc LJ 417.

Cases referred to in skeleton arguments

- c* *Christ Church, Alsager, Re* [1999] 1 All ER 117, [1999] Fam 142, [1998] 3 WLR 1394, Ch Ct.
West Norwood Cemetery, Re (6 July 2000, unreported), Con Ct.

Petition

- d* The petitioners, the Revd Canon Thomas Jeremy Inman, Jennifer Margaret Fidler and Elizabeth Mary Ladbrooke, the incumbent and churchwardens of the parish of Holy Trinity, Bosham, applied by a petition dated 26 June 2003 for a faculty for archaeological investigation of two grave sites in the nave of that church. The petition was unopposed. The facts are set out in the judgment.
- e* *Timothy Briden* (instructed by *Brutton & Co*, Fareham) for the petitioners.
Justin Gau (instructed by the Registrar of the Diocese of Chichester) as counsel to the court.

Cur adv vult

- f* 10 December 2003. The following judgment was delivered.

HILL Ch.

- g* [1] As every schoolboy knows, King Harold II was killed at the battle of Hastings in 1066. He was hit in the eye with an arrow. He is reputedly the only king of England since the time of Edward the Confessor whose final resting place is unknown. The issues before me in this petition include whether or not his mortal remains are interred at the foot of the chancel steps in the ancient church of Holy Trinity, Bosham. The consistory court was convened in the parish church immediately above the location in question. The case for the petitioners was advanced by Mr Timothy Briden of counsel. The evidence was tested by *h* Mr Justin Gau of counsel who had been appointed acting archdeacon to act as counsel to the court. I am grateful to both counsel for the skill and economy with which they dealt with the complex scientific, historic and archaeological issues raised and for their assistance on the doctrinal and legal questions involved.

- j* THE PETITION

[2] By a petition dated 26 June 2003, the incumbent and churchwardens of the parish seek a faculty to authorise the following works: 'Archaeological investigation of two grave sites in the nave, to be followed by complete restitution of the area.' This is a somewhat innocuous shorthand for a specific project more fully explained in the parish's statement of needs dated 18 February

2003. This commendably detailed statement sets out factors indicative of a nexus between the parish and King Harold II. Amongst the matters referred to was the depiction in the Bayeux Tapestry of Harold's visit to 'Bosham Ecclesia' in 1064; excavations in 1865 which exposed a child's tomb reputed to be that of the daughter of King Canute; and the opening up in 1954 of a tomb which contained bones believed to be those of King Harold. Reference was made to the possibility that there may be another grave nearby and to interest which had been shown by television companies in the story of Harold.

[3] The statement of needs went on to assert that—

'the parish will be very glad to have the most authoritative possible investigation of what is, may, or may not be under the floor of the church. The opportunity for the graves to be examined and assessed by the best available experts, using modern technology, is very welcome, particularly because substantial disruption to this area of the nave floor is required now, because of continuing problems with rot to the wooden area ... [and] the proposed investigation and archaeological study will be fully funded by the [television] production company.'

It refers to the comparatively new technologies of carbon dating and DNA testing. Implicit in the proposal is the exhumation of such human remains as may be found. The statement of needs continues:

'The investigation would form part of a substantial, serious, and not sensational, television programme about the death and burial of Harold ... [I]t is the very fact of the present mixture between history and conjecture which justifies an attempt to get closer to the truth, even if a full scientific resolution cannot be guaranteed.'

[4] To this statement of needs was annexed a summary of the arguments for the case that Harold may be buried at Bosham. The proposal documentation included a draft method statement from Development Archaeology Services. Under the heading 'Objectives of the Excavation' it is stated (para 2.1):

'To locate and record burials [two] under the nave of Holy Trinity Church Bosham. After archaeological recording make faunal/skeletal material available for recovery by selected specialists for subsequent scientific analysis.'

The methodology of DNA testing is set out at para 3.21.

[5] The proposal which I have merely summarised above was made the subject of timely and appropriate consultation with the Council for the Care of Churches and with English Heritage, together with the archaeological departments of West Sussex County Council and Chichester District Council. None of the consultees evinced any support for it. Advice was sought from the Diocesan Advisory Committee on the basis of the proposal set out in the statement of needs. This resulted in a decision not to recommend the works. A certificate to this effect was issued on 13 June 2003. The Council for British Archaeology and the Society for the Preservation of Ancient Buildings declined to comment on the proposal.

[6] The petitioners' case, however, was somewhat modified both prior to and during the hearing. In opening, Mr Briden abandoned the proposal to open up the second of the coffins and to examine the contents thereof. In closing, the focus had moved further. DNA testing of the remains seemed no longer to be the

- a dominant objective, although this was revived to some extent in a letter received subsequent to the hearing to which I shall return. Instead, Mr Briden urged upon me a threefold gradated approach to the petition. He invited me first to consider a detailed archaeological investigation, secondly the opening up of the putative coffin of Harold, and thirdly the authorisation of the removal of a sample of bone for destructive testing. I regret that this superficially attractive course belies the complexity of this case.
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WITNESSES

- [7] For the petitioners, Mr Briden called Mr Timothy Tatton-Brown, consultant archaeologist, Mr Richard Meynell RIBA, the parish's inspecting architect, and Canon Thomas Inman, the incumbent. Each read his witness statement, which was supplemented by some further evidence-in-chief, and was then cross-examined. There was little that proved contentious. Mr Tatton-Brown produced a detailed report dated 29 January 2003 by Professor James Campbell FBA, Professor of Anglo-Saxon History, Worcester College, Oxford. Mr Meynell produced a copy of the church guide *The Story of Holy Trinity Church, Bosham*, revised in 1995 by the late Geoffrey W Marwood; a pamphlet entitled *The Stone Coffins of Bosham Church* (1974) also by Mr Marwood; and a copy of a draft method statement from Development Archaeology Services. In the immediate run-up to the hearing, two further method statements, each prepared by Cambrian Archaeological Projects, were filed in substitution for the original draft. The most recent was a second revision dated 6 November 2003. Canon Inman produced two publications by John Pollock, one entitled *Bosham: Ecclesia as shown in the Bayeux Tapestry—A Speculative Guide to Bosham Church c 1066* (3rd edn, revised, 1999) and the other *Harold: Rex—Is King Harold II Buried in Bosham Church?* (4th edn, 1996). The latter included a 2002 supplement to the fourth edition. Dr Mark Thomas, senior lecturer in the Department of Biology at University College, London was not called to give evidence. Counsel had agreed that his statement of 26 September 2003 be admitted in written form together with the written answers to certain pertinent questions, settled by Mr Gau. Further, during Mr Briden's closing submissions, in a coup de theatre rarely witnessed in the consistory court, he led evidence of certain scientific tests, the results of which Dr Thomas had telephoned to his instructing solicitors. This was later reduced into writing in a short statement dated 1 December 2003. I also received in evidence a witness statement from Mr Peter Huggins, an amateur archaeologist with a particular interest in Waltham Abbey.
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- [8] Mr Gau called no evidence since both he and the Venerable Roger Combes, Archdeacon of Horsham, in whose place he stood, were entirely neutral on the merits of the petition. I then heard from Dr Joseph Elders on behalf of the Council for the Care of Churches, Miss Judith Roebuck representing English Heritage, and Mr Martin Brown, formerly archaeological advisor to the Chichester Diocesan Advisory Committee who gave the views of the committee. Each read their statements and were questioned on them. As with the petitioners' witnesses both the factual and opinion evidence were largely uncontroversial. I received evidence in written form from Mr Mark Taylor, senior archaeologist at West Sussex County Council, and from Mr James Kenny, archaeological officer with Chichester District Council. I wish to record my thanks to the petitioners for the proactive manner in which they engaged in the consultation process, and to all of the consultees for their very helpful responses. It has greatly assisted the court.
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HISTORIC EVIDENCE

[9] Long tradition runs that King Canute, who succeeded the English throne in 1017, had a home in Bosham. His daughter reputedly fell into the mill stream behind the church and was drowned. In 1865, the then vicar took it upon himself to test the belief that she lay buried in the nave in front of what is now the chancel arch. On 4 August 1865, a stone coffin was found a few feet beneath the level of the floor in which were the remains of a child of about eight years. According to the church guide (p 7) 'the coffin was of rude workmanship, and was pronounced by archaeologists to be undoubtedly of the date of Canute'. It was left open for about three weeks for public view and then reburied. Fortunately, for the purposes of these proceedings, I am not asked to determine whether or not these remains really are those of Canute's daughter as a memorial tablet erected by the children of the parish in 1906, albeit in the wrong location, positively asserted. I note, however, that Mr Kenny helpfully directs inquirers to DW Peckham 'The Bosham Myth of Camile's Daughter' (1970) *Sussex Notes and Queries* XVII, 6, pp 179–184.

[10] In 1954, it was decided to replace the Victorian flooring with the present paving and at the same time the child's coffin was reopened. The church guide continues:

'To the great astonishment of the excavators, they found, close to the little girl's coffin, a second, beautifully carved Saxon coffin, previously undiscovered. This contained the remains of a stockily built man with evidence of an arthritic hip joint. Much speculation ensued as to who this was and the suggestion was made that it was Godwin [the great Earl of Wessex] himself. But, as the Anglo-Saxon Chronicle clearly states that Godwin died at Winchester in 1053 and was buried there, the theory is untenable.'

The excavations of 1865 and 1954 are more fully described in Geoffrey Marwood's booklet, *The Stone Coffins of Bosham Church*. It was rightly posited by Mr Briden that the excavation of 7 April 1954 was performed unlawfully, there being no faculty in place. However, as he also pointed out, it had something of an official flavour, there being some nine witnesses present including the Archdeacon of Chichester, the church architect, a surgeon, and a representative of the Ministry of Works.

[11] In the *The Stone Coffins of Bosham Church* (p 4) there is the following description of the newly discovered coffin:

'[It] was made of Horsham stone, magnificently finished, and contained the thigh and pelvic bones of a powerfully built man of about 5ft 6ins in height, aged over 60 years and with traces of arthritis. Whoever was buried here must have been a person of great importance to have been placed in such a prominent position in the church next to a King's daughter.'

It is also stated that it was probable that the coffin was opened at a much earlier date and the contents vandalised as there was in 1954 no trace of a skull and the remaining bones showed signs of fractures which would not have occurred with natural decomposition.

[12] Mr John Pollock, who was present at the hearing but was not called to give evidence, seeks in his booklet *Harold: Rex—Is King Harold II Buried in Bosham Church?* to make the case for the remains being those of King Harold. He acknowledges certain discrepancies, for example Harold died at the age of 44,

- a significantly younger than the age suggested following the 1954 examination. However he refers to Dr JP O'Sullivan, chief pathologist at St Richard's Hospital, Chichester, who formed the view from 'photographs that the grave contained part of the fractured femur of a left leg. Dr O'Sullivan agrees (although it is unclear with whom) that if the fracture occurred in life, then death must have followed within a week. Mr Pollock makes reference to *Carmen de Hastingae Proelio* (the Song of the Battle of Hastings) attributed to Guy, Bishop of Amiens from 1058 to 1075. The poem gruesomely records Harold's final moments as he is encompassed by four French knights:
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'With the point of his lance the first [Duke William] pierced Harold's shield and then penetrated his chest, drenching the ground with his blood, which poured out in torrents. With his sword the second [Count Eustace of Boulogne] cut off his head, just below where his helmet protected him. The third [Hugh of Pontieu] disembowelled him with his javelin. The fourth [Walter Giffard] hacked off his leg at the thigh and hurled it far away. Struck down in this way, his dead body lay on the ground.'

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- d It may be that the legendary arrow in the eye merely incapacitated Harold and that it was through the work of this raiding party by which he met his death. However, the Saxon historian RHC Davis describes the foregoing passage as 'the most impossible scene in the whole poem'. A later account by William of Malmesbury also emphasises a leg wound.

- e [13] Further, Mr Pollock seeks to justify the anonymity of the grave as follows:

'It is understandable that William had no wish to establish a shrine or any form of memorial to Saxon times which might develop into a focus for discontented interests in the unsettled years which were bound to follow the Conquest. His refusal to hand over the corpse to Harold's own mother, Gyda, for burial instances his discretion. She, surely, would have wanted her son to be buried in Westminster with the Confessor or in Winchester where all the earlier Saxon kings, and her own husband, had their resting place. Both of these sites were potentially places of pilgrimage.'

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- g He also makes reference to the pictorial representation of the events as they appear on the Bayeux Tapestry. In a scene in the tapestry which shows Harold being cut down by a horseman it looks as if the King is being struck on his left thigh. Certainly the historic embroidery portrays Harold stopping to pray in Bosham church before he started from Bosham on his ill-fated journey to
- h Ponthieu and Normandy in 1064. A reproduction of this section of the tapestry now hangs on the north wall of the church.

- [14] Against this background, the petitioners commissioned a report from James Campbell, Professor of Anglo-Saxon History and Fellow of Worcester College, Oxford, to investigate the claim. In his paper 'Could King Harold II have been buried at Bosham?', he describes Mr Pollock's case, which I have outlined above, as 'unconvincing'. Professor Campbell accepts that the incompleteness of the skeleton at Bosham and particularly its headlessness tends to support the hypothesis that the remains are those of a battle casualty. He makes reference to dismemberment and decapitation of enemy corpses in eleventh century warfare. However, he also ventures that the translation of 'coxa' in *Carmen de Hastingae Proelio* is more likely to mean 'genitals' than 'thigh' or 'femur'. *Carmen de*
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Hastings Proelio records 'Heraldi corpus collegit dilaceratum' (translated by Barlow as 'He assembled Harold's mangled body').

[15] Professor Campbell also considers and discounts the traditional understanding that Harold was buried by the sea. References to this effect appear in *Carmen de Hastings Proelio* and in the accounts of William of Poitiers and Ordericus Vitalis. William seems to lay aside the title of Duke and assume the royal title beside the tumulus following the cliff-top funeral and he distributes alms to the poor. However, Professor Campbell states that by far the most plausible and detailed account of the burial of Harold is of his interment at the house of secular canons at Waltham, which had been lavishly endowed by Harold. Referring to Watkiss and Chibnall (eds) *The Waltham Chronicle* (1994) pp 46–56, he puts it thus:

'Harold visited the monastery on his way home from Stamford Bridge to Hastings. Two canons were sent with him to bring back Harold's body. After the battle they begged William for the body. He first refused, saying that he intended to found a monastery where all the fallen, including Harold, might be prayed for. Then he changed his mind, refused the gold they offered, and went to look for the body. They were unable to identify it. Therefore one of them went to fetch Edith swan-neck, Harold's cubicularia (concubine, or "hand-fast" wife). She found the body; and they took it to Waltham.'

Support for this account is to be found in *William of Malmesbury's Gesta Regum Anglorum: The History of the English Kings* (c 1130) (edited by Mynors, Thomson and Winterbottom (1998) vol 1, para 247). See also Freeman *The History of the Norman Conquest of England* (1867–1879) vol iii, pp 781–784. Mr Peter Huggins, an amateur archaeologist, indicates that he and his wife have dug extensively inside the present Norman church and in the abbey grounds at Waltham. He concludes that no grave which could be attributed to Harold has yet been found at Waltham Abbey.

[16] In part of his report, Professor Campbell indicates that we are 'at a loss to distinguish between fact and fiction, true reporting and literary artifice, or politically angled contrivance'. In similar vein, Mr Gau in his closing submissions spoke of the 'beguiling romanticism' of Bosham church with a long history and engaging oral tradition. This court must look at the best available interpretation of the best available evidence. Professor Campbell's objective and expert report is compelling. He states: '... in short the great likelihood is that Harold could have been buried at Waltham.' This was the church which he had endowed. From the time of William of Malmesbury his remains were widely believed to be so interred, both by the community there and by commentators and chroniclers. Professor Campbell states:

'The written sources and the Tapestry do not support the "Harold is buried at Bosham theory", and to the extent that they can be made to do so it is by argument so tortuous as to be almost self-defeating and by resort to the contention that in circumstances of very imperfect information a very large number of things are, technically, possible.'

The possibility that Harold might have survived the battle of Hastings and died later, which gained some currency, is considered by Professor Campbell and convincingly rejected.

- a [17] In cross-examination by Mr Gau, both Mr Tatton-Brown and Mr Meynell expressed the opinion that it was unlikely that Bosham church was the resting place of King Harold. Canon Inman remained curious to have a Yes or No answer to the current uncertainty. He did not regard ambivalence as a satisfactory outcome. He appeared content when I suggested to him that Professor Campbell's report seemed determinative. Such conclusion is bolstered
- b by Dr Elders who states: 'After wide consultation, I know of no professional historian or archaeologist who considers it likely that King Harold is buried at Bosham'; by Mr Taylor who 'always felt that Waltham Holy Cross had a better claim'; and by Mr Kenny whose conclusion is that 'there is no evidence that King Canute, his (unknown) daughter, Earl Godwin or his son King Harold are buried in the church'. Miss Roebuck and Mr Brown are of the same mind. The reality
- c is that in advancing the case in favour of Harold being buried in Bosham church, Mr Pollock finds himself in a minority of one. His imaginative theory does not bear academic scrutiny.

SCIENTIFIC EVIDENCE

- d [18] The preponderance of the scientific evidence came in written form from Dr Thomas of University College, London whose expertise lies in the study of human genetic variation and its use in inferring ancestry, population history and human evolution. His statement refers to the techniques employed in his laboratory to carry out research on bones believed to be approximately 1000 years old. He says it is possible to extract DNA from such ancient material
- e and compare Y-chromosome markers with those obtained from modern putative descendants. He would require a piece of bone weighing approximately 1g for the purposes of extracting DNA. This would involve taking approximately 1 sq cm of bone from the middle of the femur for preference as compact bone is more likely to produce positive results. He states that DNA may be recovered
- f from bones as old as 2000 years, but recovery is dependent on a number of factors relating to preservation conditions and age. From the information which Dr Thomas had as to the state of the bones when examined in 1954, he believed it possible to recover DNA although the results could not be guaranteed. The testing is styled 'destructive' and Mr Briden informed me that nothing would remain of the sample following the test.
- g [19] One problem which Dr Thomas identified was the handling of the bones in 1954. Mr DA Langhorne, surgeon, is photographed with ungloved hands, standing astride the open grave holding a piece of bone. It is highly likely that all the named witnesses to the excavation in 1954 might likewise have handled the bones as may others whose identities are not recorded. The DNA of a direct male
- h relative of each such person needs to be taken so that contamination can be excluded. No evidence was led by the petitioners as to whether such a venture in this instance was feasible. As Dr Elders pointed out, it may well be impossible to exclude the DNA type of all those who have previously handled the bones. Thus, in the words of Dr Thomas, 'an extra layer of credibility' will be lost.
- j [20] Dr Thomas expresses the opinion that it is worth undertaking the technically difficult process of extracting and typing DNA from these ancient remains. In answer to Mr Gau's written questions, he concedes that the oldest bone samples from which he has successfully extracted DNA for comparison with that of living people claiming descent date from the Holocaust, some 60 years ago, and puts the likelihood of recovery of Y-chromosome at 10%–30%. Commenting on the process in his statement, he continues:

'However, this should only be undertaken if it can be shown that the putative descendants of Harold II and his brother Tostig do share a recent common male-line ancestor through Y-chromosome evidence.'

Here again, the petitioners' case has changed over time. According to the statement of needs, the intention was to compare the DNA with that of the bones in the funerary chests of the Godwin family in Winchester Cathedral. Next came a proposal for the study of individuals in the Cheshire area. On this matter, Dr Thomas commented in an email of 13 May 2003:

'Assuming that a combination of reliable genealogical records and consistent Y-chromosome typing results led us to believe with a reasonable degree of confidence that they were indeed descended from Tostig [Harold's brother], I think that the proposal to test these bones would have scientific merit. Most importantly, I believe that the study of the Cheshire individuals should be carried out before attempting to extract DNA from the bones since without information on Tostig's Y-chromosome, there is little point in going through the partially destructive, technically difficult and rather laborious process of extracting and typing DNA from ancient remains.'

[21] For reasons which were not explained, the testing of the Cheshire Godwins was not pursued. Instead Dr Thomas apparently carried out tests on samples taken from three people each claiming direct patrilineal descent from Harold. These were Roger Anderson, Maurice Stack and Mark Godwin. When Mr Briden opened his case, the results of these tests were unknown. All the court had was a bundle of genealogical papers including a document headed 'Ahnentafel Chart for Roger Lyle Anderson; others in French for, respectively, Grand-Duc Vladimir II, Monomakh de Kiev, and Prince Mstislav 1er de Kiev; some handwritten and largely incomprehensible notes; an extract from M Biddle (ed) *Winchester in the Early Middle Ages: An Edition and Discussion of the Winton Domesday* (1976); and an ancestor chart for Tarjei Førstøyl. Mr Briden made no submissions based on these documents and Mr Gau's questioning of Mr Tatton-Brown, whilst an interesting discursus, was far from illuminating. I do not consider that this documentation advanced the petitioners' case in any meaningful way. It called for explanation and interpretation, and there was none.

[22] As the hearing was drawing to a close, a succession of Chinese whispers brought to the court the results of the tests conducted in Dr Thomas' laboratory in London. Mr Briden informed the court that having examined the samples from each of the gentlemen claiming to be direct descendants of Harold, the results proved conclusively that there was no common Y-chromosome type in that all three were different. Absent a known comparator any DNA testing would be pointless. Following the hearing, the petitioners' solicitors wrote to the diocesan registrar suggesting that there were six further candidates who had come forward as a result of the publicity which it generated. Even in the absence of a formal application from the petitioners, I have considered whether to reopen the evidence and to allow further testing to take place but have decided against such a course. It remains a matter of speculation whether this further testing would yield better results. Even if it were to do so, which is far from certain, and the prospects of identifying DNA from a known comparator were improved, the other difficulties highlighted elsewhere in this judgment would remain and the petition would not be differently determined. Further, even with a known

a comparator, the best that could be achieved would be to point to a commonality with the male Godwins and not necessarily with Harold himself.

[23] That only left the question of carbon dating, a matter outwith the expertise of Dr Thomas, as appears from the answers to Mr Gau's questions. Mr Brown indicated that the best that this testing could do would be to provide the age of the sample of bone with an accuracy of plus or minus 30–40 years. b Dr Thomas has suggested in his witness statement that carbon dating should also be carried out 'to determine the timescale within which the bones are likely to have been buried which would be accurate to within 50 years'. The difficulty with this, as Mr Gau rightly submitted, is that the test is insufficiently precise to be determinative. It could not rule out the bones being those of Harold's father, brothers, or male issue.

c ARCHAEOLOGICAL EVIDENCE

[24] This is a matter to which I shall return later. For present purposes, it is sufficient to note that all witnesses who expressed an opinion were agreed that it is a matter of conjecture as to what might be found within the coffin. Whilst there are photographs and notes of the 1954 excavation, the current content is d unknown. Mr Tatton-Brown said in cross-examination that there was no guarantee that any human remains would be found. When the reputed grave of Canute's daughter was opened up in 1954 there was only dust, as opposed to the skeletal material which had been present in 1865. There is a distinct possibility that, whoever might have been buried in the past, there may be nothing left to e exhume at all.

THE LAW ON EXHUMATION

[25] Any disturbance of human remains in consecrated places of burial requires the authority of a faculty. See the judgment of Wills J in *R v Tristram* [1898] 2 QB 371. The principles which govern the grant or refusal of any such f faculty were explored in the recent decision of the Arches Court in *Re Blagdon Cemetery* [2002] 4 All ER 482, [2002] Fam 299. It is summarised thus (at [20]):

'Lawful permission can be given for exhumation from consecrated ground as we have already explained. However, that permission is not, and has never been, given on demand by the consistory court. The disturbance of remains which have been placed at rest in consecrated land has only been g allowed as an exception to the general presumption of permanence arising from the initial act of interment.'

Reference is made to a paper entitled 'Theology of Burial' of September 2001 which was prepared by the Right Revd Christopher Hill, Bishop of Stafford and h extracts from which are quoted in the judgment including the following (at [23]):

'The permanent burial of the physical body/the burial of cremated remains should be seen as a symbol of our entrusting the person to God for resurrection. We are commending the person to God, saying farewell to them (for their "journey"), entrusting them in peace for their ultimate j destination, with us, the heavenly Jerusalem.'

[26] A full copy of Bishop Hill's statement was put before me by Mr Gau. Its concluding paragraph, not reproduced in *Re Blagdon Cemetery*, reads:

'In cases of Christian burial according to Anglican rites, prescinding from cases where there has been a mistake as to the faith of the deceased, I would

argue that the intention of the rite is to say "farewell" to the deceased for their "journey"; to commend them to the mercy and love of God in Christ; to pray that they may be in a place of refreshment, light and peace till the transformation of resurrection. Exhumation for sentiment, convenience, or to "hang on" to the remains of life, would deny this Christian intention.'

[27] The Arches Court in *Re Blagdon* stated (at [33]):

'We have concluded that there is much to be said for reverting to the straightforward principle that a faculty for exhumation will only be exceptionally granted.'

This general test has been variously articulated, not least by my distinguished predecessor, Edwards QC Ch, as 'good reason' and 'special and exceptional grounds'. See *Re Atkins* [1989] 1 All ER 14, [1989] Fam 37, and *Re St Mary Magdalene, Lyminster* (1990) 9 Consistory and Commissary Court Cases 1 respectively, as approved in *Re Blagdon Cemetery* [2002] 4 All ER 482 at [34]. The Arches Court in *Re Blagdon Cemetery* continued (at [35]):

'The variety of wording which has been used in judgments demonstrates the difficulty in identifying appropriate wording for a general test in what is essentially a matter of discretion. We consider that it should always be made clear that it is for the petitioner to satisfy the consistory court that there are special circumstances in his/her case which justify the making of an exception from the norm that Christian burial (that is burial of a body or cremated remains in a consecrated churchyard or consecrated part of a local authority cemetery) is final. It will then be for the chancellor to decide whether the petitioner has so satisfied him/her.'

[28] Mr Gau informed me that his researches had revealed that this is the first occasion in which a consistory court had been invited to permit the exhumation of human remains so that a sample might be removed and destroyed. Earlier cases are of limited relevance. The case of *Re Pope* (1851) 15 Jur 614 concerned whether or not the deceased, very recently buried having died in a workhouse, was one Sarah Pope, a co-trustee of certain property who had gone missing some months before. The application, described by Dr Lushington as being of a 'novel nature' was allowed and an exhumation was permitted for identification purposes. In *Druce v Young* [1899] P 84 the issue was whether or not there were any remains at all in the vault. It arose out of a disputed probate action in which it was alleged that the testator had been seen alive after the date of the grant of probate. A faculty was issued. More recently, in *Re Walker* (2002) 6 Ecc LJ 417, a faculty was granted permitting an exhumation for a pathological inspection and examination of the remains of stillborn twins since cogent evidence indicated that only one twin might have been buried. Conversely in *Re Makin (decd)* (2002) 6 Ecc LJ 414, a faculty for the opening up of a casket was refused despite questions being asked about whether it contained all the bodily organs of a five-month-old child who had died at Alder Hey Hospital in Liverpool.

[29] More recent still is the case of *Re Locock (decd)* (2003) 7 Ecc LJ 237 in which a faculty was sought for the exhumation of a gentleman who had been buried in December 1907. It was contended that he was the illegitimate son of HRH Princess Louise, a daughter of Queen Victoria. It was proposed to compare DNA obtained from his remains with that of the Russian Tsarina, Alexandra who had been murdered in 1918 and whose remains had been identified by a

a comparison with a blood sample obtained from HRH Prince Philip, Duke of Edinburgh. I was informed by Mr Briden, who acted as amicus curiae in the case, that details of the Tsarina's DNA are on a website. In refusing the faculty, Goodman Ch observed:

b '... the Locock family has lived with its legend or tradition for well over a century without any real difficulty and without any real need to know the answer which Mr Locock has sought. The family has had to accept, and indeed managed to accept, up to now, that its curiosity as to the truth or otherwise of the legend or tradition would have to remain unanswered.'

c The chancellor concluded that the petitioner had failed to discharge the burden of proof to demonstrate that an exception should be made to the presumption that a body or ashes, once interred in consecrated ground should remain undisturbed. In this case, it should be noted, the prospect of obtaining typable DNA was placed at better than 50%. I am aware that an appeal is pending. However it is unlikely to be heard for some months and there may be a further delay before a judgment is handed down. I content myself by observing that d Goodman Ch's judgment to my mind represents both the correct approach and the proper conclusion.

APPLYING THE LAW IN THE INSTANT CASE

[30] I consider that Dr Elders may have been placing the test too high when he said in his witness statement:

e '... the Council for the Care of Churches recommends that, in order to override the presumption against disturbance, an *overwhelming* case must be proved for the *necessity* of the research.' (My emphasis.)

f I consider that this test would be better expressed that in order to displace the doctrinal principle that human remains are not to be disturbed a cogent and compelling case must be proved for the legitimacy of any research.

[31] As I read the authorities, the following approach would appear to be appropriate in cases such as these. (i) As a matter of Christian doctrine, burial in consecrated land is final and permanent. (ii) This general norm creates a presumption against exhumation. (iii) Exhumation in this context comprises g any disturbance of human remains which have been interred. (iv) Departure from such presumption can only be justified if special circumstances can be shown for making an exception to the norm. (v) An applicant might be able to demonstrate a matter of great national, historic or other importance concerning human remains. (vi) An applicant might also be able to demonstrate the value h of some particular research or scientific experimentation. (vii) Only if the combined effect of evidence under (v) and (vi) proves a cogent and compelling case for the legitimacy of the proposed research will special circumstances be made out such as to justify a departure from the presumption against exhumation.

j [32] Applying that approach to the facts of this case, I am satisfied that there may well be a legitimate national historic interest in identifying the final resting place of the only English monarch since Edward the Confessor of whom this is unknown. I consider that Mr Gau was wrong when he suggested otherwise. Despite their laudable objective, I am far from satisfied that the petitioners' proposal will advance their aim. On the contrary, I am convinced that it is doomed to failure. My principal reasons are as follows: it is a matter of conjecture

whether any human remains will be found in the coffin; such remains as may be found are highly unlikely to be those of Harold since the vast preponderance of academic opinion points to him having been buried at Waltham Abbey; the prospect of recovering Y-chromosome material from such bone as may be found is as little as 10%–30%; there is currently no evidence of putative descendants of Harold sharing a recent common male-line ancestor through Y-chromosome evidence; the prospect of obtaining such evidence remains speculative; thus any DNA testing is futile and the margin of error in carbon dating testing can, at best, only produce an inconclusive result.

[33] Whilst I am sympathetic to the continuing quest for knowledge concerning our nation's history, the prospect of obtaining a meaningful result is so remote in this instance that the presumption against disturbance is not displaced. The evidence led by the petitioners fails to come near to the standard required. This aspect of the petition therefore fails.

[34] In deference to the submissions which I received, I should add some further comment. First, Dr Elders referred me to the Draft Guidelines on the Treatment of Human Remains, taken from *Church Archaeology: Its Care and Management* (Council for the Care of Churches, 1999) and to his work as co-ordinator of the Church Archaeology and Human Remains Working Group, set up by the Cathedral and Church Buildings Division of the Archbishops' Council and English Heritage. This group is due to report in the New Year. In para 9.1, reference is made to the taking of samples for scientific analysis. It concludes: 'However, such invasive techniques should only be permitted as part of a planned programme of clearly justified research.' I endorse both the work of the group and these guidelines. In this case, the evidential justification for the research is patently inadequate.

[35] Secondly, much was made by counsel and some of the witnesses as to the floodgates argument whereby if this petition is to be allowed then a rush of similar petitions will result. Mr Briden found himself arguing the contrary of that which he had advanced in *Locock's* case. I do not consider that the floodgates argument has any application in cases of this type. Since special circumstances must always be demonstrated in each and every case in order to justify a departure from the presumption against exhumation, the test *ex hypothesi* is self-regulating. Each case will be determined on its own facts. Only if consistory courts devalue the concept of special circumstance will the floodgates open.

ARCHAEOLOGICAL INVESTIGATION

[36] I therefore turn to those parts of the proposal which fall short of scientific investigation. Mr Briden invited me to permit the opening up of the coffin for visual inspection only. He styled this a 'technical exhumation', as indeed he had the scientific testing proposal. Professor Campbell stated in his report that even though the evidence is against the identification of the remains with those of Harold, that does not mean that this burial is not interesting and raises questions worth pursuit. Whilst I am satisfied that something may be learned from such an exercise, I consider it to be little more than well-founded curiosity. Dr Elders told me that one could tell slightly more from the bones now than in 1954, but he regarded them as one of the less interesting groups of bones to be found. I do not consider that the evidence which I have rehearsed at some length in this judgment, amounts to a good reason for permitting even this lesser exhumation. I therefore also reject the petition on this more limited basis.

[37] That then leaves the question of a more general archaeological investigation. The starting point for this discussion takes us away from the putative Harold grave and to a separate and discrete area of the nave, to an 'anomaly' which was identified by a non-invasive radar survey in 1999. It is situated in the nave beneath the second pew from the front on the north side. It may be a further grave. According to Mr Meynell, it is difficult to say what it is although there is an ingression of water or dampness. This dampness is causing the floor to rot and Mr Meynell indicated that it will be necessary to remove the rotten floor and timber supports together with the granular fill, and to replace them. He envisages that this will be to a depth of about 30 cm although this work may prove more extensive upon opening up. He did not anticipate the removal of any stone floor slabs.

[38] Mr Briden informed me that these works will be the subject of a future petition and the petitioners consider that the archaeological investigation could sensibly be combined with those works. I understand that the proposal has been considered by the Diocesan Advisory Committee. Mr Briden stated that the petition is likely to be uncontroversial. He has considerable experience in these matters and I have no reason to doubt him. However, I am reluctant to adjudicate upon this aspect of the current petition when I am not yet seized of the forthcoming petition upon which it is predicated. Dr Elders, Mr Brown and Miss Roebuck each indicated that they would be more inclined to support a petition limited to archaeological research, and although they were broadly happy with the content of the method statement prepared by Cambrian Archaeological Projects Ltd, they were disadvantaged in that it embraced not merely the archaeological survey but also the scientific research already discussed. Equally, it addresses a 32 sq m area and does not differentiate between the putative Harold site and that of the anomaly.

[39] In the circumstances, the appropriate course is for the question of an archaeological investigation of the anomaly site to be determined within the context of the forthcoming petition, by which time informed comment will have been obtained from relevant consultees on both the extent of the remedial works proposed and the specific archaeological investigation as contained in a further revision of the method statement taking into account my findings and rulings in this judgment.

[40] Returning to the putative Harold grave, I consider that I have no option but to stand over a consideration of an archaeological investigation of this site since it is dependent upon the outcome of the forthcoming petition. The justification for the proposed investigation is the disturbance inevitably caused by the proposed works to the anomaly. Until the extent of those works has been determined, it would be premature to resolve this matter. Additionally, this petition has been pursued on the basis that the funding for the proposal is to be met by a television production company. In the light of my adjudication on the primary issue there is to be no exhumation and thus the financial support may not be forthcoming. It would appear from Canon Inman's statement that the parish wishes to apply its limited resources in mission, ministry and maintenance. I make no criticism of that. Mr Briden could only go so far as to say that there was a fair chance that the television company would be interested in funding a limited proposal.

[41] Having regard to these uncertainties, but conscious of the widespread professional opinion which favours a revisiting and tidying up of the excavation site of 1954, I propose to adjourn consideration of this aspect of the petition for

determination at the same time as the forthcoming petition relating to the anomaly. Amongst other things, I will need to be satisfied that the further revision to the method statement has regard to my adjudication on the exhumation issue and ensures that in such archaeological investigation as may be permitted, proper respect is accorded the human remains in the coffin. a

[42] Subject to this one matter, I therefore order that the petition be dismissed. As agreed at the conclusion of argument, the costs of the petition, to include those of the acting archdeacon, will be borne by the petitioners. b

Petition dismissed.

Victoria Parkin Barrister.

Jerome v Kelly (Inspector of Taxes)

[2004] UKHL 25

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD SCOTT OF FOSCOTE, LORD WALKER OF GESTINGTHORPE AND LORD BROWN OF EATON-UNDER-HEYWOOD

10, 11 MARCH, 13 MAY 2004

Capital gains tax – Disposal of assets – Time of disposal – Parties to disposal – Bare trustees of land entering into contract for sale – Beneficial owners of land assigning part of their beneficial interests to trustee of overseas settlement – Bare trustees completing sale of land – Whether beneficial owners chargeable to capital gains tax on that part of proceeds of sale belonging to trustee of overseas settlement – Whether statutory provision relating to time of disposal relating also to parties to disposal – Capital Gains Tax Act 1979, s 27(1).

On 16 April 1987 the taxpayer, his wife and his brother entered into a contract with a development company for the sale of land with development potential. At that date the taxpayer and his brother were trustees for sale of the main part of the land, holding it on trust for themselves and the taxpayer's wife in undivided shares (shortly thereafter the taxpayer and his wife were given the remainder of the land which they held in trust for themselves jointly). In December 1989 the taxpayer and his wife assigned part of their beneficial interests in the land, subject to and with the benefit of the contract, to a Bermuda company as trustee of two overseas settlements. The contract was later completed in three tranches in 1990, 1991 and 1992. Under s 27(1)^a of the Capital Gains Tax Act 1979, where an asset was disposed of and acquired under a contract, the time at which the disposal and acquisition was made was the time the contract was made, and not, if different, the time at which the asset was conveyed or transferred. The Revenue assessed the taxpayer to capital gains tax for 1987-88 on the basis that the effect of s 27(1) was that the taxpayer and his wife had on 16 April 1987 disposed of the whole of their beneficial interests in the land, despite the assignments which they had made between contract and completion. The assessment was made on the basis of their beneficial ownership, rather than on the basis of the legal title, because s 46(1)^b of the 1979 Act provided that in relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee, the 1979 Act applied as if the property were vested in the person for whom the trustee or nominee was trustee or nominee. The taxpayer appealed. The Special Commissioner found in favour of the Revenue, on the basis that the effect of s 27(1) was that the date of the contract, 16 April 1987, was the date at which the disposal had been made and that it followed that that was the date which identified the disposal, including the parties to it and their interests in the property the subject of the disposal, so the fact that after the date of the contract and before completion the taxpayer and his wife had assigned parts of their beneficial interests to the Bermuda company did not affect the analysis of the disposal. The taxpayer's appeal against that decision was allowed by the

^a Section 27, so far as material, is set out at [15], below

^b Section 46, so far as material, is set out at [22], below

judge, but the Court of Appeal allowed the Revenue's appeal. The taxpayer appealed. a

Held – Section 27(1) of the 1979 Act was directed solely to the timing of a disposal. It did not introduce a further statutory fiction as to the parties to the disposal. It did not say that the contract was the disposal, but that a disposal effected by contract and later completion was to be treated, for timing purposes, as made at the date of the contract. In the instant case, what had happened on completion, by stages, of the contract, had been that the taxpayer, his wife, and his brother had executed three transfers of three separate pieces of land, transferring the legal estate in their capacity as trustees for sale, under the 16 April 1987 contract. Section 27(1) made the disposals of beneficial interests by the taxpayer, his wife and his brother, relate back to 16 April 1987, and so to the 1987–88 tax year. Section 46(1) required the trustees for sale to be treated as nominees for the Bermuda company to the extent of the interests which that company had acquired in December 1989. The disposal by the Bermuda company was not an occasion of charge because of its non-resident status. The appeal would therefore be allowed (see [1], [11]–[14], [27], [38], [39], [44], [48], [49], below). b
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Notes

For time of disposal and acquisition where an asset is disposed of under contract, see 5(1) *Halsbury's Laws* (4th edn reissue), para 22.

The provisions contained in s 27 of the Capital Gains Tax Act 1979 now appear in s 28 of the Taxation of Chargeable Gains Act 1992. e

For the Taxation of Chargeable Gains Act 1992, s 28, see 42 *Halsbury's Statutes* (4th edn) (2002 reissue) 1192.

Cases referred to in opinions

- Aberdeen Construction Group Ltd v Inland Revenue Comrs* [1978] 1 All ER 962, [1978] AC 885, [1978] 2 WLR 648, HL. f
- Broome v Monck* (1805) 10 Ves 597, 32 ER 976, [1803–13] All ER Rep 631, LC.
- Burca v Parkinson (Inspector of Taxes)* [2001] STC 1298.
- Burnett's Trustee v Grainger* [2004] UKHL 8, (2004) Times, 8 March.
- Chang v Registrar of Titles* (1976) 137 CLR 177, Aust HC. g
- Eastham (Inspector of Taxes) v Leigh London and Provincial Properties Ltd* [1971] 2 All ER 887, [1971] Ch 871, [1971] 2 WLR 1149, CA.
- Kidson (Inspector of Taxes) v Macdonald* [1974] 1 All ER 849, [1974] Ch 339, [1974] 2 WLR 566.
- Kirby (Inspector of Taxes) v Thorn EMI plc* [1988] 2 All ER 947, [1988] 1 WLR 445, CA. h
- Lysaght v Edwards* (1876) 2 Ch D 499.
- Marshall (Inspector of Taxes) v Kerr* [1993] STC 360, CA; *rvsd* [1994] 3 All ER 106, [1995] 1 AC 148, [1994] 3 WLR 299, HL.
- Paine v Meller* (1801) 6 Ves 349, 31 ER 1088.
- Rayner v Preston* (1881) 18 Ch D 1, CA. j
- Shaw v Foster* (1872) LR 5 HL 321, HL.
- Swiss Bank Corp v Lloyds Bank Ltd* [1979] 2 All ER 853, [1979] Ch 548, [1979] 3 WLR 201; *varied* [1980] 2 All ER 419, [1982] AC 584, [1980] 3 WLR 457, CA; *affd* [1981] 2 All ER 449, [1982] AC 584, [1981] 2 WLR 893, HL.
- Wall v Bright* (1820) 1 Jac & W 494, 37 ER 456.

Cases referred to in list of authorities

- a** *Garner (Inspector of Taxes) v Pounds Shipowners and Shipbreakers Ltd, Garner (Inspector of Taxes) v Pounds* [2000] 3 All ER 218, [2000] 1 WLR 1107, HL.
Johnson v Edwards (Inspector of Taxes) [1981] STC 660, (1981) 54 TC 488.
London and South Western Ry Co v Gomm (1882) 20 Ch D 562, [1881–5] All ER Rep 1190, CA.
- b** *Price v Strange* [1977] 3 All ER 371, [1978] Ch 337, [1977] 3 WLR 943, CA.
R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.
Sargaison v Roberts [1969] 3 All ER 1072, [1969] 1 WLR 951.
Sharp v Thomson [1997] 1 BCLC 603, HL.

c Appeal

Michael Jerome (the taxpayer) appealed with permission given by the House of Lords' Appeal Committee on 7 April 2003 from the decision of the Court of Appeal (Schiemann, Hale and Jonathan Parker LJ) on 20 December 2002 ([2002] EWCA Civ 1879, [2003] STC 206) allowing the Revenue's appeal from the

- d** decision of Park J on 15 April 2002 ([2002] EWHC 604 (Ch), [2002] STC 609) allowing the taxpayer's appeal from the decision of the Special Commissioner (Dr Nuala Brice) released on 19 July 2001 ([2001] STC (SCD) 70) dismissing the taxpayer's appeal against an assessment to capital gains tax for the tax year 1987–88 issued by H J Kelly (Inspector of Taxes). The facts are set out in the opinion of Lord Walker of Gestingthorpe.

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Robert Venables QC and Amanda Hardy (instructed by Stokes, Portsmouth) for the taxpayer.

Launcelot Henderson QC, Kenneth Munro and David Rees (instructed by the Solicitor of Inland Revenue) for the Revenue.

f

Their Lordships took time for consideration.

13 May 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.**g**

[1] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOFFMANN.**h**

[2] My Lords, the capital gains tax legislation deals with trusts in a practical way. Like most tax legislation, it is concerned with economic reality and efficiency of collection. In the case of bare trusts, such as nominee shareholdings, it ignores the trustee and treats his acts as those of the beneficiary. The latter has the entire economic interest in the assets and is therefore treated as having dealt with them. In the case of more complicated settlements, this system would not work. It might be no easy matter to determine how the economic benefit of the disposal has accrued to the various people with interests (fixed, vested, contingent and so forth) under the settlement. So that tax is charged upon the trustee, who is left to indemnify himself out of the fund.

j

[3] In both cases, the law avoids taxing the same gain twice. In the case of bare trusts, the mechanism is simple. The law taxes the beneficiary whether he

disposes of his beneficial interest or the trustee disposes of the entire property. In both cases there is a single charge upon the beneficiary. In the case of other trusts, the mechanism is different. The trustee is charged to tax, but because he is only the legal owner, he is entitled to an indemnity out of the fund. The beneficiary's interest is an item of property distinct from the underlying assets but an assignment of that interest is not ordinarily treated as a disposal giving rise to a liability to tax. Otherwise a beneficiary who disposed of his interest would be taxed twice on the same gains; once through the trustee's right of indemnity and once in his own right.

[4] This scheme for dealing with trusts has been part of the architecture of the capital gains tax since it was introduced by the Finance Act 1965: see s 22(5) and para 13(1) of Sch 7. Indeed, it goes back even further, being derived from similar provisions in the Finance Act 1962, which imposed income tax under a new Case VII of Sch D on short-term capital gains: see s 11(5) and (8). At the time of the transactions which give rise to this appeal, the relevant provisions were ss 46 and 58 of the Capital Gains Tax Act 1979.

[5] The facts are stated in the speech to be delivered by my noble and learned friend Lord Walker of Gestingthorpe and the judgments of the courts below. For present purposes I can summarise them briefly. In 1987 trustees holding land for various beneficiaries in undivided shares entered into a contract to sell it to a purchaser. In 1989 Mr and Mrs Jerome, who were absolutely entitled to interests in the land, assigned part of their beneficial interests (subject to the contract) to the trustees of two Bermuda settlements. By three conveyances in 1990–1992, the original trustees completed the contract of sale.

[6] What liabilities to capital gains tax followed from these transactions? The scheme of the Act would appear to provide a ready answer. The assignment to the Bermuda trustees was a disposal by Mr and Mrs Jerome of their beneficial interests, giving rise to a charge to tax on the gains which had accrued up to the date of the assignments. The conveyance was also a disposal, but was deemed to be the act of the persons absolutely entitled against the trustees. They were at that time the Bermuda trustees. Were it not for the fact that they were non-resident, they would have been liable for tax on the gains which accrued between the date of the assignments and the disposals which they were treated as having made when the trustees of the land executed the conveyances.

[7] The Inland Revenue submit, however, that this scheme has been displaced by s 27(1) of the 1979 Act, which provides that where an asset is disposed of and acquired 'under a contract', the time at which the disposal and acquisition is made is the time of the contract. So the disposal to the purchaser is deemed to have taken place in 1987 when the contract was made, which was before the assignments to the Bermudian trusts. At that time, the persons for whom the relevant beneficial interests were held were Mr and Mrs Jerome. So the disposal to the purchaser is deemed to have been made by them and they are the ones liable to tax. The Revenue do not carry through the deeming process to the extent of retrospectively treating the beneficial interests of Mr and Mrs Jerome as having been extinguished in 1987 by the completion of the contract in 1990–1992. Accordingly the Revenue submit that the Jeromes are also liable to tax on the 1989 disposal of their beneficial interests.

[8] I do not think that s 27 can properly be given this startling result. It was introduced into the capital gains tax legislation by s 56(2) and para 10 of Sch 10 to the Finance Act 1971. That Act abolished the income tax on short-term gains which had been introduced by the 1962 Act. Because that tax applied only to

a disposals which occurred within a certain period after acquisition (at first, three years for land and six months for shares and other assets) it was necessary to have provisions which identified exactly when the disposal and acquisition took place. Section 12(2) provided that when a contract was made to acquire or dispose of an asset, the contract should be deemed to be the acquisition or disposal. Other provision therefore had to be made for cases in which the contract was varied or dissolved or otherwise went off before the transaction was completed.

b [9] The capital gains tax introduced in 1965 was charged upon disposals whenever they occurred and the Act contained no provision for deeming a contract to be a disposal. The term was for the most part left to bear its ordinary meaning. This led to some academic speculation about whether a contract could be said to be a disposal on the ground that the purchaser acquires an equitable interest. The first edition (1967) of *Wheatcroft on Capital Gains Taxes* discussed these arguments and said (p 124 (para 6-39)) that there should be legislation to clarify the matter.

c [10] Parliament showed no sense of urgency. Nothing was done until the 1971 Act, when the relevant provision was included as para 10 of Sch 10 described in s 56(2) as having effect—

‘for making, in connection with the abolition of Case VII, modifications to the capital gains tax and the corporation tax on chargeable gains and for otherwise supplementing the provisions of this section.’

e [11] It is hard to see why the abolition of Case VII (which needed a provision to fix the time of the acquisition and disposal) should have made it necessary to introduce one for the capital gains tax, which did not depend on the time of disposal. The rules for the two taxes are quite distinct. Whatever may be the explanation, it seems to me clear that the paragraph was intended to deal only with the question of fixing the time of disposal and not with the substantive liability to tax. It does not deem the contract to have been the disposal as the 1962 Act had done. For that reason, it includes no provisions dealing with what happens if the contract goes off. In such a case, there will be no disposal and nothing to deem to have happened at the time of the contract. The time of the contract is deemed to be the time of disposal only if there actually is a disposal.

f This assumes that the contract will not in itself count as a disposal and so deals with the academic arguments about the effect of the equitable interest which arises at the time of the contract. But the paragraph seems to assume, as a matter which goes without saying, that the person who enters into the contract will be the person who makes the disposal. It gives no guidance on what is to happen if they are (or are deemed to be) different.

g [12] I rather suspect that the draftsman of the 1971 Act did not think about what should happen in the situation which has arisen in this case. But I do not think it would be right to attribute to Parliament an intention to impose a liability to tax upon a person who would not be treated as having made a disposal under the carefully constructed scheme for taxing the disposals of assets held on trust.

j And I would think such an intention especially improbable if the consequence would be to tax such a person twice upon the same gain. In my opinion s 27(1) of the 1979 Act was concerned solely with fixing the time of disposal by a person whose identity is to be ascertained by other means. It follows that the disposal under the conveyance to the purchasers was made by the Bermudian trustees and not by Mr and Mrs Jerome.

[13] I accept that this conclusion leaves certain puzzles about what exactly s 27(1) does do in a case like this. It is tempting to say that it simply cannot apply to a case in which the person who enters into the contract is different (or deemed to be different) from the person who completes it. But I agree with my noble and learned friend Lord Walker that this would mean that the date on which the purchaser was deemed to have acquired the assets would depend upon circumstances such as changes in beneficial ownership of which he might have no means of knowledge. On the other hand, if s 27(1) does apply, it may mean that a person will be deemed to have disposed of an asset at a time when he had no interest in that asset; indeed, when he may not even have existed. I would not be particularly concerned about the disponent not having had an interest in the property because this happens whenever someone contracts to sell property which he has not yet acquired. But the ontological problem is more difficult and can probably be solved only by saying that the disposal must be taken to have happened when the company or trust which completed the contract first came into existence. That is, I would accept, a rather makeshift answer. But I see no elegant solution to the problem posed by s 27(1). Among the inelegant solutions, that offered by the Revenue is in my opinion the least acceptable. I would therefore allow the appeal.

LORD SCOTT OF FOSCOTE.

[14] My Lords, I have had the advantage of reading in advance the opinions of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. For the reasons they give, with which I am in full agreement, I, too, would allow the appeal and make the order Lord Walker has proposed.

LORD WALKER OF GESTINGTHORPE.

[15] My Lords, this appeal turns on the construction of some provisions of the Capital Gains Tax Act 1979, since replaced by the Taxation of Chargeable Gains Act 1992. The provision of central importance is s 27(1) of the 1979 Act (now s 28(1) of the 1992 Act) which is in the following terms:

‘Where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred). This subsection has effect subject to section 20(2) above, and subsection (2) below.’

Section 20(2) is not relevant; I shall return to s 27(2). The main issue is whether s 27(1) (which the courts below treated as being, at least in some sense, a deeming provision) fixes not only the time of a disposal but also the person by whom it is made.

[16] Such a question can arise only on fairly unusual facts, and the facts of this case are both unusual and complicated. They are fully set out in the successive decisions of the Special Commissioner (Dr Brice) ([2001] STC (SCD) 170), Park J ([2002] EWHC 604 (Ch), [2002] STC 609) and the Court of Appeal (Schiemann, Hale and Jonathan Parker LJJ) ([2002] EWCA Civ 1879, [2003] STC 206). At this stage it is sufficient to give an abbreviated and simplified summary of the facts.

[17] Members of the Jerome family owned some pieces of land at Bridge Farm, Hook, Hampshire. The land had development potential and this was reflected in the terms of the contract dated 16 April 1987 by which they agreed to sell the land to Conder Developments Ltd (Conder). On 11 November 1987

- a Conder assigned its interest to Crest Estates Ltd (Crest) and references below to Conder include Crest as its assignee. The contract specified fixed prices for different parts of the land, totalling just under £4·465m. But the price was liable to adjustment both upwards (if completion of the sale of any lot occurred after the end of 1988) or downwards (in respect of approved expenditure by Conder in connection with the obtaining of planning permission, which Conder was under an obligation to seek). Completion was to take place on 16 May 1994 at latest, but with provision for earlier completion once outline planning permission had been obtained. The contract did not require the payment of any deposit.

- b [18] The contract was unconditional but Conder could rescind it at any time if outline planning permission for specified purposes was refused or was granted in an unsatisfactory form. Conder could also rescind if outline planning permission had not been granted within seven years (that is, by 16 April 1994). In the event outline planning permission was obtained (though only after an appeal) on 22 February 1990 and the contract was completed in three tranches as follows:

d	Plot 1	1 November 1990	£2,743,386
	Plot 2	23 December 1991	£509,282
	Plot 3	7 December 1992	£1,780,375

e

- [19] However, between the date of the contract and the dates of completion there were changes in the beneficial ownership of the land comprised in the contract. That is what has given rise to the issue in this appeal. In December 1988 Mr Michael Jerome (the taxpayer) and his wife Mrs Mary Jerome established two settlements with a single corporate [trustee] resident in Bermuda, Codan Trust Co Ltd (Codan). Under one settlement they took life interests in possession. The other was an accumulation and maintenance settlement for their children. Then during the tax year 1989–1990 (and before the completion of any part of the contract) they made assignments dated 15 December 1989 to Codan, as trustee of the two settlements, of one-half of their respective interests in the land, subject to and with the benefit of the contract with Conder.

- g [20] Before these assignments (and apart from a complication mentioned below) the land had been held by the taxpayer and his brother, Mr Oliver Jerome, as trustees (as to one-half) for Mr Oliver Jerome and (as to one-quarter each) for the taxpayer and his wife. After the assignments the beneficial interests were one-eighth each for the taxpayer and his wife and one-eighth each for the two Bermuda settlements, with Mr Oliver Jerome retaining his original interest.

- h [21] The complication was that a small area of land included in the contract (and referred to in the judgments below as the additional land) was at the date of the contract owned by the taxpayer's mother (who was not a party to the contract). She transferred the additional land to the taxpayer and his wife by way of gift on 1 May 1987. They held it in trust for themselves as joint tenants beneficially and the taxpayer's brother was not interested in it. This additional land (consisting of a small part of Plot 1 and a small part of Plot 2) was also included in the assignments to Codan and came to be beneficially owned in quarter shares by the taxpayer, his wife, and the two settlements.

[22] During the tax year 1991–1992 the Revenue assessed the taxpayer to capital gains tax for 1987–1988 in the sum of a little over £195,000. This assessment was made on the footing that the effect of s 27(1) of the 1979 Act was that the taxpayer and his wife had on 16 April 1987 disposed of the whole of the beneficial interests in the land which they had immediately before that date, despite the assignments which they had made between contract and completion. At that time capital gains tax on chargeable gains accruing to a married woman was normally assessed on her husband. The assessment was made on the basis of their beneficial ownership (rather than by reference to the vesting of the legal estate in the land) because of s 46(1) of the 1979 Act (now s 60(1) of the 1992 Act) which provides as follows:

‘In relation to assets held by a person as nominee for another person, or as trustee for another person absolutely entitled as against the trustee ... (or for two or more persons who are ... jointly so entitled), this Act shall apply as if the property were vested in, and the acts of the nominee or trustee in relation to the assets were the acts of, the person or persons for whom he is the nominee or trustee (acquisitions from or disposals to him by that person or persons being disregarded accordingly).’

In this provision ‘jointly’ does not have its technical meaning but is to be more widely construed: see *Kidson (Inspector of Taxes) v Macdonald* [1974] 1 All ER 849, [1974] Ch 339. Trustees of a settlement, by contrast, are treated as a ‘single and continuing body of persons (distinct from the persons who may from time to time be the trustees)’ under s 52(1) of the 1979 Act (now s 69(1) of the 1992 Act). Those are the statutory provisions which are directly in point in this appeal, although various other provisions have been referred to in the course of argument. All further references to statutory provisions are to those of the 1979 Act, except where otherwise stated.

[23] The litigation has produced changing fortunes. The Special Commissioner decided in favour of the Revenue. The crucial passage in her decision is in [2001] STC (SCD) 170 at 177 (para 49):

‘Section 27 is in very clear terms and it is not difficult to apply it to the facts of this appeal. Plots 1, 2 and 3 were disposed of under the contract of 16 April 1987. Accordingly, the section provides that that was the time at which the disposal was made. It follows that that was the date which identified the disposal including the parties to the disposal and their interests in the property the subject of the disposal. The fact that, after the date of the contract and before completion, the taxpayer and Mrs Jerome assigned parts of their beneficial interests to the trustee cannot alter that analysis.’

Park J disagreed. He handed down a long judgment, discussing various hypothetical cases in detail. But the nub of his disagreement is in [2002] STC 609 at [21]:

‘I agree that, by virtue of s 27(1), the date of the contract (16 April 1987) was the time at which the disposal was made. I do not agree that the date “identified the disposal”. I am not sure that I understand what Dr Brice means by that expression. If she means that, once s 27(1) has specified that the date of the contract is the time of the disposal, the subsection also has the effect that the contract itself was the disposal, I do not agree ... I certainly do not agree that the date of 16 April 1987 identified the parties to the disposal.’

[24] The Court of Appeal in turn disagreed with Park J. The leading judgment was given by Jonathan Parker LJ, with whom Schiemann and Hale LJ agreed.

a Jonathan Parker LJ attached importance to the effect of the contract under the general law relating to sales of land (see [2003] STC 206 at [61]):

b 'As a matter of general law, and leaving aside for the moment all considerations of capital gains tax, the effect of the transactions which took place in the instant case was in my judgment as follows. On the making of the 1987 contract Conder acquired an immediate equitable interest in the original land (see *Lysaght v Edwards* (1876) 2 Ch D 499 at 506–507 per Jessel MR). In other words, the effect of the 1987 contract was to change the ownership of the original land in equity. As Sir George Jessel MR put it the vendor "is not entitled to treat the estate as his own" (see (1876) 2 Ch D 499 at 507).'

c He also referred to *Swiss Bank Corp v Lloyds Bank Ltd* [1979] 2 All ER 853 at 866, [1979] Ch 548 at 565. As regards the additional land the position was the same as from 1 May 1987, when the taxpayer's mother made her gift.

[25] From his view of the effect of the contract, Jonathan Parker LJ reasoned (at [72]) that Park J had erred because he had—

d 'proceeded on the basis that s 27(1) requires that the position of the parties under the general law be ignored, in that for capital gains tax purposes Codan is to be treated as having taken a full beneficial interest under the assignments, free from the rights of Conder/Crest under the 1987 contract.'

e Jonathan Parker LJ concluded as follows:

f '[75] In my judgment, the fallacy in each of the judge's two hypothetical cases lies in his assumption (which he wrongly concluded he was required by s 27(1) to make) that, pending completion of a contract for the disposal of an asset, the owner of the asset is to be regarded for capital gains tax purposes as continuing to enjoy full ownership of it, free from the rights of the other contracting party. That fallacy seems to have permeated the whole of the judge's reasoning, leading him to what I would regard as the incongruous result that Codan is to be treated for capital gains tax purposes as having disposed of its interest in the land under a contract to which it was not a party, and at a date when it might not even have been in existence.

g [76] For the reasons I have given the true position, in my judgment, is that s 27(1) has a much simpler and more limited effect than that which the judge ascribed to it. Its effect, in my judgment, is that where the owner of an asset contracts to convey or transfer it, and the contract is subsequently completed, the disposal of the asset for capital gains tax purposes takes place when the contractual obligation is created and not when it is performed.'

h So the decision of the Special Commissioner, and the assessment, were restored.

j [26] The capital gains tax legislation in its original form did not contain any provision dealing with a sale which takes place in two stages, contract and completion by transfer or conveyance. The provision which became s 27(1) of the 1979 Act was first introduced by the Finance Act 1971, and it has in the past attracted little attention from the court. It has an obvious function in determining the tax year in which a chargeable gain arises if a taxpayer agrees to sell a chargeable asset in (say) March and completes the sale by transfer in (say) the following May. There is no indication that Parliament contemplated that the interval between contract and completion might be measured in years rather than weeks, or might be

punctuated by a change in beneficial ownership. Indeed the scope of s 27(1) is cut down by sub-s (2):

‘If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.’

That would cover many long-term contracts for the sale of land with development potential, since such contracts are often conditional on planning permission being obtained. But it is common ground that in this case the contract was unconditional. A contract is not conditional merely because it contains obligations which may be termed promissory conditions: see *Eastham (Inspector of Taxes) v Leigh London and Provincial Properties Ltd* [1971] 2 All ER 887, [1971] Ch 871. As the history of this litigation shows, the statute does not give a clear answer to the question how intermediate dispositions, subject to and with the benefit of a subsisting and uncompleted contract, are to be viewed.

[27] The Special Commissioner’s conclusion was based on her view of s 27(1) as containing ‘deeming provisions ... in very clear terms’. In my opinion Park J was right in rejecting that approach, and the Revenue have not in terms relied on it either in the Court of Appeal or before this House. Section 27(1) appears to be directed to a single limited issue, that is the timing of a disposal. It does not say that the contract is the disposal, but that a disposal effected by contract and later completion is to be treated, for timing purposes, as made at the date of the contract. Its language is not so clear and compelling as to lead to the conclusion that Parliament must have intended to introduce a further statutory fiction as to the parties to a disposal. The differences between Park J and the Court of Appeal are more complex than that and cannot be resolved by a single knock-down argument.

[28] It may be worth reflecting on why this issue has caused so much difficulty. In s 27(1) Parliament has enacted an apparently simple rule directed at the timing of a taxable event (it is of some interest that the rule originated in the short-lived tax on short-term gains introduced by the Finance Act 1962, in which timing was particularly important since a gain was taxed only if realised within a relatively short period). This rule has to cover disposals of assets of all sorts under contracts which may be governed by the law of England and Wales, the law of Scotland or Northern Ireland, or some foreign system of law. In this case attention has, naturally enough, centred on a sale of land under a contract regulated by English law, but it must not be forgotten that the principles of the law of Scotland regulating sales of heritable property are very different (see the recent decision of this House in *Burnett’s Trustee v Grainger* [2004] UKHL 8, (2004) Times, 8 March).

[29] The Court of Appeal took the view that Park J had wrongly ignored the general law of England as to sales of land, and in particular the significance of a contract for the sale of land being (in general) enforceable by the equitable remedy of specific performance. If and so long as the contract is enforceable in that way, the seller becomes in some sense a trustee for the buyer; the buyer has an equitable interest of some sort in the subject matter of the contract; and the contract (if protected by the machinery appropriate to registered or unregistered titles, as the case may be) is enforceable (by specific performance) against a third party who becomes owner of the property.

[30] These are the matters which the Court of Appeal had in mind when referring to the general law. But Mr Venables QC for the appellant taxpayer has criticised the Court of Appeal’s exposition of the general law. Jessel MR did indeed refer, in *Lysaght v Edwards* (1876) 2 Ch D 499 at 506 (a case about the equitable

a doctrine of conversion) to what had been settled doctrine since the time of Lord Hardwicke:

b 'What is that doctrine? It is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession.'

c But he went on to explain that the trusteeship is not an ordinary trusteeship, and that point has been made in many other well-known cases. In *Shaw v Foster* (1872) LR 5 HL 321 at 338, Lord Cairns said—

d 'that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it.'

Similarly in *Rayner v Preston* (1881) 18 Ch D 1 at 6, Cotton LJ said:

e 'An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a Court of Equity will give effect to by transferring the property sold to the purchaser ...'

[31] There is a useful summary in the judgment of Mason J in *Chang v Registrar of Titles* (1976) 137 CLR 177 at 184:

f 'It has long been established that a vendor of real estate under a valid contract of sale is a trustee of the property sold for the purchaser. However, there has been controversy as to the time when the trust relationship arises and as to the character of that relationship. Lord Eldon considered that a trust arose on execution of the contract (*Paine v. Meller* ((1801) 6 Ves 349, 31 ER 1088); *Broome v. Monck* ((1805) 10 Ves 597, 32 ER 976)). Plumer M.R. thought that until it is known whether the agreement will be performed the vendor "is not even in the situation of a constructive trustee; he is only a trustee sub modo, and providing nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay" (*Wall v. Bright* ((1820) 1 Jac & W 494 at 501, 37 ER 456 at 459)). Lord Hatherley said that the vendor becomes a trustee for the purchaser when the contract is completed, as by payment of the purchase money (*Shaw v. Foster* ((1872) LR 5 HL 321)). Jessel M.R. held that a trust sub modo arises on execution of the contract but that the constructive trust comes into existence when title is made out by the vendor or is accepted by the purchaser (*Lysaght's case*). Sir George Jessel's view was accepted by the Court of Appeal in *Rayner v. Preston* ((1881) 18 Ch D 1). It is accepted that the availability of the remedy of specific performance is essential to the existence of the constructive trust which arises from a contract of sale.'

See also the judgment of Jacobs J (at 189–190), concluding that—

'[w]here there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship

which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties.’ a

[32] It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full. b

[33] Section 27 is intended to provide a simple rule to resolve what would otherwise be a highly debateable point. But the contingent way in which s 27(1) operates creates an obvious problem for a taxpayer who has entered into a contract to sell an asset, with completion postponed until a later tax year. Should he assume that the contract will be duly completed and, on that assumption, return a chargeable gain accruing on the date of the contract? The Revenue acknowledge that this is a flaw in the capital gains tax legislation. Good legislative practice requires that a taxpayer should not be left in doubt as to whether or not he has incurred a tax charge. This problem arises however the present appeal is to be resolved; this appeal simply presents it in an acute form because the parties chose to frame as an unconditional contract a bargain whose outcome was, as a matter of economic reality, unpredictable, and capable of remaining in uncertainty for several years. c

[34] I see some force in the appellant’s criticism of the Court of Appeal’s rather abbreviated exposition of the general law, at any rate to the extent that it was reflected in criticism by the Court of Appeal of the reasoning of Park J. I think the Court of Appeal tended to oversimplify (and so misunderstand) Park J’s reasoning in attributing to him (in a passage in the judgment of Jonathan Parker LJ [2003] STC 206 at [75] from which I have already quoted) the theory that— d

‘pending completion of a contract for the disposal of an asset, the owner of the asset is to be regarded for capital gains tax purposes as continuing to enjoy full ownership of it, free from the rights of the other contracting party.’ e

But that by itself does not solve the problem of how the admitted flaw in the capital gains tax legislation is to be dealt with, or the gap filled. If (as seems likely) Parliament never addressed this problem at all, the answer may have to be derived from the scheme of the legislation, and Lord Wilberforce’s well-known guidance (in *Aberdeen Construction Group Ltd v Inland Revenue Comrs* [1978] 1 All ER 962 at 966, [1978] AC 885 at 892–893) as to how the legislation should be interpreted. Park J was, I think, taking the same approach when he observed ([2002] STC 609 at [24]) that he would always tend to favour a statutory analysis under which the taxable results correspond with the actual f

a results. By that I take him to have meant the commercial (or economic) consequences.

[35] The different conclusion reached by the Court of Appeal proceeds partly on the view that s 27(1) is not a deeming provision, or at any rate not a positively fictional deeming provision (see the judgment of Jonathan Parker LJ [2003] STC 206 at [70]). The Court of Appeal seems to have viewed it as
b operating (in line with the general law, in the case of a sale of land in England) as a confirmation (with hindsight gained on completion) that the seller ceased to be beneficial owner on the date of the contract, and so made a disposal on that date. Underlying the Court of Appeal's decision (but not, I think, clearly articulated in it) is the thought that just as *nemo dat quod non habet*, so an
c owner can only dispose of a single asset once. If the taxpayer and his wife are now known, with hindsight, to have disposed of the property on 16 April 1987, they had no interest in it to dispose of to Codan on 15 December 1989.

[36] That argument has an attractive simplicity but I do not think it is the correct solution to the problem. After 16 April 1987 the taxpayer and his brother, as trustees for sale, were bound by an unconditional contract to sell the
d land (for simplicity, I am ignoring the additional land). But although unconditional in legal terms the contract was attended by many commercial uncertainties centring on the application for planning permission. There was a very strong likelihood, indeed a near-certainty, that the buyer would rescind the contract if outline planning permission in a satisfactory form was not
e obtained within seven years. Until the planning appeal was allowed the open market value of the land, whether subject to and with the benefit of the contract, or free from the contract, was almost certainly a good deal less than £4.465m.

[37] While the contract subsisted, it would probably have been a breach of contract for the trustees to sell the land to another purchaser, or indeed to make
f any transfer of it (other than one necessitated by the appointment of new trustees). Even though the contract was protected by registration, the sellers would have been acting contrary to their contractual duty in depriving themselves of their personal power to complete the contract. But there was no inhibition on any of the sellers making an assignment of his or her own
g beneficial interest, and that is what the taxpayer and his wife did (as to part of their respective interests). The land remained vested in the same trustees for sale, who continued to be bound by the contract with Conder (and Crest as its assignee) but there was a partial change of beneficial interest. The assignments executed by the taxpayer and his wife used the traditional conveyancing form (now obsolete since the coming into force of the Trusts of Land and
h Appointment of Trustees Act 1996):

‘... all that one eighth of the Assignors’ said one equal half share of the net proceeds of sale and the net rents and profits until sale of and in [the relevant parcels of land].’

j The assignments did not identify the contract of 16 April 1987. Nevertheless (as the agreed statement of facts and issues records) they were effective as assignments of beneficial interests (and not merely of a share of the purchase money if and when received). Codan as trustee of the Bermuda settlements became entitled, so long as the contract remained uncompleted, to an appropriate share of the net rental income of the land. There is no finding that

there was any rental income, but if there was the assignments carried a share of it. a

[38] But for s 27(1), and by the operation of s 46(1), the capital gains tax analysis of the assignments would be straightforward. The taxpayer and his wife each made a part disposal affecting their respective undivided shares in the land. As the assignments were not arm's length transactions, the part disposals had to be treated as made at open market value. As already noted, that would have been a fraction of a sum probably much less than £4.465m. The contract provided a rough guide as to the land's maximum value, subject to possible adjustments, but the minimum value was existing use value and the open market value was somewhere between the two. b

[39] Does s 27(1) prevent this straightforward analysis of the effect of the assignments? Park J thought that it does not, and I agree with him, although no analysis of the successive transactions is without its difficulties. Before turning to those difficulties, and explaining why I consider Park J's answer to be the least unsatisfactory solution to a fairly intractable problem, I must deal with a new point which (if sound) avoids, rather than resolving, most of the difficulties. c

[40] In this House, and with some encouragement from your Lordships, Mr Venables argued for the first time that s 27(1) is not applicable at all because the disposals effected by the three transfers on 1 November 1990, 23 December 1991 and 7 December 1992 were not made 'under' the contract dated 16 April 1987. This argument proceeds by treating the disposals as having been made (in relation to the relevant undivided shares, and by the effect of s 46(1)) by Codan. Codan was not a party to the contract. Indeed, for capital gains tax purposes, by the effect of yet another deeming provision in s 52(1), it is apparently to be treated as not having been in existence before the Bermuda settlements were made in 1988, whenever it was actually incorporated. Therefore, it is said, the disposal made by Codan cannot have been a disposal under the contract. d

[41] Mr Henderson QC described that argument as remarkably paradoxical, since in fact the contract was entered into by three individuals (the taxpayer, his wife and his brother) and in due course those same individuals (as trustees for sale) completed the transfers precisely in accordance with the terms of the contract, without any novation, variation or deviation (apart from the assignment of the benefit of the contract from Conder to Crest). I agree with Mr Henderson. I do not consider that s 46(1) has such a far-reaching effect. The acts to be attributed to the beneficial owners include both the making of the contract and its eventual completion according to its terms. I am not persuaded that the intervening change in beneficial ownership effected by the assignments had the result that completion did not take place under the contract. There is no suggestion that Crest knew anything about the assignments or that they affected the completion of the contract in any way. Section 27(1) applies to the timing of Crest's acquisition as well as to the sellers' disposals. Crest is presumably taxed as a developer and may not be concerned about any possible liability to corporation tax on chargeable gains. But if that were an issue, it would be bizarre if the date of its acquisition of the land were affected by actions which it could not possibly control, and probably did not even know of. e

[42] I return to the difficulties of applying simultaneously three deeming provisions: the timing provision in s 27(1), the equation of their trustees and beneficial owners in s 46(1), and the requirement in s 52(1) that Codan as f

a trustee of the Bermuda settlements should be regarded as a single and continuing body of persons distinct from Codan's normal corporate personality. The first difficulty (quite 'apart from s 52(1)) is the notion that Codan should be treated as making a disposal on 16 April 1987 of an asset which it acquired on 15 December 1989. The Court of Appeal regarded as absurd the notion that the disposal of an asset for capital gains tax purposes might precede its acquisition. But that is just what happens whenever a speculative investor sells short (that is, contracts to deliver shares which he does not then own) in the hope of making a gain by acquiring the shares at a lower price before the time for delivery under his sale contract. That may or may not be a socially or economically useful activity but it is not absurd that any gain which he makes (if not within the scope of income tax under Sch D, Case I) should be taxed by deducting the (later) acquisition price from the (earlier) sale price. The observations of my noble and learned friend, Nicholls LJ as he then was, in *Kirby (Inspector of Taxes) v Thorn EMI plc* [1988] 2 All ER 947 at 952, [1988] 1 WLR 445 at 451 were made in a different context, that of an asset which did not exist at all (in anyone's hands) before its disposal. I cast no doubt on those observations but they were not directed to this sort of case.

[43] If it is accepted as a general proposition that a person's disposal of an asset may sometimes precede his acquisition of it, is it nevertheless inconsistent with the rule which s 27(1) lays down in relation to a completed contract? That rule works neatly only if the person who makes the disposal was also the maker of the contract (but for reasons already mentioned, I consider that s 27(1) cannot be treated as simply inapplicable). That is the second difficulty. Park J was troubled by this point, and especially by the possibility that the new beneficial owner (C in his imaginary example) might not have existed at the date of the contract. His concern would probably have increased if it had been pointed out that, because of s 52(1), Codan must apparently be treated as not having existed for capital gains tax purposes on 16 April 1987, regardless of the date of its incorporation. Park J suggested that the answer might be to take the earliest date at which Codan would have been capable of making a disposal. It is hard to find any warrant for that in the statute, but it seems to involve less violence both to the statute and to common sense than any other solution which has been suggested. Your Lordships do not have to decide this point, which is material only as a test of the coherence and practicality of a legislative scheme which has admitted flaws. I would, without enthusiasm, provisionally adopt Park J's suggestion. In reaching this conclusion I am not treating the deeming provision in s 27(1) as having any general power to trump that in s 46(1). But I am, I think, following the general guidance as to the application of deeming provisions given by Peter Gibson J in *Marshall (Inspector of Taxes) v Kerr* [1993] STC 360 at 365–366, approved by this House on appeal ([1994] 3 All ER 106 at 118–119, [1995] 1 AC 148 at 164–165) (although the appeal was allowed on other grounds).

[44] I would summarise my view of the matter as follows. What happened on completion, by stages, of the contract was that the taxpayer, his wife and his brother executed three Land Registry transfers of three separate pieces of land. Although they were expressed to be transferring 'as beneficial owners' (as the contract required) they were necessarily transferring the legal estate in their capacity as trustees for sale (and it was probably unnecessary for Mrs Jerome to join in the transfer of Plot 3, which did not include any of the additional land). They sold under the contract of 16 April 1987, which had bound them from first

to last. The fact that Codan was not a party to the contract does not alter that. Section 27(1) made the disposals of beneficial interests by the taxpayer, his wife and his brother, relate back to 16 April 1987, and so to the 1987–1988 tax year. Section 46(1) required the trustees for sale to be treated as nominees for Codan to the extent of the interests which that company had acquired, as trustee, on 15 December 1989. But s 27(1) could not and did not produce the absurd result that the interests which Codan had acquired on 15 December 1989 were instead disposed of by the Jeromes to Crest on 16 April 1987. Codan's disposal was not an occasion of charge, because of its non-resident status, but the disposal may in due course have consequences under special provisions first enacted in the Finance Act 1981.

[45] Mr Henderson for the Revenue relied on three main arguments against that conclusion. I can deal with them briefly because I have already covered much of the ground. First, it was said that the interests acquired by Codan were not the same assets as the assets contracted to be sold (to Conder), because the contract of sale to Conder (and its consequences in equity) had intervened. That is so, in a sense, but I do not think that it helps the Revenue. Capital gains tax is on the whole (and subject to exceptions which I need not detail) concerned with assets, not with contractual rights over assets. The corporeal land was the same and (as already noted) the contract, because of its unusual terms, had only a vague bearing on the open market value of the land before planning permission was obtained on appeal. The essential point is that the contract, until completed, was not either a disposal or a part disposal.

[46] Second, the Revenue tried to turn to its advantage the absurdity of backdating Codan's acquisition to a time when it had no beneficial interest in the land at all (and might not even have been in existence). I agree that that would be an absurdity, but the way to avoid the absurdity is to give a less drastic operation to the deeming provisions, not to distort other parts of the analysis so as to accommodate the absurdity. In my opinion the Court of Appeal was wrong in supposing that it was giving s 27(1) a simpler and more limited effect than Park J had given it.

[47] Third, the Revenue sought to treat each of the assignments to Codan as no more than an assignment of the consideration due under a contract, which does not alter the capital gains tax liability of the person making the disposal (see *Burca v Parkinson (Inspector of Taxes)* [2001] STC 1298, a decision of Park J in favour of the Revenue). But as already noted, the assignments had a more immediate and far-reaching effect as assignments of beneficial interests in property.

[48] For these reasons I would allow the appeal with costs and restore the order of Park J.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[49] My Lords, I have had the privilege of reading in draft the speeches of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. I agree with both of them and for the reasons they give I too would allow the appeal with costs and restore the order of Park J.

Appeal allowed.

a Collins v Royal National Theatre Board Ltd
[2004] EWCA Civ 144

COURT OF APPEAL, CIVIL DIVISION

b BROOKE, SEDLEY AND LATHAM LJ

8, 9 DECEMBER 2003, 17 FEBRUARY 2004

c *Employment – Disability – Discrimination – Employee dismissed from employment following injury – Employee making complaint of unlawful disability discrimination – Employer owing duty to take reasonable steps to prevent employee being at a disadvantage in comparison to persons who were not disabled – Whether employer's failure to comply with duty justified – Disability Discrimination Act 1995, ss 5(4), 6.*

d The claimant was employed by the defendant as a semi-skilled carpenter's labourer. Following an accident his right hand was painful and clumsy. After his recovery the defendant assessed the claimant's capability with particular regard to safe working by a series of controlled tasks. As a result the defendant had genuine and appropriate concerns that the claimant could no longer work efficiently or safely and concluded that there was no job to which the claimant could return. It terminated his employment. The claimant made a complaint of, **e** inter alia, disability discrimination under the Disability Discrimination Act 1995. Under s 6^a of the 1995 Act it was the duty of an employer to take such steps as it was reasonable in all the circumstances for him to have to take in order to prevent any arrangements made by or on its behalf, or any physical feature of the premises it occupied, placing a disabled person at a disadvantage in comparison **f** to persons who were not disabled. Under s 5(2)^b an employer discriminated against a disabled person if he failed to comply with a s 6 duty and he was unable to show that his failure to comply with that duty was justified. Section 5(4) provided that for the purposes of s 5(2), failure to comply with a s 6 duty was justified if, but only if, the reason for the failure was 'both material to the **g** circumstances of the particular case and substantial'. There was a parallel set of provisions in s 5(1) and (3). Under s 5(1) an employer discriminated against a disabled person if for a reason which related to a disabled person's disability, he treated him less favourably than others and he was unable to show that the treatment was justified. Section 5(3) provided that for the purposes of s 5(1) treatment was justified if, but only if, the reason for it was 'both material to the **h** circumstances of the particular case and substantial'. The employment tribunal found that the dismissal had been discriminatory; it held that the claimant was disabled, that the defendant could have done significantly more in the direction of seeing what adjustments could be made to accommodate him and enable him to grow back into his job and was in breach of s 6 of the 1995 Act. The defendant **j** appealed. The Employment Appeal Tribunal allowed the appeal, holding (i) that it was established that for the purposes of s 5(3) materiality and substantiality were all that justification required and that that what was material and what was substantial was for the employer to decide, the tribunal's only power being to

a Section 6 is set out at [3], below

b Section 5 is set out at [2], below

decide whether the decision fell within the range of reasonable responses to the known facts; and (ii) that s 5(4) had the same meaning. The claimant appealed. a

Held – Section 5(4) of the 1995 Act did not permit justification of a breach of s 6 of the 1995 Act to be established by factors properly relevant to the establishment of a duty under s 6. The meaning of the closely similar words in ss 5(3) and 5(4) was materially different. In s 5(4) what was material and substantial for the purposes of justifying an established failure to take such steps as were reasonable to redress disadvantage could not, consistently with the statutory scheme, include elements which had already been, or could already have been, evaluated in establishing that failure. That that departed significantly from the meaning and effect of s 5(3) was fully explained by the fact that justification under s 5(3) started from a form of discrimination which was established without the need of any evaluative judgment. In the instant case there was no defence under s 5(4) because everything going to justification had been subsumed in the finding that a s 6 duty existed and had been breached. Accordingly, the appeal would be allowed (see [32], [39], [41]–[43], below). b

Jones v Post Office [2001] IRLR 384 considered. c

Notes d

For justification for discriminatory treatment or failure to make adjustments, see 13 *Halsbury's Laws* (4th edn reissue) para 490, and Supp to 12 *Halsbury's Laws* (4th edn reissue) para 490. e

For the Disability Discrimination Act 1995, ss 5, 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 296, 298.

Cases referred to in judgments

Heinz (HJ) Co Ltd v Kenrick [2000] IRLR 144, [2000] ICR 491, EAT. f

Jones v Post Office [2001] EWCA Civ 558, [2001] IRLR 384, [2001] ICR 805, CA.

Appeal

The claimant, Sidney Collins, appealed with permission of Pill LJ from the decision of the Employment Appeal Tribunal (Mr Commissioner Howell QC, JR Crosby and AD Tuffin) delivered on 29 April 2003 allowing the appeal of the defendant, the Royal National Theatre Board Ltd (the National Theatre), from the decision of the London South Employment Tribunal issued on 24 May 2002 that Mr Collins had suffered discrimination by reason of disability when the National Theatre had terminated his employment. The facts are set out in the judgment of Sedley LJ. g

Robin Allen QC and *Catherine Rayner* (instructed by *Thompsons*) for Mr Collins. h

Richard Lissack QC and *Andrew Short* (instructed by *Ann Cutting*) for the National Theatre. j

Cur adv vult

17 February 2004. The following judgments were delivered.

a **SEDLEY LJ** (giving the first judgment at the invitation of Brooke LJ).

THE ISSUE

[1] This appeal raises a new and sharp question of discrimination law: can an employer's failure to make adjustments to accommodate a disabled employee be unreasonable but justified?

b

THE LAW

[2] In the Disability Discrimination Act 1995, s 4 makes it unlawful for an employer to discriminate against a disabled person by, among other things, dismissing him. Section 5 then defines discrimination:

c

'(1) For the purposes of this Part, an employer discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified.

d

(2) For the purposes of this Part, an employer also discriminates against a disabled person if—(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified.

e

(3) Subject to subsection (5), for the purposes of subsection (1) treatment is justified if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

(4) For the purposes of subsection (2), failure to comply with a section 6 duty is justified if, but only if, the reason for the failure is both material to the circumstances of the particular case and substantial.

f

(5) If, in a case falling within subsection (1), the employer is under a section 6 duty in relation to the disabled person but fails without justification to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with the section 6 duty ...'

[3] The employer's s 6 duty is the following:

g

'(1) Where—(a) any arrangements made by or on behalf of an employer, or (b) any physical feature of the premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.

h

(2) Subsection (1)(a) applies only in relation to—(a) arrangements for determining to whom employment should be offered; (b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.

j

(3) The following are examples of steps which an employer may have to take in relation to a disabled person in order to comply with subsection (1)—(a) making adjustments to premises; (b) allocating some of the disabled person's duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his working hours; (e) assigning him to a different place of work; (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment; (g) giving him, or arranging for

him to be given, training; (h) acquiring or modifying equipment; (i) modifying instructions or reference manuals; (j) modifying procedures for testing or assessment; (k) providing a reader or interpreter; (l) providing supervision. a

(4) In determining whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1), regard shall be had, in particular, to—(a) the extent to which taking the step would prevent the effect in question; (b) the extent to which it is practicable for the employer to take the step; (c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities; (d) the extent of the employer's financial and other resources; (e) the availability to the employer of financial or other assistance with respect to taking the step. This subsection is subject to any provision of regulations made under subsection (8). b

(5) In this section, "the disabled person concerned" means—(a) in the case of arrangements for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment; (b) in any other case, a disabled person who is—(i) an applicant for the employment concerned; or (ii) an employee of the employer concerned. c

(6) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know—(a) in the case of an applicant or potential applicant, that the disabled person concerned is, or may be, an applicant for the employment; or (b) in any case, that that person has a disability and is likely to be affected in the way mentioned in subsection (1). d

(7) Subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others. e

(8) Regulations may make provision, for the purposes of subsection (1)—(a) as to circumstances in which arrangements are, or a physical feature is, to be taken to have the effect mentioned in that subsection; (b) as to circumstances in which arrangements are not, or a physical feature is not, to be taken to have that effect; (c) as to circumstances in which it is reasonable for an employer to have to take steps of a prescribed description; (d) as to steps which it is always reasonable for an employer to have to take; (e) as to circumstances in which it is not reasonable for an employer to have to take steps of a prescribed description; (f) as to steps which is never reasonable for an employer to have to take; (g) as to things which are to be treated as physical features; (h) as to things which are not to be treated as such features. f

(9) Regulations made under subsection (8)(c), (d), (e) or (f) may, in particular, make provision by reference to the cost of taking the steps concerned. g

(10) Regulations may make provision adding to the duty imposed on employers by this section, including provision of a kind which may be made under subsection (8) ... h

[4] The 1995 Act by s 53A(1) (introduced by the Disability Rights Commission Act 1999) provides for the Disability Rights Commission to 'prepare and issue codes of practice giving practical guidance on how to avoid discrimination'. As j

a further amended, sub-s (8) makes it clear that breach of the code by itself confers no rights, but sub-s (8A) provides that a tribunal must take into account any provision of the code which appears to it to be relevant.

[5] An unfair dismissal, under s 98 of the Employment Rights Act 1996, occurs either when none of the potentially fair reasons for the dismissal (which include incapacity) is shown or when the employer has not acted reasonably in treating the reason he has established as a sufficient reason for dismissal.

CHANGES TO THE LEGISLATION

[6] The justification defence afforded by s 5(4) has been removed from the 1995 Act with effect from 1 October 2004 by the Disability Discrimination Act 1995 (Amendment) Regulations 2003, SI 2003/1673. The justification defence afforded by s 5(3) will, however, remain. The present case is therefore one of a substantial but now diminishing residue.

[7] It is relevant to see the form which the new provision is to take. In place of s 5, s 4 is to be preceded by a new s 3A:

d '(1) For the purposes of this Part, a person discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply, and (b) he cannot show that the treatment in question is justified.

e (2) For the purposes of this Part, a person also discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person.

(3) Treatment is justified for the purposes of subsection (1)(b) if, but only if, the reason for it is both material to the circumstances of the particular case and substantial.

f (4) But treatment of a disabled person cannot be justified under subsection (3) if it amounts to direct discrimination falling within subsection (5).

g (5) A person directly discriminates against a disabled person if, on the ground of the person's disability, he treats the disabled person less favourably than he treats or would treat a person not having that particular disability whose relevant circumstances, including his abilities, are the same as, or not materially different from, those of the disabled person.

h (6) If, in a case falling within subsection (1), a person is under a duty to make reasonable adjustments in relation to a disabled person but fails to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with that duty.'

[8] The history of this change is material to what we have to decide. As long ago as 1999 a ministerial taskforce reported that, while the s 5(3) defence of justification of less favourable treatment should be retained, subject to monitoring and possible adjustment by regulation, the s 5(4) defence of justification of unreasonable failure to make adjustments seemed—judging by the examples given in the code of practice—to travel over the same issues as would already have been decided under s 6. They recommended that the justification defence to a breach of s 6 should be removed and the code modified so as to allocate its examples to the s 6 exercise. (See the report of the Disability

Rights Task Force *From Exclusion to Inclusion* (December 1999) (chair: Margaret Hodge MP.)

[9] Government's published response (*Towards Inclusion—civil rights for disabled people*) was this (para 3.26):

'When legislative time allows, we will ... remove the justification for failure to make a reasonable adjustment because this defence can be entirely covered by the need for adjustments only to be reasonable ...'

[10] It is both in fulfilment of this commitment and in order to comply with the framework directive on discrimination (Council Directive (EC) 2000/78 (OJ 2000 L303 p 16)) that the amending regulations cited above have now been introduced.

THE FACTS

[11] Mr Collins, who was born in 1938, was for 18 years a semi-skilled carpenter's labourer in the National Theatre's carpentry shop. All the other workers there were time-served skilled tradesmen. On 11 February 2000 he lost about a third of the distal phalanx of his right ring finger when, instead of using a push-stick as he knew he should do, he used his hand to flick away an offcut from a powered bench-saw. It was the workshop's first serious accident in the 12 years the head carpenter had been there. The wound healed but with painful neuromas which made the hand—Mr Collins's dominant hand—clumsy. His hand surgeon advised surgery, which offered a better than even chance of success, but Mr Collins's GP was against it, even though on the suggestion of the National Theatre he was shown the surgeon's report. Mr Collins therefore refused surgery, and in the resulting situation the National Theatre terminated his employment. Before doing so they had set up a series of controlled tasks to assess his capability with particular regard to safe working. The employment tribunal found this to have been done fairly and objectively. It resulted in what were found to be 'genuine and appropriate concerns' that Mr Collins could no longer work efficiently or safely. A meeting with Mr Collins and his union representative followed under the theatre's long-term sickness procedure, but in the light of a disability for which Mr Collins would still not countenance surgery it was concluded that there was simply no job to which he could return.

THE FINDINGS

[12] The employment tribunal nevertheless concluded that although a permitted reason for the dismissal—incapacity—had been established, it had been both discriminatory and unfair to dismiss Mr Collins. They considered that the National Theatre's focus had been on what Mr Collins could not do, and that it 'could have done significantly more in the direction of seeing what adjustments could be made to accommodate' him and enable him to 'grow back into the job' (para 27). Their finding that, albeit marginally, he was disabled within the meaning of the 1995 Act has not been challenged; nor has their finding that the National Theatre was in breach of s 6, sympathetic though one may be to its position.

[13] But the National Theatre on appeal successfully challenged the tribunal's twin conclusions that the dismissal had been discriminatory and unfair. The Employment Appeal Tribunal (EAT), in a careful judgment delivered by Mr Commissioner Howell QC, considered that the decision in *Jones v Post Office* [2001] EWCA Civ 558, [2001] IRLR 384, [2001] ICR 805 of this court (Pill, Arden

- a and Kay LJ), while troubling in its effect, was indistinguishable in principle. They remitted the claims for determination accordingly.

THE DECISION IN *JONES V POST OFFICE*

- b [14] *Jones's* case concerned the dismissal of a Post Office driver who had developed first diabetes and then heart disease. He claimed disability discrimination when he was taken off driving duties as all insulin-dependent Post Office employees were. But he had been subsequently offered limited driving duties, and the Post Office conceded that the complete bar had been discriminatory. The tribunal found that the limited offer was also discriminatory; but the EAT and this court held that they had approached their decision on the erroneous footing that it was for them to say, having heard medical evidence on
- c both sides, whether the employer's decision to set the proposed limit on the employee's driving was justified or not. The decision of this court was (a) that materiality and substantiality were all that justification required, and (b) that what was material and what was substantial was for the employer to decide, the tribunal's only power being to decide whether the decision fell within the range
- d of reasonable responses to the known facts.

- [15] It is right to say that the consequent threshold of justification has been consistently recognised as a surprisingly low one. The EAT in the present case described it as 'not very demanding' (para 15). But it is also right to say that the facts in *Jones's* case clearly warranted the outcome, because the employment tribunal had decided the case on medical evidence obtained after the employer
- e had made its decision. I will return to the question of how, jurisprudentially, that outcome was reached.

- [16] The subsections in play in *Jones* were sub-ss (1) and (3). Those in play in this case are sub-ss (2) and (4). In *Jones's* case [2001] IRLR 384 at [6] Pill LJ recorded: 'A second form of discrimination is defined in s.5(2) and s.6. It is
- f common ground that consideration of those provisions does not now arise in this case.' *Jones's* case having been decided on this deliberately restricted footing, Pill LJ in the present case gave permission to appeal so that a differential construction could be argued.

THE PROBLEM

- g [17] In giving permission Pill LJ remarked that the applicant's difficulties should not be underestimated. This was plainly right so far as any merely textual difference is concerned: the reason why there is not a single definition of justification for both sub-s (1) and sub-s (3) appears at first sight to be simply stylistic. The one provision concerns treatment; the other concerns failure to do
- h something; both require justification, but a unitary definition would require verbose provision of a kind which modern parliamentary drafters rightly try to avoid, at least in legislation of this kind. Two subsections, Richard Lissack QC for the National Theatre submits, simply make a unitary test more comprehensible.

- [18] But on examination there may well be more than draftsmanship
- j involved. There is a substantive difference too. Subsections (1) and (3) concern unjustified treatment of a disabled employee. While by virtue of sub-s (5) treatment for this purpose is to be tested by an element derived from the s 6 duty, it is there precisely to prevent an employer from taking advantage of his own unreasonable failure to accommodate a disabled employee.

[19] Subsections (2) and (4), by contrast, are there to deal specifically with discrimination which takes the form of an unjustified breach of the s 6 duty. They

start, therefore, from a point at which the employer has been shown to have failed to take such steps as were reasonable to prevent the disability resulting in substantial disadvantage. a

[20] The test of reasonableness under s 6, as is rightly accepted on both sides, must be objective. One notes in particular that s 6(1)(b) speaks of 'such steps as it is reasonable ... for him to have to take' (my emphasis). One approaches s 5(2) and (4), therefore, on the footing that the tribunal will already have found the employer's failure to accommodate the employee's disability to be objectively unreasonable. If, however, justification under sub-s (4) has the same threshold as this court ascribed to sub-s (2) in *Jones's* case, it will be a sufficient answer if the employer had a reason for the failure which he himself considered, without irrationality but erroneously, to be material and substantial. Hence the question posed in the first paragraph of this judgment. Put as Catherine Rayner, junior counsel for Mr Collins, puts it in her excellent skeleton argument, can an employer resurrect as a justification for his non-compliance a ground for not accommodating his disabled employee which the tribunal have already rejected as unreasonable? b
c

[21] Towards the conclusion of argument Brooke LJ asked Mr Lissack whether his case was that the same test of justification applied (a) to discriminatory treatment, which by s 5(1) is established without any regard to reasonableness, and (b) to failure to make reasonable adjustments, which by s 6 only arises when 'all the circumstances of the case'—including the employer's own state of mind—have been explored, evaluated and balanced as the statute and regulations require. Mr Lissack's candid assent demonstrated how stark the problem is. d
e

THE SOLUTION

[22] There are a number of avenues to a solution. Although some are no longer open to us at this level and some have not been canvassed before us, it is worth noting them all, since our decision may not be the end of this particular road. f

[23] First, materiality and substantiality might be necessary but not sufficient conditions of justification. Although not argued before us, this is in my present view an intelligible meaning of the words in sub-ss (3) and (4). Pill LJ noted in his judgment in *Jones's* case [2001] IRLR 384 at [21] that in *HJ Heinz Co Ltd v Kenrick* [2000] IRLR 144, [2000] ICR 491 Lindsay J had 'flirted with' this idea before rejecting it, and the rejection now has this court's imprimatur in *Jones*. If it were not thus concluded I would want to think about it again. The phrase 'but only if' is the language of necessity, not of sufficiency. 'If, by contrast, is the language of both: it can mean 'provided only that' and it can mean 'provided at least that'. g
h

[24] There is a further element which was not examined in *Jones*. The clear purpose of s 5(5) is to deny to an employer who has treated a disabled employee less favourably than others any defence of justification which depends directly or indirectly on a breach by the employer of his s 6 duty to make adjustments. How is this meant by Parliament to operate on s 5(3)? In its terms it has to do neither with materiality nor with substantiality, though it could have been so phrased that it did: '... cannot be material under subsection (3) unless ...', for example. This too suggests that justification may be more than the sum of materiality and substantiality. i

a [25] Secondly, both subsections might make the tribunal the arbiter of what is material and what is substantial. But this court in *Jones's* case was unanimous in rejecting such a construction of s 5(3). Pill LJ concluded ([2001] IRLR 384 at [25]):

b 'Upon a consideration of the wording of s.5(3) in context, I conclude that the employment tribunal are confined to considering whether the reason given for the less favourable treatment can properly be described as both material to the circumstances of the particular case and substantial.'

Arden LJ put it in this way:

c '[35] It is clear from the wording of s.5(3) that the standard by which the employer's reason is to be reviewed is an objective one ... This case has raised the novel question of the intensity of that review ...

[41] ... If credible arguments exist to support the employer's decision, the employment tribunal may not hold that the reason for the discrimination is not "substantial".'

d [26] The present difficulty with the decision in *Jones* is that, because it took s 5(3) in conscious isolation from s 5(4), the possible impact of the latter on the former was not considered. The third possibility, however, is that the impact of s 6 on s 5(2) and (4) is such that the reading of s 5(3) has to be brought into line with it. This too has not been urged upon us by Mr Allen QC. He is content for the present to leave *Jones* where it is. It is Mr Lissack who argues that, taking the decision in *Jones* as given, as we must, there is no daylight between the subsection in issue there and the one in issue here: their key wording is identical. If Mr Allen had sought to meet this challenge frontally, it would have been necessary to consider whether the principle of stare decisis prevented us from considering the argument.

e [27] What Mr Allen does urge upon us is a fourth, and in the alternative a fifth, course. His principal submission is that we should adopt a differential interpretation of sub-ss (3) and (4). The alternative submission, spelt out in Ms Rayner's skeleton argument, is that we should qualify the decision in *Jones* by excluding from the process of justification under s 5(4) anything already rejected by the tribunal as unreasonable under s 6(1). For reasons to which I will come, these seem to me to be two sides of one coin.

f [28] It is undoubtedly open to us in the light of the specificity of the argument and reasoning in *Jones's* case to read s 5(4) in a different sense from s 5(3). Mr Lissack does not contend otherwise. His argument is that we would be unjustified in doing so.

g [29] Mr Lissack's junior Andrew Short has helpfully set out in his skeleton argument the series of issues which arise respectively under sub-s (1) and sub-s (2). Their parallelism, he submits, argues strongly against a differential construction:

Under s 5(2):

- j
- Was there a duty to adjust? If yes
 - Did the employer fail to comply with that duty? If yes
 - Was the failure to comply justified?

Under s 5(1):

- Was there less favourable treatment for a reason relating to the disabled person's disability? If yes

- Was the less favourable treatment justified? If yes
- In cases where there has also been an unjustified failure to comply with the duty to adjust, would the less favourable treatment still have been justified had the employer complied with the duty to adjust?

[30] But *are* the two provisions parallel or analogous? Mr Short's analysis of s 5(2) in my view omits something crucial: a failure to comply with the duty to adjust can only occur if the employer's response has fallen short of what it was reasonable for him to do. There is no such qualitative element to s 5(1): the bare fact of less favourable treatment is all that is required to establish discrimination. The question then is whether Parliament can possibly have meant, by enacting s 6 with s 5(2) and (4), to allow an unreasonable failure to accommodate an employee's disability to be justified so long as the employer tenably regarded it as immaterial or insubstantial. If not, but if *Jones* is to be respected, the solution has to be a differential meaning.

[31] Mr Lissack contends that this is not open us. He advances two main reasons. One is that the only differential meaning which is available is one which renders s 5(4), so far as anyone can see, otiose. The other, its mirror image, is that Parliament's election to keep a justification defence to a breach of s 6 on the statute book until October 2004 has been made in the knowledge that informed commentators considered s 5(4) not to be otiose and to require repeal for that very reason. We are faced, he submits, with a triple choice: to treat s 5(4) as a dead letter; to import into it an improvised ringfence to prevent the s 6 findings from being circumvented; or to give s 5(4) exactly the meaning given to s 5(3) in *Jones*' case. He accepts that there is in fact a fourth choice—to give s 5(4) a role but to make the test of materiality and substance an objective one for the tribunal itself to apply—but argues that to do that would be to overset *Jones* by stealth; and Mr Allen has not invited us to do this.

CONCLUSION

[32] In my judgment the only workable construction of s 5(4), in the context of the 1995 Act and its manifest objects, is that it does not permit justification of a breach of s 6 to be established by reference to factors properly relevant to the establishment of a duty under s 6. In other words, the meaning of the closely similar words in the two adjacent subsections is materially different. In s 5(4), what is material and substantial for the purposes of justifying an established failure to take such steps as are reasonable to redress disadvantage cannot, consistently with the statutory scheme, include elements which have already been, or could already have been, evaluated in establishing that failure. That this departs significantly from the meaning and effect of s 5(3) is fully explained by the fact that justification under s 5(3) starts from a form of discrimination—less favourable treatment—which is established without the need of any evaluative judgment.

[33] Such differential construction is no doubt rare and to be avoided—Mr Lissack may therefore be right to call it extraordinary—but it is not impermissible if there is no other way to give effect to Parliament's intention. Bennion *Statutory Interpretation* (4th edn, 2002) pp 992–995 stresses the presumption against holding words in an Act to be idle but also cites judicial decisions which have had to go against the presumption. Some of these contain comments about parliamentary drafting far sharper than anything deserved by the drafter of the 1995 Act which is, as both counsel have stressed, pioneering

a social legislation always known to be in need of monitoring and review. If absolutely necessary, words may have to be held to be idle.

[34] Here, however, the choice is by no means so stark. Even though, as the taskforce pointed out and as government accepted, all the examples given in the code of the operation of s 5(4) are more relevant to s 6 than to s 5(4), there is no reason to think that no circumstances can ever arise in which factors not apt for consideration under s 6 prove material and substantial under s 5(4); and if they do, the justification defence is there to accommodate them. In that event, s 5(4) will operate as this court in *Jones's* case has held that s 5(3) operates: anything else would be disruptive of precedent.

[35] The reason why it seems to me that s 5(4) needs to be construed as I have proposed above and not as simply excluding those factors which have in the event been canvassed under s 6 is this. To leave to the respondent in the employment tribunal the choice of where to deploy its arguments will place respondents' advisers in an invidious professional and ethical position, and respondents themselves in a forensic situation in which guile pays. Rather than risk forfeiting a ground for not accommodating an employee's disability by having it objectively rejected under s 6, an employer would gain a tactical advantage by admitting—indeed asserting—a marginal ground of failure to take reasonable steps and then advancing his full case, which might have failed under s 6, by way of justification under s 5(4).

[36] It follows that the extant statutory provision about discrimination by failure to make adjustments has something close to the shape which it will explicitly acquire when the amendments come into force in October 2004. As it happens, that is also the shape adumbrated in the original White Paper *Ending discrimination against disabled people* (Cm 2729) (January 1995), which proposed a justification defence for less favourable treatment but not for failure to make reasonable adjustments. What is now s 5(4) was not in the initial Bill but, we are told, entered it just prior to the report stage of its passage in the House of Lords. For the present, the justification which it affords of a failure to make reasonable adjustments is not ruled out but is, on a proper reading of the 1995 Act, heavily restricted.

g POSTSCRIPT

[37] This makes it unnecessary to address the more modest solution offered by Mr Allen to the present case. He suggests that the employment tribunal's findings of fact are such that the National Theatre cannot on any view of the meaning of s 5(4) establish justification. The full passage of their extended reasons, from which I earlier quoted briefly, is as follows:

h '27. The tasks assessment of the applicant's abilities seems to us to have been a fair and reasonable manner to proceed at the time it took place. The tribunal accepts that it was fairly and objectively carried out. It was clear at the time there was concern for aggravation of the injury, and that the applicant took longer and needed significant breaks when carrying out the allocated tasks. We note that at the time there was not an identified concern of any danger potential to others. But for whatever reason the focus from there on was on what the applicant was unable to do, and not on how the situation could be created whereby he could continue to work. It is our view that the respondent could have done significantly more in the direction of seeing what adjustments could be made to accommodate the applicant. The

assessment had been carried out at a relatively early stage after injury had occurred; he was out of practice and short on relevant fitness, bearing in mind his age, and it is clear on the evidence that the finger's sensitivity was still raw. There was an understandable, but overly, caution about allowing him back to see what he could do. We are not persuaded in the particular that there was a genuine examination of what modifications to equipment could have been available to help. Despite the assessment, in our view there was the opportunity to allow him to grow back into the job (allowing some tolerance for time, regeneration of strength, practice and fitness), and that this, as frequently requested by him, would have better identified what he could do, rather than having the emphasis on what he could not do. We accept that with the applicant's particular skills the range of alternative jobs was effectively nil. We are left though with the conclusion, on the evidence, that the respondent could and should have more actively pursued these alternatives, to see what could be done.

[38] On these findings, he submits, the National Theatre has failed to surmount even the modest hurdle set by *Jones*, because its belief that there was now no feasible role for Mr Collins was not based on any 'genuine examination of what modifications to equipment could have been available to help him'. In other words, it was not a reasonably held belief. That such a belief fails to get over the threshold for justification emerges, Mr Allen submits, from the two principal judgments in *Jones's* case. It must equally be part of the inquiry proposed by Pill LJ ([2001] IRLR 384 at 388 [25]) (can the employer's reason be properly described as material and substantial?) and that proposed by Arden LJ ([at [39]]) (does the employer's reason on critical examination have substance?). A reason based on no genuine examination of whether the disabled employee could be accommodated by modifying the equipment in the workshop, it is submitted, passes neither of these tests.

[39] The National Theatre's cup of woe is already full, and I see no need to make it brim over with the consequences of the employment tribunal's findings of fact. Mr Collins is entitled to succeed because everything going to justification was subsumed in the finding that a s 6 duty existed and was breached, leaving no room for a defence under s 5(4). That is enough.

[40] We have heard no argument on unfair dismissal, and I say nothing about it.

ORDER

[41] I would allow the appeal by restoring the employment tribunal's decision that Mr Collins's claim under the 1995 Act is well-founded and by remitting the claim for a decision on remedy.

LATHAM LJ.

[42] I agree.

BROOKE LJ.

[43] I also agree.

Appeal allowed.

M v Secretary of State for the Home Department

[2004] EWCA Civ 324

COURT OF APPEAL, CIVIL DIVISION

LORD WOOLF CJ, POTTER AND CLARKE LJ

17, 18 MARCH 2004

National Security – Risk to national security – Suspicion that a person is a terrorist – Secretary of State issuing certificate and detaining person suspected of being a terrorist – Special Immigration Appeals Commission cancelling certificate – Whether reasonable grounds existing for belief that the person’s presence a risk to national security and suspicion that he was a terrorist – Whether suspicious circumstances necessarily establishing reasonable suspicion – Anti-terrorism, Crime and Security Act 2001, ss 21(1), 25.

The appellant was a Libyan national. He had travelled to Saudi Arabia to concentrate on Islamic studies, gone to Pakistan and fought with the Arab Mujahidin against the communist regime in Afghanistan, and had been involved in opposing the regime of Colonel Gaddafi in Libya. He had claimed asylum in the United Kingdom in 1994, but his application had been refused. He came to the attention of Special Branch and it was noted that it was his contention that he was part of an anti-Gaddafi organisation involved in illegal arms and demonstrations. Despite this a further application for asylum was rejected in July 1997. However, the appellant was not removed from the United Kingdom and it came to be accepted that he could not be returned to Libya. Under s 21(1)^a of the Anti-Terrorism, Crime and Security Act 2001 the Secretary of State had power to issue a certificate in respect of a person if he reasonably believed that the person’s presence in the United Kingdom was a risk to national security and reasonably suspected that the person was a terrorist. A terrorist was defined as a person with links to an international terrorist group. However, the Secretary of State’s powers were limited by the terms of the Human Rights Act 1998 (Designated Derogation) Order 2001 to the effect that it was not enough that the person detained had connections with a terrorist organisation; it had to be a terrorist organisation which had links with Al-Qaida. In November 2002 the Secretary of State issued a certificate in relation to the appellant under s 21 of the 2001 Act. The reasons given were: ‘You are a member of a group of Mujahadin engaged in active support for various international terrorist groups, including networks associated with Osama bin Laden [the founder of Al-Qaida]. Your activities on behalf of these networks include the provision of material support.’ The 2001 Act provided, by s 25^b, that a suspected international terrorist could appeal against his certification under s 21 to the Special Immigration Appeals Commission (SIAC), a superior court of record consisting (when hearing an appeal) of three members, one of whom had to be a judge who held, or had held, high judicial office, one of whom had to be either the chief adjudicator or a member of the Immigration Appeal Tribunal, and one of whom it was intended

^a Section 21, so far as material, is set out at [7], below

^b Section 25, so far as material, is set out at [8], below

should have experience of national security matters (although that was not a statutory requirement). On an appeal under s 25 SIAC was required to cancel a certificate if it considered that there were no reasonable grounds for a belief or suspicion of the kind referred to in s 21(1) of the 2001 Act, or if it considered for some other reason that the certificate should not have been issued. SIAC allowed the appellant's appeal under s 25 and cancelled the certificate. In its judgment SIAC noted that the appellant's contention was that his only interest was in opposing the Gaddafi regime in Libya and that the Secretary of State's position was that some members of the organisation with which the appellant had been involved had supported and had links with Al-Qaida and that the appellant was one such. SIAC said that the persons making the assessments on which the Secretary of State had relied were entitled to be suspicious of the appellant's activities and to question whether they were limited to promotion of the anti-Gaddafi cause alone or to the assistance of its members or supporters in a way which showed that the appellant did not know nor should have known that the assistance would benefit Al-Qaida-linked extremists. However, it found that the assertions made in the statements provided by the Secretary of State were not supported by the evidence. The Secretary of State applied for permission to appeal against SIAC's decision, contending that SIAC's decision was one to which no reasonable tribunal, in the position of SIAC, could have come. He argued that SIAC could not have looked at the circumstances as a whole, as it was required to do. He argued further that SIAC had not explained why the evidence, which it was accepted that the Secretary of State had been entitled to take into account, did not give rise to a reasonable suspicion that the appellant's activities included assistance to known supporters of Al-Qaida.

Held – The decision of SIAC had not been defective in law. The Secretary of State had not shown that the decision had been one which SIAC had not been entitled to come to because of the evidence, or that the decision had been perverse, or that there had been any failure to take into account any relevant consideration. It followed that there was no prospect of an appeal succeeding. SIAC had accepted that there was evidence which raised suspicions, but as it had pointed out, the fact that there were suspicious circumstances did not mean that, when all the circumstances were looked at, the suspicious circumstances established that there was a *reasonable* suspicion. SIAC had looked at the matters relied upon by the Secretary of State as a whole and had also dealt with each of the matters on which particular reliance had been placed and had assessed their individual merit without losing sight of the need to have regard to the whole picture. SIAC had had to make the critical value judgment as to whether there had been reasonable grounds for the belief or suspicion required and in relation to that question it was the body qualified by experience to make a judgment. Accordingly, the application would be refused (see [31]–[34], below).

Notes

For certification and detention of suspected international terrorists and for appeals to the Special Immigration Appeals Commission, see 4(2) *Halsbury's Laws* (4th edn) (2002 reissue) paras 167, 184.

For the Anti-Terrorism, Crime and Security Act 2001, ss 21, 25, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 2367, 2370.

Cases referred to in judgment

- a *Ajouaou v Secretary of State for the Home Dept* (29 October 2003, unreported), SIAC.
Chahal v UK (1996) 1 BHRC 405, ECt HR.

Cases referred to in skeleton arguments

- b *English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (t/a Freightmaster Commercials) v Comr of Police for the Metropolis* [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.
Flannery v Halifax Estate Agencies Ltd (t/a Colleys Professional Services) [2001] 1 All ER 373, [2000] 1 WLR 377, CA.
Fox v UK (1991) 13 EHRR 157, [1990] ECHR 12244/86, ECt HR.
R v Legal Aid Board, ex p Kaim Todner (a firm) [1998] 3 All ER 541, [1999] QB 966, [1998] 3 WLR 925, CA.

Application for permission to appeal

The Secretary of State for the Home Department applied for permission to appeal from the decision of the Special Immigration Appeals Commission (Collins J,

- d J Barnes and M James) on 8 March 2004 allowing an appeal by M, a Libyan national, under s 25 of the Anti-Terrorism, Crime and Security Act 2001 against the certificate of the Secretary of State under s 21 of the 2001 Act and his decision to make a deportation order. The facts are set out in the judgment of the court. The court disappplied para 6.1 of *Practice Note* [2001] 2 All ER 510.

- e Wyn Williams QC and Lisa Giovannetti (instructed by the Treasury Solicitor) for the Secretary of State.
 Ben Emmerson QC and Raza Husain (instructed by Birnberg Peirce & Partners) for M.
 Angus McCullough and Martin Chamberlain acting as special advocates.

- f Cur adv vult

18 March 2004. The following judgment of the court was delivered.

LORD WOOLF CJ.**INTRODUCTION**

- h [1] This is an application for permission to appeal on behalf of the Secretary of State for the Home Department. His application relates to a decision of 8 March 2004 of the Special Immigration Appeals Commission (SIAC). SIAC was established by the Special Immigration Appeals Commission Act 1997 in response to a decision of the European Court of Human Rights in *Chahal v UK* (1996) 1 BHRC 405 at 420 (para 58) in relation to the procedures which then existed where an individual was to be deported on the grounds that the deportation would be—

- j ‘conducive to the public good as being in the interests of national security or of the relations between the United Kingdom and any other country or for reasons of a political nature...’

[2] SIAC is a superior court of record. Its members are appointed by the Lord Chancellor. To be properly constituted to hear an appeal it must consist of three members, one of whom is to be a judge who holds or who has held high

judicial office, one of whom has to be either the chief adjudicator or a member of the Immigration Appeal Tribunal and one of whom it is intended should have experience of national security matters (as we understand was the position of this case) although this is not a statutory requirement (see para 5 of Sch 1 to the 1997 Act and 299 HC Official Report (6th series) col 1055).

[3] The Anti-Terrorism, Crime and Security Act 2001 was a response by Parliament to the increased threat of terrorist activity. The 2001 Act gave the Secretary of State a power to issue a certificate in respect of a person if the Secretary of State reasonably: (i) believes that person's presence in the United Kingdom is a risk to national security, and (ii) suspects that the person is a terrorist (see s 21(1) of the 2001 Act).

[4] While a person who would otherwise be detained is free to leave this country, the 2001 Act provides that a suspected international terrorist may be detained despite the fact that his safe removal or departure from the United Kingdom is not practical (s 23(1) of the 2001 Act). An individual who is detained has a right to appeal to SIAC against his certification under s 21.

[5] On 8 March 2004 SIAC (the members being Collins J, Mr J Barnes and Mr M James) after a hearing lasting three days allowed an appeal against the Secretary of State's certificate under s 21 and his decision to make a deportation order in relation to a Libyan national, who for the purposes of these proceedings, is known as 'M'. SIAC's decision in relation to M is the first occasion upon which SIAC has allowed an appeal of an individual detained under the 2001 Act. This is therefore the first occasion upon which the Secretary of State has attempted to appeal to this court against a decision of SIAC. There have however been a number of appeals in relation to the decisions of SIAC that dismissed appeals by those who have been detained. On 29 October 2003, SIAC, presided over by Ouseley J, sitting with Mr CMG Ockleton and Mr J Chester, considered five appeals (*Ajouaou v Secretary of State for the Home Dept* (29 October 2003, unreported)). In relation to those appeals, SIAC gave a judgment dealing with a number of general issues as to the interpretation and application of the 2001 Act. That judgment is known as 'the generic judgment'. The generic judgment is itself subject to appeal to this court.

THE LEGISLATIVE PROVISIONS

[6] In determining the present application for permission to appeal, the relevant statutory provisions are important.

[7] We have already referred to s 21(1). However, it is helpful to set out the relevant provisions of that section in full. They are as follows:

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably—(a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means a person who ... has links with an international terrorist group.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if—(a) it is subject to the control or influence of persons outside the United Kingdom, and (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

a (5) In this Part—"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c 11), and "suspected international terrorist" means a person certified under subsection (1).'

b [8] It is to be noted that the power of the Secretary of State to certify, contained in s 21(1), refers to the Secretary of State's reasonable belief and suspicion. That section has to be contrasted with s 25 of the 2001 Act which deals with the right of the person who is the subject of a certificate to appeal. Section 25 provides, so far as relevant, as follows:

(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

c (2) On an appeal the Commission must cancel the certificate if—(a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or (b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

d (4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.'

e [9] It will be observed that s 25 refers to what SIAC considers the position to be. If SIAC considers that 'there are no reasonable grounds for a belief or suspicion' then SIAC must cancel the certificate. Similarly, it must do so if it considers that the certificate should not have been issued.

[10] The appeal to this court is governed by s 7 of the 1997 Act. Section 7(1) provides:

f 'Where the Special Immigration Appeals Commission has made a final determination of an appeal, any party to an appeal may bring a further appeal to the appropriate appeal court on any question of law material to that determination.'

This is the only way in which a decision of SIAC can be questioned in legal proceedings (see s 1 of the 1997 Act as amended by s 35 of the 2001 Act).

g [11] Although the definition of a terrorist in s 21 of the 2001 Act is in general terms it is common ground that the Secretary of State's powers under the 2001 Act are limited by the terms of the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001/3644, by which the United Kingdom derogated from art 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). h Accordingly, those powers cannot be exercised (except in accordance with the derogation) in respect of someone whom he does not reasonably suspect or believe to be a risk to national security because of his connection to the public emergency threatening the life of the nation—namely the threat posed by Al-Qaida and its associated networks. Thus it is not enough that the person j detained may have had connections with a terrorist organisation. It must be a terrorist organisation which has links with Al-Qaida.

[12] Section 5 of the 1997 Act contains a wide power for the Lord Chancellor to make rules. Those rules are required to provide that an appellant has the right to be legally represented. Section 6(1) of the 1997 Act also provides that a law officer—

'may appoint a person to represent the interests of an appellant in any proceedings before the Special Immigration Appeals Commission from which the appellant and any legal representative of his are excluded.'

A person so appointed is usually known as a special advocate. This provision reflects the fact that it was appreciated that in many of the appeals which are heard by SIAC, it is necessary for evidence to be given in closed session without the appellant or his lawyers being informed of the nature of the evidence.

[13] In this situation individuals who appeal to SIAC are undoubtedly under a grave disadvantage. So far as it is possible this disadvantage should be avoided or, if it cannot be avoided, minimised. However, the unfairness involved can be necessary because of the interests of national security. The involvement of a special advocate is intended to reduce (it cannot wholly eliminate) the unfairness which follows from the fact that an appellant will be unaware at least as to part of the case against him. Unlike the appellant's own lawyers, the special advocate is under no duty to inform the appellant of secret information. That is why he can be provided with closed material and attend closed hearings. As this appeal illustrates, a special advocate can play an important role in protecting an appellant's interests before SIAC. He can seek further information. He can ensure that evidence before SIAC is tested on behalf of the appellant. He can object to evidence and other information being unnecessarily kept from the appellant. He can make submissions to SIAC as to why the statutory requirements have not been complied with. In other words he can look after the interests of the appellant, in so far as it is possible for this to be done without informing the appellant of the case against him and without taking direct instructions from the appellant.

[14] The legislation to which we have been referring, represents the attempt made by Parliament to protect national security, while at the same time safeguarding the interests of individuals against whom the powers contained in the 2001 Act have been exercised. The responsibility for exercising the powers in the first instance is that of the Secretary of State. The responsibility of SIAC and this court on appeal is to ensure that the powers exercised by the Secretary of State are not exercised in cases where it is inappropriate or unlawful for this to happen. The Secretary of State, SIAC and this court in the present-day situation have very heavy responsibilities to fulfil in order to achieve the purpose of the legislation.

[15] SIAC's task is not to review or 'second-guess' the decision of the Secretary of State but to come to its own judgment in respect of the issue identified in s 25 of the 2001 Act. The task of this court on an appeal is limited to questions of law. However, the power of this court to determine questions of law enables the court (among other grounds) to set aside a decision of SIAC if that decision is unsupported by any evidence or if it is a decision to which a tribunal cannot properly come on that evidence so that it is perverse.

[16] SIAC is required to come to its decision as to whether or not reasonable grounds exist for the Secretary of State's belief or suspicion. Use of the word 'reasonable' means that SIAC has to come to an objective judgment. The objective judgment has however to be reached against all the circumstances in which the judgment is made. There has to be taken into account the danger to the public which can result from a person who should be detained not being detained. There are also to be taken into account the consequences to the person who has been detained. To be detained without being charged or tried or even knowing the evidence against you is a grave intrusion on an individual's rights. Although, therefore, the test is an objective one, it is also one which involves a

- a value judgment as to what is properly to be considered reasonable in those circumstances. The nature of the task which SIAC has to perform no doubt explains why the members of SIAC have the qualifications already indicated. The tribunal is a specialist one so that it can appropriately perform the role which it has been given. Collins J who was the chairman of SIAC that gave the decision in favour of M is a judge who was particularly well equipped by experience to be
- b a party to that decision. He was until recently president of the Immigration Appeal Tribunal and now is the judge in charge of the Administrative Court. The other two members by their experience were also equipped to assist in reaching an appropriate decision.

PREPARATION FOR THE HEARING OF THIS APPEAL

- c [17] Before SIAC in M's case, evidence was given in closed session. He was given an indication of the general nature of the case against him but he did not know the detail. In those circumstances, although he submitted a statement in support of the appeal, he himself took no part in the appeal because he did not consider that he could obtain justice from such a procedure. However, special
- d advocates were appointed, Mr Angus McCullough and Mr Martin Chamberlain. From the material which is before us, it is clear that they performed their role in the most commendable way and they certainly ensured all steps which a special advocate could take were taken on behalf of M.

- e [18] Because there was a closed hearing, SIAC gave two judgments, an open judgment and a closed judgment. Prior to the hearing of this application the members of the court were provided with not only those judgments but also the open and closed material and open and closed skeleton arguments by Mr Wyn Williams QC who appeared on behalf of the Secretary of State and the submissions on behalf of the special advocate. The material with which we were provided, which we read prior to the hearing, enabled us to fully consider the
- f issues on the appeal. So far as was possible, we heard the argument in open court. There came a stage however when we had to adjourn to closed court if we were to do justice to the Secretary of State's application. In open court Mr Emmerson QC addressed us on behalf of M. In closed court we had the advantage of the submissions of Mr McCullough as special advocate. It is not necessary for us to give a closed judgment. In his submissions, Mr Emmerson
- g asked us to protect the identity of M and we make the appropriate orders.

THE FACTS

- h [19] It is necessary next to turn to the facts. M is a Libyan national who was born in April 1966. He was brought up in Sibrata. He went to university and obtained a degree in geology and geological engineering with a view to working in the oil industry. According to his statement he went subsequently to Medina University in Saudi Arabia to concentrate on Islamic studies. In 1992 he went to Pakistan and fought with the Arab Mujahidin against the communist regime in Afghanistan. In 1994 he arrived in this country and claimed asylum. It appears
- j that he had been detained by the Gaddafi regime because he had shown opposition. On 18 November 1994, his claim to asylum was refused. It was said that the Libyans were not likely to be interested in him as he had been away from Libya from 1992 and in any event there was doubt as to whether he was really involved with an anti-Gaddafi group. He came to the attention of Special Branch and it was noted that it was his contention that he was part of an anti-Gaddafi organisation involved in illegal arms, demonstrations and general stirring of

anti-Gaddafi feelings in mosques. Despite this a further application for asylum was rejected in July 1997. SIAC had no doubt he had been 'actively involved in the provision of false documentation'. He was also involved in the provision of money to Fahdal Saadi who is suspected of having links to Al-Qaida. a

[20] Despite the rejection of his asylum claims, the appellant was not removed from the United Kingdom and it came to be accepted that he could not be returned to Libya. On 23 November 2002 the Home Secretary issued certificates under ss 21 and 33 of the 2001 Act. The reasons given were: b

'You are a member of a group of Mujahidin engaged in active support for various international terrorist groups, including networks associated with Osama bin Laden. Your activities on behalf of these networks include the provision of material support.' c

[21] A deportation order was made on the same grounds. M was then detained. After this he was served with the open statement indicating the case relied upon by the Home Secretary but this made no reference to some of the supporting material because this was regarded as being secret material which would be damaging to the public interest if it was revealed. It was in response to the open statement that he made his statement on 8 August 2003. d

[22] At the opening of the appeal before SIAC, M was represented by Mrs Peirce. She explained why M did not want to take any further part in the proceedings. She did however go on to indicate that—

'He wanted it to be made clear that it was not to be taken that he was involved in or supported terrorism. He did not. He had been involved only in assisting fellow refugees and those who were like him, supporters or members of the Libyan Islamic Fighting Group (LIFG) which is not a proscribed organisation and is not linked to any Al-Qaida network.' e

It was suggested that some of the material which had been disclosed, in particular a confused and contradictory report in an Italian newspaper, was wholly unreliable and should not have been used to justify detention. He believed the appeal was a foregone conclusion and his inability to deal with the closed material made the whole process unfair. He did not want to lend it any credence by further participation. He did, however, wish his appeal to be considered and it was not withdrawn. f

[23] Having set out the facts in the open judgment, SIAC indicates its general approach: 'Each case has been and is considered on its own facts against the tests and legal background which have been set out in the generic judgment.' SIAC say that they have reminded themselves of para 48 of the generic judgment and then continue: g

'We recognise that we must be careful not to place undue weight upon any particular piece of intelligence or assessment, since each must be looked at in the context of the whole. Equally, individual pieces of evidence looked at in isolation may seem to show little or nothing adverse to the appellant. But we must not discard them merely because of that. When the whole picture is considered, they may properly be given some weight. Equally, there may be innocent explanations for individual pieces of evidence relied on against the appellant. But we are concerned to decide whether reasonable suspicion is established and so the existence of an innocent explanation may not prevail. The question always is whether the suspicion was reasonable. We can only h

a answer that question by submitting all the evidence to a close and penetrating analysis and then deciding whether it does establish a reasonable suspicion notwithstanding that there might be an innocent explanation.'

[24] The judgment then continues by setting out M's contention that his only interest was in opposing the Gaddafi regime in Libya and the Secretary of State's position that some members of the LIFG have supported and have links with Al-Qaida and the appellant is one such. Having identified this conflict of views, it is explained why it is important for there to be reasonable suspicion either of assistance or support of Al-Qaida or those with whom that group is associated or linked. Echoing para 115 of the generic judgment it is added:

c '... the [Secretary of State] alleges and must establish albeit to the low standard of reasonable suspicion that the appellant has links to Al-Qaida or has knowingly provided support to extremists who belong to loosely affiliated Al-Qaida networks. We recognise that it is enough that he has supported one who in fact belongs to such a network if he has turned a blind eye. He does not have to know; it is sufficient if he ought to have known in all the circumstances.'

[25] The use of the expression 'ought to have known' is criticised by Mr Wyn Williams. However, far from being unduly favourable to M the test of whether 'he ought to have known' in this judgment and in para 115 of the generic judgment is unduly favourable to the Secretary of State. The earlier reference to turning a 'blind eye' identifies the correct approach. If a reasonable suspicion of actual knowledge is not established what is required is a reasonable suspicion that M has closed his eyes to the obvious.

[26] SIAC then criticises certain of the material relied on by the Secretary of State while making it clear that it does not doubt the good faith of those responsible for making the assessments on which the Secretary of State no doubt relied. SIAC also acknowledges the heavy responsibility that those persons have of trying to ensure that this country is safeguarded from acts of terrorism. SIAC add:

g 'We have no doubt whatever they were entitled to be suspicious of the appellant's activities and to question whether they were limited to promotion of the LIFG cause alone or to assistance of its members or supporters in a way which showed that the appellant did not know nor should have known that the assistance would benefit Al-Qaida-linked extremists.'

h [27] The fact remains however that SIAC finds, '[a]s a result of Mr McCullough's rigorous cross-examination in the closed session', that 'the assertions made in the statements provided by the respondent are not supported by the evidence'. It is pointed out that in some cases assertions are found to be misleading when the source documents are looked at. In other cases that there had been insufficient effort made to ensure that they were accurate. As against this SIAC also accepts that M has played down his involvement in the provision of false documentation. In so far as it can do so, in the open judgment, SIAC gives examples.

[28] The conclusions of SIAC are set out in the following terms:

j 'We do not doubt that the respondent was entitled to suspect that the appellant is a terrorist within the meaning of the 2001 Act. Much of the material

upon which the respondent relies could point in that direction, but only if a generally adverse view is taken of everything. Such a view is in our judgment not reasonable and, as we have said, we are concerned that too often assessments have been based on material which does not on analysis support them. We have thought long and hard before deciding on this appeal since we are conscious of the heavy responsibility that is placed upon us where the safety of the citizens of this country is at stake. There can be no doubt that Al-Qaida and those who support its aims do constitute a very real threat. However, although we pay the greatest respect to the views of the respondent and those who advise him, we would be failing in our duty if we did not act on our own judgment. We believe that the assessments placed before us and the respondent are not reliable and that reasonable suspicion is not established. It follows that we must allow the appeal against certification and cancel the certificate. There is also an appeal against the decision to make a deportation order. We recognise that the interests of national security as a ground for deportation may go beyond what is required to justify certification under the 2001 Act. But the reasons for the decision to make a deportation order were precisely the same as those which had led to the decision to certify. Accordingly, since we have not accepted that those reasons have been established, we must also allow the appeal against the decision to make a deportation order.'

THE CONTENTIONS OF THE SECRETARY OF STATE

[29] It is accepted by Mr Wyn Williams on behalf of the Secretary of State that before this court could allow an appeal from the decision of SIAC, it would be necessary to show that the decision of SIAC was one to which no reasonable tribunal, in the position of SIAC, could have come. Supporting arguments are advanced that SIAC cannot have looked at the circumstances as a whole as they are undoubtedly required to do. It is also contended that SIAC has not explained why the evidence, which it is accepted that the Secretary of State was entitled to take into account, does not give rise to a reasonable suspicion that M's activities include the provision of false documents and money to known supporters of Al-Qaida.

OUR CONCLUSIONS

[30] We accept that, particularly in the closed session, Mr Wyn Williams was able to point to evidence which raised suspicions. However, as the paragraphs from the open judgment to which we have referred make clear, this was also accepted by SIAC. As SIAC points out, the fact that there are suspicious circumstances does not mean that, when all the circumstances are looked at, the suspicious circumstances establish that there is a *reasonable* suspicion. As Mr Wyn Williams contends, it is essential to look at all the circumstances and circumstances which in isolation may or may not look suspicious can when looked at in context create a different impression.

[31] Despite Mr Wyn Williams' contention to the contrary it is clear beyond doubt that SIAC did look at the matters relied on by the Secretary of State as a whole. SIAC also dealt in one or other of the judgments with each of the matters on which particular reliance was placed and assessed their individual merit without losing sight of the need to have regard to the whole picture.

[32] The case which was being put forward by the Secretary of State at the outset of the appeal before SIAC was not the same case as remained at the end of

a the appeal. For example, at the outset, Mr Wyn Williams had to concede that the manner in which reliance was placed on M's membership of the LIFG was inappropriate. The cross-examination by the special advocate which obviously impressed SIAC weakened the case further.

b [33] What is critical was the value judgment which SIAC had to make as to whether there was reasonable ground for the belief or suspicion required. As to this question SIAC was the body qualified by experience to make a judgment. SIAC came to a judgment adverse to the Secretary of State. It has not been shown that this decision was one to which SIAC was not entitled to come because of the evidence, or that it was perverse, or that there was any failure to take into account any relevant consideration. It was therefore not defective in law. It follows that there is no prospect of an appeal succeeding and accordingly we refuse permission to appeal.

c [34] However, before we depart from this case, we would make the following comments. (i) Having read the transcripts, we are impressed by the openness and fairness with which the issues in closed session were dealt with by those who were responsible for the evidence given before SIAC. (ii) We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process. (iii) While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as M was detained, that individual should have access to an independent tribunal or court which can adjudicate upon the question of whether the detention is lawful or not. If it is not lawful, then he has to be released. (iv) This is not a case in which SIAC overruled a decision of the Secretary of State. SIAC had to come to its own decision on the material which as we have indicated was tested in a way which it could not be tested before the Secretary of State.

f [35] It is because of the importance of the issues to which we have referred, that this application has been heard and decided expeditiously.

Application refused. The court directed that para 6.1 of Practice Note [2001] 2 All ER 510, 1 WLR 1001 did not apply.

Kate O'Hanlon Barrister.

R (on the application of Laporte) v Chief Constable of Gloucestershire Constabulary (Chief Constable of Thames Valley Police and Commissioner of Police of the Metropolis, interested parties)

[2004] EWHC 253 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

MAY LJ AND HARRISON J

15, 16 JANUARY, 19 FEBRUARY 2004

Police – Powers – Power to stop, search and detain – Protestors – Protest demonstration at RAF base – Police stopping coaches on route to protest – Police forming opinion occupants of coaches likely to cause breach of the peace – Police escorting coaches back to departure point – Whether in the circumstances police entitled to take measures to prevent breach of the peace – Whether claimant's enforced return on coach lawful – Human Rights Act 1998, Sch 1, Pt I, arts 5, 10, 11.

The claimant, who was opposed to the US-led war against Iraq, was on one of three coaches travelling from London in order to join a demonstration at a RAF base in Gloucestershire. The defendant chief constable was concerned about hardcore protestors and believed that incidents of serious violence might take place as they had on previous occasions. Therefore authorisation was given by a chief superintendent, under s 60 of the Criminal Justice and Public Order Act 1994 to exercise powers of stop and search. The coaches were stopped some five kilometres from the base and various offending articles were seized. The chief superintendent concluded that some of the occupants of the coaches, not including the claimant, were likely to cause a breach of the peace. He, therefore, gave instructions that the coaches and all their occupants should be escorted back to London. The claimant applied for judicial review. She contended: (i) that the chief superintendent's decision to stop the coaches from proceeding to the RAF base was unlawful and infringed her rights of freedom of expression under art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), and freedom of assembly and association under art 11 of the convention; and (ii) that her detention and forcible return to London infringed her right to liberty under art 5^a of the convention.

Held – (1) It was a question of fact in each case whether preventive measures short of arrest and detention complied with the requirement in arts 10(2) and 11(2) of the convention that restrictive measures had to be prescribed by law and necessary in the democratic society in the interests of public safety, or the prevention of disorder or crime, and thus proportionate. Preventive measures would be prescribed in law where a senior police officer honestly and reasonably formed the opinion that there was a real risk of breach of the peace in close proximity both in place and time; where the possibility of a breach was real; and

a Article 5, so far as material, is set out at [26], below

a where the preventive measures were reasonable. The imminence or immediacy of the threat to the peace would determine what action was reasonable, bearing in mind that the degree of imminence might not be so great as to justify anyone's arrest. Moreover, the police were entitled to have regard to what was practical, which could include a consideration of the number of people from whom a breach of the peace was apprehended. That did not mean, however, that the police could
 b take preventive measures indiscriminately. In the instant case, the chief superintendent had reasonably and honestly believed that, if the coaches were permitted to proceed, some at least of their occupants would cause or contribute to a breach of the peace. He was also justified in regarding the situation as one in which individual discrimination was impractical. It followed that he had been
 c lawfully entitled to give instructions for preventive measures to stop the coaches from proceeding to the RAF base (see [39]–[41], below); *Moss v McLachlan* [1985] IRLR 76 applied, *Albert v Lavin* [1981] 3 All ER 878 considered.

(2) The detention of the coach passengers while they were escorted back to London did not come within art 5(1)(b) of the convention. As on the face of it,
 d detention 'to secure the fulfilment of any obligation prescribed by law' did not, in the context, happily encompass a negative obligation not to act in breach of the peace. Further, since in appropriate circumstances a breach of the peace was within the ambit of 'offence' in art 5(1)(c), it would be surprising if the same matters were encompassed within art 5(1)(b) to justify detention, which was not
 e for the purpose of bringing the person detained before a competent authority. Nor was the detention justified under art 5(1)(c) because it was not effected for the purpose of bringing the persons detained before a magistrate. The power and duty to use reasonable force to detain someone to prevent an immediately apprehended breach of the peace, although it might be described as transitory
 f detention, was scarcely detention within the scope of art 5. Detention beyond that period, however, would not be justified unless there was an arrest followed by bringing the person arrested before a magistrate. How long transitory detention might lawfully last would depend on the facts of the case, but it could not be for long. In the instant case, there was no immediately apprehended breach of the peace by the claimant sufficient to justify even transitory detention;
 g detention on the coach went far beyond anything which could conceivably constitute transitory detention; and even if there had been any justification, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace. Accordingly, the claimant's enforced return on the coach to London was not lawful and the application for
 h judicial review would be allowed (see [45]–[48], below); *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647, *Brogan v UK* (1989) 11 EHRR 117 and *Williamson v Chief Constable of West Midlands Police* [2004] 1 WLR 14 considered.

Notes

j For the common law power of arrest to deal with or prevent breaches of the peace, see 11(1) *Halsburys Laws* (4th edn reissue) para 709 and for the right to liberty, freedom of expression and freedom of association, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 130, 197 and 117.

For the Human Rights Act 1998, Sch 1, Pt I, arts 5, 10 and 11, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553 and 555.

Cases referred to in judgments

- Albert v Lavin* [1981] 3 All ER 878, [1982] AC 546, [1981] 3 WLR 955, HL; *affg* [1981] 1 All ER 628, [1982] AC 546, [1981] 2 WLR 1070, DC. a
- Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223, CA.
- Bibby v Chief Constable of Essex* (2000) 164 JP 297, CA.
- Brogan v UK* (1989) 11 EHRR 117, [1989] ECHR 11209/84, ECt HR. b
- Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844, [2004] 04 LS Gaz R 31.
- DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 1 WLR 945, DC.
- DPP v Morrison* [2003] EWHC 683 (Admin), [2003] Crim LR 727, DC.
- Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, ECt HR.
- Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705, CA. c
- John Lewis & Co Ltd v Tims* [1952] 1 All ER 1203, [1952] AC 676, HL.
- Lawless v Ireland (No 3)* (1961) 1 EHRR 15, [1961] ECHR 332/57, ECt HR.
- Moss v McLachlan* [1985] IRLR 76, DC.
- R v Howell* [1981] 3 All ER 383, [1982] QB 416, [1981] 3 WLR 501, CA.
- R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, [2002] 2 WLR 754. d
- R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
- Steel v UK* (1998) 5 BHRC 339, ECt HR.
- Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14. e

Application for judicial review

The claimant, Jane Laporte, applied, with the permission of Richards J, for judicial review of the decision of Chief Superintendent Lambert of the Gloucestershire Constabulary, made on 22 March 2003, whereby he instructed that the coach on which the claimant was travelling from London to RAF Fairford should be stopped and searched and thereafter that the coaches with their passengers should be sent back to London with a police escort without being allowed to stop on the way. The facts are set out in the judgment of May LJ. f

Michael Fordham (instructed by *Bindman & Partners*) for the claimant. g

Simon Freeland QC and *Jeremy Johnson* (instructed by the *Force Solicitor, Gloucestershire Constabulary*) for the defendant.

Simon Readhead (instructed by *Guy Lemon, Kidlington*) and *John Beggs* (instructed by *David Hamilton*) for the interested parties. h

Cur adv vult

19 February 2004. The following judgments were delivered.

MAY LJ. j**INTRODUCTION**

[1] On Saturday, 22 March 2003, the claimant, Jane Laporte, was one of about 120 passengers on one of three coaches travelling from London to RAF Fairford in Gloucestershire. She and the other coach passengers wanted to join a demonstration at Fairford against the US-led war against Iraq to which she was

a utterly opposed. Some way short of Fairford, near the town of Lechlade, the coaches were stopped at a lay-by by the Gloucestershire Police. The police searched the coaches and found a number of items which they seized. On instructions from Chief Superintendent Lambert, the coaches with their passengers were then sent back to London under police escort without being allowed to stop on the way.

b [2] In this application for judicial review, the claimant contends that the actions of the Gloucestershire Police were unlawful. She says that it was unlawful to prevent her from travelling to the demonstration at Fairford and unlawful to force her to return to London, detaining her in the process. She says that preventing her attending the demonstration infringed her freedom of peaceful assembly under c art 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and her freedom of expression under art 10. Her detention and forcible return to London infringed her right to liberty under art 5 of the convention. She claims declarations to that effect and damages.

d [3] Richards J gave permission to apply for judicial review. He reserved for the decision of this court whether judicial review is an appropriate procedure. The defendant articulates—somewhat mutedly in the face of lack of enthusiasm from the court—a submission that this is in substance a false imprisonment claim entitling the parties to trial by jury. He submits with somewhat greater e persuasion that the issues are more suitable for a witness action with full disclosure and oral evidence, including cross-examination. In my judgment, judicial review is not inappropriate. As to disclosure, I doubt if the claimant has any documents of critical importance. The defendant has been able to put all their relevant documents before the court in evidence. There is some force in the f plea for oral evidence, but the claimant does not challenge the factual accuracy or good faith of the defendant's evidence. Since the claimant has chosen judicial review proceedings, the defendant's evidence is to be taken as it stands.

[4] The claimant does not contend that the police actions in stopping and searching the coaches and seizing items found were unlawful. For these actions, there were appropriate authorisations under ss 60 and 60AA of the Criminal g Justice and Public Order Act 1994, which the claimant does not challenge.

[5] The defendant contends that the police actions in preventing the claimant from travelling further and forcibly returning her to London were lawful and proportionate to prevent likely breaches of the peace. The police did not arrest h the claimant, but it is accepted that they detained her. The claimant contends that there is no lawful power of detention falling short of arrest.

[6] In addition to the defendant, the chief constables of Thames Valley Police and the Metropolitan Police were represented as interested parties. Their officers participated in escorting the coaches back to London. It is accepted that they did so at the instance of the Gloucestershire Police. The interested parties made no j independent submissions except to discourage the court from considering or referring to wider questions relating to police containment of demonstrations. I understand that the Metropolitan Police Commissioner is concerned with other proceedings arising out of a police containment operation in London on 1 May 2001. This court indicated during the course of the hearing that it would confine its observations to the facts of the present case, and I do so.

FACTS

[7] The background to the events of 22 March 2003 from the defendant's perspective was as follows. RAF Fairford is a base used by the United States Air Force. In the last months of 2002, war with Iraq appeared probable. On 14 December 2002, there were protests at Fairford. There were 500 people there. Damage was caused to the perimeter fence and 30 trespassers were ejected from the site. On 26 January 2003, there was a further protest at Fairford attended by 1,500 people. There were four arrests and the perimeter fence was again damaged. a
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[8] On 15 February 2003, several protest groups including 'Disobedience Against War' advertised an intended protest demonstration at Fairford on 22 March. On 20 February 2003, US-led military activity against Iraq began with bombing raids on Baghdad. On 23 February 2003, there was a protest at RAF Fairford, attended by 500 people including groups described as hardcore activist groups. These included a London-based group called the Wombles—an acronym for White Overalls Movement Building Libertarian Effective Struggles. There was serious disorder. The main gate of the base was forced open and there was a major incursion into the base. There were 12 arrests. A peace camp was established to the south of the airfield, with individuals and groups walking further around the boundary line from the main gate. c
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[9] In early March 2003, websites of Gloucester Weapons Inspectors and the Wombles referred to the planned protest on 22 March as 'Judgement Day—a National day of Action at Fairford'. Protesters were invited to join the 'citizens inspection of the biggest bomber base in Europe'. It was suggested that they might wear white contamination suits. Police intelligence suggested that coaches would be available to travel to RAF Fairford from London. On 6 March 2003, 14 B52 bombers and 1,300 additional United States military personnel arrived at Fairford. There was a protest there on 9 March 2003, which 120 people attended. Damage was caused to the chain-link fencing and incursions made onto the site. There were about 20 arrests. Two people entered a munitions storage area. Three people damaged runway approach lights. There were numerous holes in the perimeter fence. e
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[10] On 10 March 2003, the Gloucestershire Police began to plan for the expected protest on 22 March. They agreed a tactical plan. The Gloucestershire Police and the United States Air Force Police agreed that there was a high risk of perimeter incursion and that the 13-mile perimeter could not be adequately or safely policed. On 12 March 2003, there was £1.7m damage caused to an aircraft at an RAF base in Scotland. g

[11] On 13 March 2003, further holes were made in the perimeter fence. Two people were found in the fuel dump area. On 14 March, two protesters gained entry to RAF Fairford and caused £40,000 damage to vehicles. They smashed windscreens, broke pipes and contaminated fuel supplies with sand. On 18 March, a person was found hiding near the site with ingredients for a suspected incendiary device. On 20 March, a National Public Order Intelligence Unit assessment considered that the recruitment of protesters could be seen as an ideal opportunity to infiltrate individuals or groups with terrorist intent. On 21 March 2003, B52 bombers began to fly operationally from Fairford. h
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[12] The Wombles website stated that they promote anarchism. They had posted a website message on 11 March 2003 under the heading 'Smash USAF Fairford! Info on coaches' which stated:

a 'The first we went their [sic] 50 people entered the base, the second time the main gates were pulled down, what happens on March 22nd at USAF Fairford is up to you. Are we going to passively spectate while hundreds of thousands of Iraqis are murdered or are we going to be actively involved in changing history and stopping this war by any means necessarily? Book a place on the coach and find out!'

b [13] The police assessment was that hardline protestors would attend on 22 March with an intention to partake in violent protest and to attempt to enter the airbase. The police had a detailed plan whose intent was to enable the protest to take place peacefully and to minimise the risk of serious public disorder. At 5.30 pm on 21 March, Mr Lambert gave an authorisation under s 60 of the 1994 Act to exercise powers of stop and search on the following day within a delineated area. The basis for the authority was that he reasonably believed that incidents of serious violence might take place.

c [14] At 10.45 am on 22 March, Mr Lambert directed that the coach on which the claimant was travelling should be stopped together with two other coaches and a van. The following note was made in the intelligence log:

d 'Based on intelligence received it is understood that 3 coaches and a van are en route from London carrying items and equipment to disrupt the protest today and gain entry to the airbase. The protesters are the "Wombles". A section 60 is in place and I have asked for an objective to be made for the Bronze in charge of the two PSU's on intercept duty to intercept the coaches and van to search and identify any items that may be used. Items on the vehicles are to be seized if they are offending articles and if that is the case the coaches and van are to be turned around and sent back towards the Metropolitan area. The Metropolitan Police will be asked to pick them up at the M25. They are not to be arrested to prevent a breach of the peace at that particular time, if that is the only offence apparent, as I do not consider there to be an imminent breach of the peace. However, they are to be warned if articles are found on the coaches and they arrive at Fairford then I will consider them to be there intent on causing disruption and a breach of the peace and they may find themselves arrested.'

e f g [15] The three coaches and a transit van were stopped at Lechlade, less than five kilometres from the perimeter of RAF Fairford. The police carried out searches under s 60 of the 1994 Act. When passengers left the coaches, they tried to conceal their identities. One person who was suspected of having caused damage at Fairford on 23 February was arrested. Mr Lambert was made aware at 12.45 pm that the three coaches and a transit van had been stopped. He was not at that stage aware that the transit van was unconnected with the coaches and that it was not the van that had been referred to in the intelligence reports. At 1 pm, Mr Lambert gave instructions for articles to be seized if necessary to prevent a breach of the peace and for the coaches and van to be turned round if that was the case as there was reason to believe that they were coming to Fairford to cause a breach of the peace. At 1.35 pm, he gave an authorisation under s 60AA of the 1994 Act to remove disguises.

j [16] A large number of items were seized. When police officers asked who certain items belonged to, nobody accepted responsibility for them. The items seized from the coaches were in the main protective or useful to conceal identity. There were few items capable of being used offensively. The items included

masks and some protective clothing, spray paint, two pairs of scissors, a smoke bomb and five shields. It is submitted on behalf of the defendant that these were generally inconsistent with an intention to carry out a peaceful protest. The claimant herself refused to give her name and address when she was asked. It is accepted that she could not be compelled to do so, but suggested that she gave no good reason for not co-operating. a

[17] At 2 pm, Mr Lambert was informed of the property found on the coaches, the mode of dress of some of the occupants and the arrest of one person. He concluded that the persons on the coaches were heading for RAF Fairford and were likely to cause a breach of the peace. He gave instructions for the occupants of the coaches to be escorted back to London. The coaches left under escort at 2.30 pm. At 4.55 pm, the claimant got off the coach at Shepherds Bush. The coaches were escorted back to London because it was feared that otherwise the passengers would seek the first opportunity to find another route back to RAF Fairford. b

[18] Although those on the three coaches were not permitted to participate, the protest at Fairford on 22 March 2003 took place and was a lawful assembly. The aim of the Gloucestershire Police in dealing with it was advertised to be to protect life and property, to preserve the peace and to enable peaceful protest to take place. The arrangements made were designed to be sufficient to cater for 10,000 protesters, but many fewer than that in fact attended. c

[19] The defendant's essential case depends on Mr Lambert's reasonable apprehension that, if the coaches were permitted to proceed to Fairford, some at least of their occupants would cause or contribute to a breach of the peace there. In the circumstances that the claimant has chosen to proceed by judicial review upon untested written evidence, I accept that that was his apprehension and that it was reasonable. The case is that such an apprehension justified in law both preventing the coaches from proceeding to Fairford and the enforced return of their occupants to London. d

THE COMMON LAW e

[20] There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other unlawful disturbance. For such a breach of the peace when done in his presence, a constable or anyone else may arrest an offender without a warrant (see *R v Howell* [1981] 3 All ER 383 at 389, [1982] QB 416 at 427). A constable or an ordinary citizen has a power of arrest where there is 'reasonable apprehension of imminent danger of a breach of the peace'. This includes where the arrestor reasonably believes that a breach of the peace will be committed in the immediate future by the person arrested (see [1981] 3 All ER 383 at 388, [1982] QB 416 at 426). f

[21] In *Albert v Lavin* [1981] 3 All ER 878, [1982] AC 546, the defendant, in an attempt to board a bus, pushed past a number of people standing in a bus queue. Several of them objected, and a police constable in plain clothes, fearing a breach of the peace, sought to prevent the defendant from boarding the bus. A struggle took place, and the constable pulled the defendant away from the queue. He then told the defendant that he was a police officer and that, if he did not stop struggling, he would arrest him. The defendant, who did not believe that the constable was a police officer, hit him five or six times. He was arrested and charged with assaulting a constable in the execution of his duty contrary to g

a s 51 of the Police Act 1964. A question arose before the justices and the Divisional Court whether the defendant had reasonable grounds for his belief that the constable was not a police officer. The House of Lords held this to be irrelevant. In dismissing the defendant's appeal, the House of Lords held, in the words of Lord Diplock ([1981] 3 All ER 878 at 880, [1982] AC 546 at 565), that—

b 'every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although, except in the case
c of a citizen who is a constable, it is a duty of imperfect obligation.'

[22] Where in exercise of the common law power of arrest, a person arrests another for an offence, his duty is to take the arrested person before a justice or to a police station as soon as he reasonably can (see *John Lewis & Co Ltd v Tims* [1952] 1 All ER 1203, [1952] AC 676). A breach of the peace is not an offence
d within this context and the provisions of the Police and Criminal Evidence Act 1984 do not apply (see *Williamson v Chief Constable of West Midlands Police* [2003] EWCA Civ 337, [2004] 1 WLR 14). But as Dyson LJ said in that case:

e '[19] Finally, I should add that I do not consider that it was irrational of Parliament to have decided to exclude arrest and detention for breach of the peace from the scope of PACE. The common law provides persons arrested and detained for breach of the peace with a considerable measure of protection against arbitrary arrest and/or unreasonable detention. Thus, an arrest may only be lawfully made if a breach of the peace is being, or reasonably appears to be about to be, committed in the presence of the
f arresting person and it is reasonable for an arrest to be made: see *Albert v Lavin* ([1981] 3 All ER 878 at 880, [1982] AC 546 at 565). When a person is arrested at common law for breach of the peace, the arrested person must be taken to a police station and then brought before a justice as soon as reasonably practicable: see *John Lewis & Co Ltd v Tims* ([1952] 1 All ER 1203 at 1211, [1952] AC 676 at 691–692) (per Lord Porter).

g [20] No doubt there are arguments in favour of extending PACE to apply to arrest and detention for breach of the peace. One of these is that the bail conditions contained in section 34(5) do not apply. I should add that it has not been suggested before us that the police have the power at common law to release a detained person on bail. As against that, it can be said that, for
h the most part, persons detained for breach of the peace are either released unconditionally after a very short period of detention, or are promptly brought before the magistrates' court by the police exercising their common law powers.

j [21] If the police consider or ought reasonably to consider that there is no longer a real (as opposed to fanciful) danger that, if released, the detained person will commit or repeat his breach of the peace within a short time, and they decide, or ought reasonably to decide, that a bind over to keep the peace is unnecessary, then continued detention is unlawful at common law. Furthermore, if the police reasonably consider that such danger exists, detention will become unlawful at common law if they fail to take the detained person to the magistrates' court as soon as reasonably practicable.

In this way a detained person is afforded a substantial degree of protection by the common law.’ a

[23] It will be necessary to consider art 5 of the convention later in this judgment. At common law, the philosophical position appears to be that there may be a distinction between arrest and detention. There is a common law power of detention to prevent a breach of the peace which may not also amount to arrest (see *Albert v Lavin*). If a person is arrested and detained (or just detained) for any prolonged period, they must be taken before a magistrate. But if a breach of the peace is no longer reasonably apprehended, a person detained may be released unconditionally without being taken before a magistrate, and must be released if he is not taken before a magistrate. b

PARTIES’ SUBMISSIONS AND DISCUSSION c

[24] Mr Fordham, counsel for the claimant, correctly submits that the common law power of a police constable to arrest where no actual breach of the peace has taken place but where he apprehends that such a breach may be caused is exceptional. The apprehended breach of the peace must be about to occur or be imminent. There has to be a sufficiently real and present threat to the peace to justify the extreme step of depriving of his liberty a citizen who is not at the time acting unlawfully (see *Foulkes v Chief Constable of the Merseyside Police* [1998] 3 All ER 705 at 711). Mr Fordham further submits that the threat of breach of the peace must come from the person who is to be arrested (see *Bibby v Chief Constable of Essex* (2000) 164 JP 297). The apprehension of breach of the peace must be objectively reasonable. He emphasises that the power of arrest carries with it a duty to bring the person arrested to a police station and then before a magistrate as soon as reasonably practicable. d

[25] The facts of *Moss v McLachlan* [1985] IRLR 76 occurred during the 1984 miners’ strike. The four appellants, all striking miners, were travelling in a convoy of motor vehicles on the M1 in Nottinghamshire. They were stopped by a police cordon at a junction and required to turn back. The police officer doing this stated that he had reason to fear a breach of the peace if they continued to the pits, and that he had a duty at common law to prevent a breach of the peace. The appellants attempted to continue and were arrested on the ground that if they proceeded the police feared a breach of the peace at one of the four collieries. They were convicted by magistrates of wilfully obstructing a police officer in the execution of his duty. There were four pits within five miles of the cordon, and over 25 cars carrying over 60 striking miners were involved in the attempt to break through the police cordon. The Divisional Court held, on an appeal by case stated, that there was ample evidence to support the magistrates’ conclusion that the police, when they stopped the convoy of striking miners, honestly and reasonably feared that there would be an imminent breach of the peace if the striking miners were allowed to continue to the collieries. The police were not only entitled, but under a duty to take reasonable steps to prevent the breach of the peace occurring. The mere presence of such a body of men at the place in question in the context of the situation in the Nottinghamshire coalfields was enough to justify the police in taking preventive action. Nor could it be held that the breach of the peace was not imminent so that the police were not entitled to take preventive action. *Skinner J* said (at 79 (para 24)): e

‘The possibility of a breach must be real to justify any preventive action. The imminence or immediacy of the threat to the peace determines what f g h j

a action is reasonable. If the police fear that a convoy of cars travelling towards a working coal field bearing banners and broadcasting, by sight or sound, hostility or threats towards working miners might cause a violent episode, they would be justified in halting the convoy to enquire into its destination and purpose. If, on stopping the vehicles, the police were satisfied that there was a real possibility of the occupants causing a breach of the peace
b one-and-a-half miles away, a journey of less than five minutes by car, then in our judgment it would be their duty to prevent the convoy from proceeding further and they have the power to do so.'

The facts in that case are quite close to those in the present case, except that in *Moss*' case the actions of the police did not extend to detaining the striking miners and forcibly returning them to where they had come from.

c [26] Mr Fordham submits that the 1998 Act reinforces the common law. Under s 6, it is unlawful for the police, a public authority, to act in a way which is incompatible with a convention right. Article 5 of the convention provides:

d '1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) ... (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the
e competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ...

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be
f entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

[27] Contrary to my personal inclination as to the syntax of art 5(1)(c), it appears that this paragraph authorises the arrest or detention of a person only when it is effected for the purpose of bringing him before the competent judicial
g authority (see *Lawless v Ireland* (No 3) (1961) 1 EHRR 15 at 23 (para 9) and *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647 at 673 (para 69); see also *Brogan v UK* (1989) 11 EHRR 117 at 131 (para 53)). From this, Mr Fordham submits that detention without arrest to prevent an anticipated breach of the peace but not in order to bring the person detained before a magistrate is not lawful. An extreme
h version of this submission would mean that *Albert v Lavin* should no longer be regarded as good law, and that Dyson LJ was mistaken in *Williamson's* case to sanction, as he apparently did, unconditional release from detention without bringing the person detained before a magistrate if a breach of the peace is no longer apprehended.

j [28] As to arts 10 and 11 of the convention, Mr Fordham submits that the claimant's freedom of expression and of assembly and association may be subject only to such restrictions as are prescribed by law and necessary in a democratic society in the interests, in the present case, of public safety or for the prevention of disorder or crime. As to whether the restrictions relied on by the defendant are prescribed by law, Mr Fordham refers to *Steel v UK* (1998) 5 BHRC 339 at 357 (para 94), where the European Court of Human Rights held that the requirement

under art 10(2) that an interference with the exercise of freedom of expression be 'prescribed by law' is similar to that under art 5(1) that any deprivation of liberty be 'lawful'. The court held in *Steel v UK* that, although breach of the peace is not classified as a criminal offence under English law, it is nevertheless to be considered an offence within the meaning of art 5(1)(c) of the convention, bearing in mind the nature of proceedings and the penalties which could be imposed by the court. The court was satisfied that the concept of breach of the peace met the requirements of art 5(1)(c). a
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[29] Mr Freeland QC, for the defendant, submits that the issue in the present case is whether the decision of Mr Lambert to turn back the coach was a decision which, taking into account the passengers' right of liberty and right to protest, no reasonable officer properly directing himself as to the law could have made. He seeks to edge the question as close to a *Wednesbury* question (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) as the authorities permit. In this context, Mr Fordham directs our attention to *R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247. Lord Bingham of Cornhill said (at [33]) that, in any application for judicial review alleging violation of a convention right, the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible. Lord Bingham referred to the opinion of Lord Steyn in *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26 at [26]–[28], [2001] 3 All ER 433 at [26]–[28], [2001] 2 AC 532. In the passage which Lord Bingham quoted, Lord Steyn said that the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Lord Hope of Craighead said in *R v Shayler* [2002] 2 All ER 477 at [61], [2003] 1 AC 247 at [61] that a close and penetrating examination of the factual justification for the restriction is needed if the fundamental rights enshrined in the convention are to remain practical and effective for everyone who wishes to exercise them. I accept that the court is obliged in the present case to conduct a rigorous and intensive review, including a close and penetrating examination of the defendant's factual justification for what Mr Lambert instructed his officers to do. c
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[30] Mr Fordham submits that the decisions to prevent the claimant from attending the demonstration and her enforced return to London under police escort were unlawful. He submits that there was no imminent apprehended breach of the peace. He submits that the indiscriminate decision to stop and return three coach loads of passengers, including the claimant, insufficiently distinguished between different individuals. The police were concerned with hardcore activists. There was no sufficient inquiry to determine whether the claimant was among any hardcore activists. Mr Fordham further submits that the claimant's detention and enforced return to London were unlawful and disproportionate. h
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[31] Mr Lambert had recorded in terms in his logbook at 10.45 am that the coach passengers were not to be arrested when they were stopped. If a breach of the peace was the only apparent offence then, he did not consider that such a breach of the peace would be imminent. It would become imminent, if they were allowed to continue to RAF Fairford.

a [32] As to the 'blanket' approach of the police, Mr Fordham submits that Mr Lambert treated all those on the coaches indiscriminately. His apprehension of a breach of the peace was concerned with the view that hardcore protesters were intent on violence. There was no evidence that the claimant had such an intent. She had attended a previous Fairford demonstration peaceably. She was not one of those who entered the gates when they were pulled open. In treating the passengers collectively, Mr Lambert only considered that there was a potential risk that some peaceful protesters might be caught up in his decision not to allow the coaches to proceed. Other coach loads of protesters were allowed to proceed. There was no proper basis for supposing that all those on the coaches which were stopped were hardcore activists. The police knew that transport arrangements had been advertised not only on the Wombles website but also elsewhere. They knew that travel arrangements had been made in a number of ways. There was no proper basis for supposing that all those on the coaches were Wombles.

d [33] Mr Lambert's decision was partly based on the articles seized from the coaches. He had already decided that the coaches would be turned back if offending articles were found. In fact, the nature of the articles found scarcely measured up to his own criteria for doing so. In the context of any attempted incursion into RAF Fairford, for practical purposes none of the articles seized were to be regarded as offensive. Two pairs of scissors would not make much impression on the perimeter fencing of the airbase. Mr Fordham submits that there is no record of Mr Lambert considering the nature of the items actually seized. He had plainly decided to turn the coaches round before they were stopped and whatever was found on them. Ironically, since the articles were seized, if the coaches had proceeded, the articles would not have been available for use at Fairford.

f [34] Mr Fordham contrasts the facts in the present case with those in *Cumming v Chief Constable of Northumbria Police* [2003] EWCA Civ 1844, [2004] 04 LS Gaz R 31. In that case, the police arrested a group of six council employees on suspicion of perverting the course of justice by tampering with a CCTV tape recording. The employees had been narrowed down to six who had the opportunity to commit the offence. Latham LJ said (at [41]):

g 'Where a small number of people can be clearly identified as the only ones capable of having committed the offence, I see no reason why that cannot afford reasonable grounds for suspecting each of them of having committed that offence, in the absence of any information which could or should enable the police to reduce the number further.'

h Brooke LJ was very uneasy about the case. He said that it seemed very strange that the law could raise no protest when five loyal employees of the council could be arrested and detained for an offence which the police reasonably believed only one of them must have committed. Despite his unease, Brooke LJ agreed with Latham LJ's analysis.

j [35] Mr Fordham submits that in the present case the police made no attempt, by questioning or facial recognition, to distinguish between those who might be hardcore activists and those who were not. The claimant's evidence is that the police did not question her about anything found on the coach nor about her intentions at the demonstration. There is evidence from the police themselves that the leading Wombles activists were well known to officers within the Metropolitan Police and that an officer of the Metropolitan Police, who was

helping at Lechlade, recorded eight named individuals whom he readily recognised. a

[36] Mr Fordham submits that the enforced return of the coach passengers to London constituted unlawful detention. He relies on his submissions that the police did not apprehend any imminent breach of the peace and that the facts did not justify as proportionate an indiscriminate approach. It would not have been lawful to arrest the coach passengers in the lay-by. It was not lawful to detain b them without arresting them. Since the claimant was not arrested, she did not have the safeguard of being taken before a magistrate as soon as this was reasonably practicable. Since her detention was not for the purpose of bringing her before a magistrate, the requirement of lawfulness under art 5(1)(c) of the convention was not satisfied. The police did not bring the claimant before a magistrate and her detention was not for that purpose. Mr Fordham further c submits that, even if an apprehended breach of the peace at Fairford was a justified reason for turning the claimant and other coach passengers away, forced return from Gloucestershire to London was wholly disproportionate and detention during a coach journey lasting more than two hours was disproportionately long. d

[37] Mr Freeland on behalf of the defendant submits that at common law police officers have the power to take all reasonable steps to prevent a breach of the peace. This includes, not only a power of arrest, but a power of detention using reasonable force short of arrest. He relies on *Albert v Lavin*. In addition to the passage from the opinion of Lord Diplock which I have already referred to, Mr Freeland refers to the judgment of Hodgson J in the Divisional Court where e he said ([1981] 1 All ER 628 at 632, [1982] AC 546 at 553):

‘It is however clear law that a police officer, reasonably believing that a breach of the peace is about to take place, is entitled to take such steps as are necessary to prevent it, including the reasonable use of force ... And if those f steps include physical restraint of someone then that restraint is not an unlawful detention but a reasonable use of force. It is a question of fact and degree when a restraint has continued for so long that there must be either a release or an arrest, but on the facts found in this case it seems to me to be clear that that point had not been reached. Obviously where a constable is restraining someone to prevent a breach of the peace he must release (or g arrest) him as soon as the restrained person no longer presents a danger to the peace.’

Mr Freeland refers to *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 1 WLR 945 and *DPP v Morrison* [2003] EWHC 683 (Admin), [2003] Crim LR 727 as analogous examples of common law powers to restrict a person’s freedom of h movement without arresting them.

[38] Mr Freeland submits that the circumstances in which a breach of the peace may be apprehended vary infinitely, and that whether the apprehended breach of the peace is ‘imminent’ or ‘about to’ happen (to use the words of Lord Diplock in *Albert v Lavin*) will depend on all the circumstances. I accept this j submission so far as it goes, but there must be a limit beyond which the concept of imminence will not stretch. I also consider that it may be relevant to consider what actions on their part the police are seeking to justify, and what preventive steps are practical. Preventing a single person from committing a breach of the peace is a different thing from preventing a large number of people from doing so. Different preventive measures may be justified in each case and this in turn

a may lend colour to what is properly apprehended as imminent. Mr Freeland submits that, when a coach contains passengers who are expected to resort to violence on reaching their destination, that is a sufficient basis for preventing them reaching the destination by stopping them at a convenient place which in the context of motor travel by road is close to the destination and where the preventive measures can be taken in an orderly way. He draws attention to the similarities
b between the present case and *Moss v McLachlan* [1985] IRLR 76. On the facts of the present case, he submits that a breach of the peace was properly to be regarded as imminent.

[39] In my view, there are difficulties with this submission. It is necessary to distinguish between arrest and preventive action short of arrest. On the facts of the present case, Mr Freeland struggles to submit persuasively that any
c apprehended breach of the peace justifying arrest was imminent at the time when the coaches were in the lay-by. Mr Lambert's own assessment at the time had been that it was not. He did not consider that anticipated circumstances in the lay-by would justify the arrest of the passengers in the coaches. In my view, he was correct in this. His view was that arrest would have been justified if they had
d reached RAF Fairford itself. If in law the circumstances which justify preventive measures short of arrest, which interfere with a person's freedom under arts 10 and 11 of the convention, are the same as those which justify arrest, it is difficult to justify the preventive measures in the present case. On the other hand, *Moss'* case is an authority providing strong support for Mr Freeland's case that the preventive measures in the present case falling short of detention were
e legitimate. To comply with arts 10(2) and 11(2) of the convention, restrictions of this kind have to be prescribed by law and necessary in the democratic society in the interests of public safety or for the prevention of disorder or crime. It is, in my judgment, a question of fact in each case whether preventive measures of this kind are necessary in this context and thus proportionate. For them to be prescribed
f by law, it is necessary that the law sufficiently defines the circumstances in which the police may lawfully take preventive measures of this kind. In my view, this requirement is in substance satisfied by the judgment of Skinner J in *Moss'* case. The essential features are that a senior police officer should honestly and reasonably form the opinion that there is a real risk of a breach of the peace in close proximity both in place and time; that the possibility of a breach must be
g real; that the preventive measures must be reasonable; and that the imminence or immediacy of the threat to the peace determines what action is reasonable. I would add that the police are entitled to have regard to what is practical and that the number of people from whom a breach of the peace is apprehended may be relevant. The question of imminence is thus relevant to the lawfulness of
h preventive measures of this kind, but the degree of imminence may not be as great as that which would justify arrest.

[40] In the present case, Mr Lambert reasonably and honestly believed that, if the coaches were allowed to proceed to Fairford, there would be breaches of the peace. He was in my judgment in these circumstances lawfully entitled to give
j instructions for preventive measures. It was his duty to do so. As in *Moss'* case, anyone seeking to override the preventive measures would be obstructing a police officer in the execution of his duty. But Mr Lambert himself acknowledged that the circumstances in the lay-by did not justify the arrest of the coach passengers generally.

[41] The principle that the police are, in the circumstances which I have stated, entitled to take preventive measures does not entitle them to take those

measures indiscriminately. But there may be circumstances in which individual discrimination among a large number of unco-operative people is impractical. In my judgment, Mr Lambert was entitled to regard the circumstances in the lay-by at Lechlade as such. For these reasons I do not consider that the police action in preventing the coaches from proceeding to Fairford was unlawful. I would reject this part of the claimant's claim. a

[42] As to the enforced return of the coach passengers to London, Mr Freeland submits that the apprehended breach of the peace was imminent within the terms of *Moss*' case and that there was no basis upon which the police might distinguish between one passenger and another. The intelligence, which was credible, related to the coaches as a whole and the passengers were unco-operative when they were asked about their identities and the ownership of the items seized. Mr Freeland submits that in the circumstances the enforced return to London was a proportionate, necessary and reasonable step to prevent the apprehended breach of the peace. In the absence of oral evidence, the court should not speculate about other possibilities, such as taking steps to stop the coaches from approaching the air base by other routes if they chose to do so. b
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[43] Mr Freeland submits that the law does not impose a straightjacket where the only option is arrest. It would have been impractical and disproportionate to arrest 120 people and take them before a magistrate. Detaining them on the coach for so long as was necessary to remove them from the area and prevent them joining the demonstration was a more proportionate and practical choice. Mr Freeland urges numerous features of the evidence as justifying Mr Lambert's conclusion that a breach of the peace would occur if the coaches were allowed to travel to Fairford. I have already indicated that in my view the court should proceed on the basis that Mr Lambert honestly and reasonably held this view. My only minor gloss is that the nature of the articles seized from those on the coaches does not seem to me to add much to the intelligence available to Mr Lambert before the coaches arrived, which he himself did not consider would justify arresting the coach passengers when they were stopped at some distance from the airbase. d
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[44] As to art 5 of the convention, Mr Freeland submits that the claimant's detention was readily justified under art 5(1)(b) which allows arrest or detention to secure the fulfilment of any obligation prescribed by law. He refers to *DPP v Meaden* [2003] EWHC 3005 (Admin), [2004] 1 WLR 945 as an example of permissible detention short of arrest to prevent a person walking around his own home whilst it was being lawfully searched. In that case, there was a warrant which authorised a search of premises and persons for controlled drugs and documents connected with drug offences. The court held that, to be meaningful, the authority given by the warrant had to enable the search to be effective. It could not be effective if the occupiers of the premises were permitted to move about freely while the search was going on. It was entirely reasonable that officers should seek, by no more force than was necessary, to restrict the movements of those in occupation of the premises while they were searched. Rose LJ accepted (at [26]) that this might not come within art 5(1)(c) of the convention, but said that it might well be within art 5(1)(b). But it did not seem to him that art 5 added anything to the common law principles which were in his view determinative in the case before the court. g
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[45] On the face of it, detention 'to secure the fulfilment of any obligation prescribed by law' does not in the context happily encompass a negative obligation not to act in breach of the peace. I would expect that part of art 5(1)(b)

a to refer to positive obligations prescribed by law. Since in appropriate circumstances a breach of the peace is within the ambit of 'offence' in art 5(1)(c), it would be surprising if the same matters were encompassed within art 5(1)(b) to justify detention which was not for the purpose of bringing the person detained before a competent legal authority. This is confirmed to be correct in the judgment of the European Court of Human Rights in *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647. The case concerned provisional arrest under the Netherlands military discipline procedure: provisional arrest may be effected either in the interest of an investigation or in order to prevent disorder (at 656 (para 26)). The court stated (at 672 (para 69)):

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c 'The court considers that the words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of the law from which the whole Convention draws its inspiration. It would justify,

d for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law.'

The court held that provisional arrest more resembled that spoken of in art 5(1)(c) of the convention, but that in the case before the court it did not fulfil one of the requirements of that provision because Mr Engel's detention had not been 'effected for the purpose of bringing him before the competent legal authority'. The same point is to be found as the opinion of the Commission in *Lawless v Ireland* (No 3) (1961) 1 EHRR 15 at 23 (para 9).

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[46] In my judgment, therefore, the detention of the coach passengers while they were escorted back to London did not come within art 5(1)(b) of the convention. Nor, on the face of it, was it justified under art 5(1)(c) because it was not effected for the purpose of bringing the persons detained before a magistrate. This might arguably suggest that there is a conflict between art 5(1)(c) and the common law power and duty of detention short of arrest which *Albert v Lavin* enunciates and illustrates. The apparent conflict may, however, be readily resolved. The power and duty to use reasonable force to detain someone to prevent an immediately apprehended breach of the peace, although it may be described as transitory detention, is scarcely detention within the scope of art 5. It is perhaps analogous to using reasonable force in self-defence. It is a defence to an allegation of assault. There should be and, in my judgment, is no obligation to bring a person thus prevented from breaching the peace before a magistrate, provided he is released unconditionally as soon as the immediate apprehension of breach of the peace is past. But detention beyond that period will not be justified unless there is an arrest followed by bringing the person arrested before a magistrate. How long transitory detention of this kind without arrest may lawfully last will depend on the facts of the case, but it cannot be for long. This view of the law is consonant with the passage in the judgment of Dyson LJ in *Williamson's* case which I have quoted at [22], above. It is also consonant with the judgment of the European Court of Human Rights in *Brogan v UK* (1989) 11 EHRR 117 at 133 (para 58), where the court said:

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'The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5(3). No

violation of Article 5(3) can arise if the arrested person is released “promptly” before any judicial control of his detention would have been feasible.’ a

[47] Upon this view of the law, in my judgment the claimant’s enforced return on the coach to London was not lawful because (a) there was no immediately apprehended breach of the peace by her sufficient to justify even transitory detention, (b) detention on the coach for two-and-a-half hours went far beyond anything which could conceivably constitute transitory detention such as I have described, and (c) even if there had been, the circumstances and length of the detention on the coach were wholly disproportionate to the apprehended breach of the peace. b

[48] I appreciate this view of the law may cause difficulties for the police in circumstances such as those at Fairford on 22 March 2003, and there is no proper basis for impugning Mr Lambert’s intention or motive. But the detention on the coaches which he instructed was not, in my judgment, lawful. The claimant is entitled to a declaration to that effect and an inquiry as to damages. c

HARRISON J.

[49] I agree. d

Application allowed.

Dilys Tausz Barrister.

a **Giambrone and others v JMC Holidays Ltd
(formerly Sunworld Holidays Ltd) (No 2)**
[2004] EWCA Civ 158

b COURT OF APPEAL, CIVIL DIVISION
BROOKE, MANCE LJ AND PARK J
16 JANUARY, 18 FEBRUARY 2004

c *Damages – Personal injury – Carer services – Gratuitous carer services provided to claimant by relative living in same household – Whether claimant in personal injury action able to recover damages in respect of gratuitous care – Whether damages for gratuitous care reserved for very serious cases.*

d Customers of the defendant developed gastro-enteritis or similar illnesses while on holiday at a resort in Majorca. Those customers brought a group action for breaches of contract and judgment was entered against the defendant by consent for damages to be determined by a judge. The claimants' cases were among those selected as lead cases. Five of the claimants were young children. All included a claim for the value of gratuitous care after the claimants had returned home, provided by the parents in the case of the first five claimants, and the spouse in the case of the sixth. The judge made awards for the value of gratuitous care on the basis that such awards might be allowed if a claimant's illness or injury was sufficiently serious to give rise to a need for care and attendance significantly over and above that which would be given anyway in the ordinary course of family life. He assessed damages by taking into account the general nature of the extra burden. The defendant appealed, submitting, inter alia, that awards to compensate for gratuitous care could only be made in very serious cases.

e **Held** – Awards for gratuitous care were not reserved for very serious cases. In the instant cases the claimants had required care which went distinctly beyond that which was a part of the ordinary regime of family life and the judge had been correct in principle, and correct in his approach, to make awards for the cost of gratuitous care. Accordingly, the appeals would be dismissed (see [26], [31], [32], [35]–[37], below).

g *Mills v British Rail Engineering Ltd* [1992] PIQR Q130 explained.

Decision of Judge MacDuff QC [2003] 4 All ER 1212 affirmed.

h Per curiam. An award for gratuitous care in excess of £50 per week at present day values in a case in which a child suffering from gastro-enteritis receives care from its family (so that there is no question of the cost of substitute care) should be reserved for cases far more serious than the instant cases (see [33], [36], [37], below).

j **Notes**

For damages for gratuitous services, see 12(1) *Halsbury's Laws* (4th edn reissue) para 898.

Cases referred to in judgments

Evans v Pontypridd Roofing Ltd [2001] EWCA Civ 1657, [2002] PIQR Q61.

Hogg v Doyle (6 March 1991, unreported), CA.

Housecroft v Burnett [1986] 1 All ER 332, CA.

Hunt v Severs [1994] 2 All ER 385, [1994] 2 AC 350, [1994] 2 WLR 602, HL.

Mills v British Rail Engineering Ltd [1992] PIQR Q130, CA.

Cases referred to in skeleton arguments

Blair v Michelin Tyre plc [2002] All ER (D) 210 (Jan).

Cunningham v Harrison [1973] 3 All ER 463, [1973] QB 942, [1973] 3 WLR 97, CA.

Donnelly v Joyce [1973] 3 All ER 475, [1974] QB 454, [1973] 3 WLR 514, CA.

Fairhurst v St Helens and Knowsley Health Authority [1995] PIQR Q1.

Fitzgerald v Ford [1996] PIQR Q72, CA.

Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, HL.

Lowe v Guise [2002] EWCA Civ 197, [2002] 3 All ER 454, [2002] QB 1369, [2002] 3 WLR 562.

Nash v Southmead Health Authority [1993] PIQR Q 156.

Snell v Newalls Insulation Co Ltd [1998] CA Transcript 911.

Appeal

The defendants, JMC Holidays Ltd (formerly Sunworld Holidays Ltd) appealed with the permission of Judge MacDuff QC from his decision on 1 May 2003 ([2003] EWHC 2619 (QB), [2003] 4 All ER 1212) awarding damages for the value of gratuitous care to the claimants Sean Paul Mason, Lauren Ilic, Emma Farrar, Molly Woodier, Lauren Hunt and Patrick Brennan in six lead cases in a group action brought against the defendants by Anita Giambrone and 651 others for breaches of contract leading to personal injury in which 401 of the claims had already settled. The facts are set out in the judgment of Brooke LJ.

Charles Haddon-Cave QC and *John Russell* (instructed by *Field Fisher Waterhouse*) for the defendant.

Andrew Spink QC and *Samantha Presland* (instructed by *Irwin Mitchell*, Birmingham) for the claimants.

Cur adv vult

18 February 2004. The following judgments were delivered.

BROOKE LJ.

[1] This is an appeal by the defendants against an order made by Judge MacDuff QC sitting as a High Court judge in the Birmingham District Registry on 1 May 2003 ([2003] EWHC 2619 (QB), [2003] 4 All ER 1212). The judge was concerned with the assessment of damages in six 'lead cases' arising out of the defendants' breaches of contract which led to personal injury being sustained by the claimants while on holiday at the Club Aquamar in Majorca. Unhappily many of the defendants' customers at that resort developed gastro-enteritis or other similar illnesses during their holiday. Six hundred and fifty two of them brought claims against the defendants, and the judge had been concerned with the case management of these claims under the umbrella of a group action. Judgment was entered against the defendants by consent on 5 April 2000 for damages to be determined by a judge.

[2] Thirty-two lead cases were selected, and in due course 401 of these claims were settled, including 26 of the lead cases. At the trial on 3 March 2003 the judge was concerned with the assessment of damages in the remaining six lead cases.

a At the centre of the dispute at the trial was the question whether an award should be made for the ‘value of care’ given to the claimants after they returned home. There was a similar dispute about the viability of a ‘loss of services’ claim by an adult claimant, but we are not concerned with that on this appeal. All the other heads of damage were agreed, subject’ to the court’s approval in the cases involving claimants under the age of 18. The judge decided the ‘value of care’ issue in favour of the claimants.

b [3] This, then, is the subject matter of the defendants’ appeal. Although the amounts at issue in these six cases are comparatively small, there are many group claims of this kind making their way through the courts, so that this judgment will be of much wider importance than might be indicated by the amounts at issue in these appeals. The defendants made it clear in their grounds of appeal c that if we were to uphold the judge’s judgment in principle, there would be no challenge to the amount of the awards he made in these six cases.

[4] The lead cases all represented cases in which the claimant had been ill for more than 14 days. Cases involving an illness of shorter duration were dealt with separately. The lead cases were divided into 11 groups, depending on the length d of the claimant’s illness. I will refer to the six claimants by the letters A to F, and they can be categorised (with an indication of their age at the time of the holiday) as follows:

	Claimant	Group	Duration of illness	Age	Care claim
e	A	2	22–28 days	3 years 10 months	2 weeks
	B	3	29–42 days	7 years	2 weeks
	C	5	3–4 months	8 years 9 months	111 days
f	D	8	6–8 months	18 months	77 days
	E	9	8–10 months	7 years	2 weeks
g	F	11	Over 12 months	29 years	3 weeks

[5] The principal issue the judge had to decide was whether these claimants could recover damages for gratuitous care after they returned home from their holiday. The judge held that they could, and he awarded them sums ranging h between £120 and £275. In the first five of these cases it was only the value of parental care that was in issue. In the sixth case the adult claimant claimed the value of extra care provided by his wife.

[6] The judge summarised the general nature of the first five of these claims in these terms ([2003] 4 All ER 1212):

j ‘[20] In all these claims, the care (be it “nursing” care and attendance, or child minding) was provided by a parent and not by some third party for payment. In all these claims, the claim is for the value of that which the parent provided. I do not think there is any distinction to be drawn between these different categories (nursing care and child minding). They are part and parcel of the same need—to look after the child during his/her illness. The “care” may attract different labels. It may be child minding; attending

the child when, but for the illness, it would not be necessary. It may be nursing care in the narrow sense: helping to the lavatory, administering medicine, changing the bedding, or cleaning up after an accident. It may be care (or attendance) in the wider sense: being at the bedside, to provide comfort and support to an ill child. These different roles all fall within the generic term "care and attendance" or (where the provision is by a parent and not a professionally engaged carer) "gratuitous care".' a
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[7] The claim advanced in the case of each child was a claim based on the hourly rates set out in the Home Cover (Home Help) National Joint Council for Local Authority Services, new spinal point 8 (see *NJC for Local Government Services—National Agreement on Pay and Conditions of Service* (the 'Green Book')), with no allowance being made for enhanced rates paid to local authority workers for unsocial hours. The duties involved in this work tended to mirror those of a family providing care in their own homes. In four of the cases an hourly rate of £4.98 was adopted, and in the fifth case a rate of £4.84 an hour. The sums claimed, and the judge's award, were as follows: c
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Claimant	Days	Hours per day	Claim	Total award
A	7	4	£139.44	
	7	2	<u>£69.72</u>	
			£209.16	£150
B	4	5.5	£103.88	
	5	6	<u>£145.20</u>	
			£249.08	£175
C	14	4	<u>£278.88</u>	£175
D	5	4	£99.60	
	2	14	£139.44	
	2	10	£99.60	
	27 weeks	4 per 3 weeks	<u>£179.28</u>	
			£517.92	£275
E	1	6	£29.88	
	14	2	<u>£139.44</u>	
			£169.32	£150

[8] After considering the authorities, to which I will turn, the judge concluded that the governing principle was that an award for the value of gratuitous care e
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a might be allowed if the claimant's illness or injury was sufficiently serious to give rise to a need for care and attendance significantly over and above that which would be given anyway in the ordinary course of family life. He said that he knew from his own experience of trying and case managing these cases, both in the High Court and in the county court, that these claims were regularly made and regularly allowed.

b [9] The judge then referred to the judgment of May LJ in *Evans v Pontypridd Roofing Ltd* [2001] EWCA Civ 1657, [2002] PIQR Q61 and went on to say ([2003] 4 All ER 1212 at [55]):

c '... I do draw assistance from the case. The Court of Appeal took the opportunity to emphasise that a judge of first instance should not be put into a straitjacket, when assessing this head of damage. In many cases, it might be inappropriate to adopt the traditional approach (assessing a number of hours input per day or week, applying a commercial hourly rate, and then discounting, in the way described earlier in this judgment). It is open to a judge to assess the value of the care, very much as he might assess general damages for pain and suffering, by having regard to what the carer has done and fixing appropriate compensation. In this case it seems to me that such an approach is the correct one. It is artificial to adopt what I have called the conventional approach where a parent of young children is providing a mixture of love, support, and care. It is just not possible to separate out the "extra" hours or minutes superimposed on the normal daily round by the illness. It is possible to understand the general nature of the extra burden placed upon the parent, and to make a proportionate and proper award. That is how I propose to assess the damages in these cases.'

f [10] The judge noted that it had been conceded that there should be some discount from the amounts claimed on full commercial care rates, but he commented (at [56]):

g 'That is of small significance, in view of the fact that I intend, as I have said, to adopt a more broad brush approach. I have read the evidence of the parents carefully. I have read the medical evidence, because it seems to me that the nature and severity of the child's illness is a relevant factor. I have noted the number of days or weeks over which care was said to be necessary. I have taken account of the fact that, for part of the time, the claimant was getting better and that the need for care would, at that time, reduce. I have taken account of whether or not the claim incorporates a claim for "child minding" (where the claimant was unable to go to nursery or school and needed to be attended) and I have taken account, in each case, of the nature of the additional burden, as described by the parent.'

j [11] He then proceeded, without any further explanation, to make the individual awards I have indicated in the right hand column of the table in [7], above. On this appeal Mr Haddon-Cave QC, who appeared for the defendants, made no attempt to challenge the reasonableness of the judge's awards on the basis on which he made them. His concern was to persuade us that no award ought to have been made at all under this head in any of these cases.

[12] There was very little dispute on the hearing of the appeal about the general rules which govern the award of damages for gratuitous care rendered to

an injured claimant. There is a useful summary of the law in 12(1) *Halsbury's Laws* (4th edn reissue) para 898: a

‘Where the injured plaintiff is cared for, not by professional, paid carers, but by volunteers, whether members of his family or otherwise, the award of damages will reflect the value of the services provided. The value of such gratuitous services may be determined either by applying the cost of buying such care on the open market, or by assessing the loss of income suffered by a carer who has given up paid employment to care for the plaintiff, or a combination of the two. A plaintiff who receives damages for services rendered by another holds the relevant amount on trust for that other.’ b

[13] A footnote records that a common practice now is to award gratuitous family care at two-thirds of the market rate. Awards of this kind generally attract publicity when a claimant has been grievously injured. In the leading case of *Housecroft v Burnett* [1986] 1 All ER 332 at 342–343 O’Connor LJ set out the governing principles. This passage was authoritatively reviewed by May LJ in *Evans v Pontypridd Roofing Ltd* [2001] EWCA 1657, [2002] PIQR Q61 in a judgment which clearly influenced Judge MacDuff’s approach in the present case. It is sufficient for present purposes to cite a few short passages from May LJ’s judgment. c

[14] First, he cited (at [23]) Lord Bridge of Harwich’s speech in *Hunt v Severs* [1994] 2 All ER 385 at 394, [1994] 2 AC 350 at 363 in which he said: d

‘Thus, in both England and Scotland, the law now ensures that an injured plaintiff may recover the reasonable value of gratuitous services rendered to him by way of voluntary care by a member of his family ... [T]he underlying rationale of the English law ... is to enable the voluntary carer to receive proper recompense for his or her services ...’ e

May LJ then went on to say ([2002] PIQR Q61 at [25]): f

‘In my judgment, this court should avoid putting first instance judges into too restrictive a strait-jacket, such as might happen if it was said that the means of assessing a proper recompense for services provided gratuitously by a family carer had to be assessed in a particular way or ways. Circumstances vary enormously and what is appropriate and just in one case may not be so in another.’ g

[15] After saying that the means of reaching the assessment must depend on what is appropriate to the individual case, and mentioning the judgment of Turner J in *Hogg v Doyle* (6 March 1991) referred to in *Kemp and Kemp The Quantum of Damages* vol 3, para A2-005, May LJ said ([2002] PIQR Q61 at [26]): h

‘What this case ... illustrates is that it is appropriate to make an assessment on the basis of the caring services provided by the gratuitous carer as a result of the claimant’s injury, and it will depend on the circumstances of the case what the extent of those services are. In many cases, it will be appropriate to assess them at a relatively small number of hours per day or week.’ i

[16] As I have said, Mr Haddon-Cave did not attempt to shift the strongly established principles of law to which I have referred. His clients’ concern was to establish a principle that awards of this kind should only be made in serious cases, or in cases where the claimant could point to a demonstrable financial expense in providing the necessary care, such as the cost of employing a carer during the day

a when a working mother was out at work and somebody had to be at home to look after a very sick child.

[17] Mr Haddon-Cave supported his contention that these awards should be restricted to serious cases by reference to a single decision of this court in 1992, *Mills v British Rail Engineering Ltd* [1992] PIQR Q130. In that case the court was concerned, among other things, with an appeal by defendants against an award of £8,000 to the widow of a man who died of lung cancer, the award being made as a recompense for her caring services to her husband during the last months of his life. Her claim had been based on two hours' services each day for the first two months of his illness. The claim increased to three hours, and then to four hours a day during the next two months up to the time his cancer was diagnosed. For the next six months the claim was elevated to what in essence represented ten hours' services each day. For the last three months a claim was made for 14 hours' services each day. Except for this final period, the claim was based on a rate of £3 per hour. For the last three months the rate was £3.25 per hour.

[18] These were the charging rates for carers who were not qualified nurses with caring skills, and the award of £8,000 was based on two-thirds of the full commercial rate for such services, without any extra allowances for agency charges. The claimant's expert witness, Miss Sergeant, had prepared the necessary calculations.

[19] Mr Haddon-Cave relies on passages in the judgments of Dillon and Staughton LJ as establishing a point of principle in cases involving a claim for care services, which is said to be binding on this court. Dillon LJ said (at 137–138):

"To my mind there can be no justification in principle for differentiating between full-time care needing really a trained nurse and full-time care needing a carer giving love and affection to the patient, the dying person, to a degree far more than would be expected in any ordinary way of life. In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative *well beyond the ordinary call of duty* for the special needs of the sufferer. The basis, as explained by O'Connor L.J. in his judgment in *Housecroft v. Burnett*, is that the court will make an award to enable the sufferer or his estate to make reasonable recompense to the relative who has cared so devotedly. So it must indeed *only be in a very serious case* that an award is justified—where, as here, there is no question of the carer having lost wages of her or his own to look after the patient ... To my mind however, if one looks at Miss Sergeant's schedule for a wife's care beyond what she would anyhow have been doing for her husband in her part of the household tasks and cooking, it comes out too high. She had a lot of extra duties put upon her. Because of his illness she rightly thought that it would be wrong to leave her husband on his own. She took him out from the house either in a wheelchair that was obtained or for a drive in the car, but not otherwise; he did not walk outside the house; he could walk a little, but without ease, in the house or occasionally out to the back of the garden. He had been keen on do-it-yourself and on gardening and was an active man. Those are matters taken into account in other heads of special damage which were not in dispute. She was understandably afraid of what might happen if he pottered out in the garden on his own.' The quality of his life had been reduced and that meant more care from her was needed. But I take the view that the figure that the judge awarded, having regard to the way Miss. Sergeant's schedule is made up and the extent to which it goes back,

was too high. I would accordingly reduce this award from £8,000 to £5,000. It is not possible to make a really precise calculation.’ (My emphasis.) a

[20] Staughton LJ said (at 138–139):

‘It seems to me that a plaintiff would naturally wish to pay some reward or compensation, if he had the money to do so, for care and attendance by a relative *which goes distinctly beyond that which is part of the ordinary regime of family life*; and, where his disability has been caused by the fault of the defendant, it is right that he should be provided with the money to do so. It will often be difficult, or even impossible, to measure with complete accuracy what reward or compensation a reasonable plaintiff would pay to the relative in those circumstances, even though this is said to be a head of special damages. The sum should be modest and not extravagant. Here the care continued in all for a period of no more than a year, becoming increasingly demanding as time went by. I agree with Dillon L.J. that an appropriate figure is £5,000.’ (My emphasis.) b
c

The third member of the court, Neill LJ, simply said that he agreed that the appeal should be allowed to the extent that Dillon LJ indicated. d

[21] It is suggested that two principles were established along the following lines. (1) There should be no award of this kind except in a very serious case. (2) In order to qualify for an award the relative must provide care well beyond the ordinary call of duty for the special needs of the sufferer, alternatively care which went distinctly beyond that which was part of the ordinary regime of family life. e

[22] Mr Haddon-Cave subjected both the facts of this case and the language of these extempore judgments to a scrutiny of an intensity which would have surprised the judges concerned. It was clearly a very serious case—the total award of damages exceeded £80,000—so that the court did not have to determine whether no award for gratuitous care should be made at all on the grounds that the seriousness of the deceased’s illness did not cross some unidentified threshold. This was a typical appeal against quantum in pre-CPR days, in which the defendants were contending not that no award should be made at all but that it should be restricted to the ‘last month or so’ when Mrs Mills was providing care which amounted to full-time care of a nursing nature. f
g

[23] The full value of the claim in *Mills’* case, based on Miss Sergeant’s calculations, was about £12,000, and the discount reduced this to the £8,000 awarded by the judge. The substituted award of £5,000 is equivalent to a full commercial claim of £7,500, so that it appears that the Court of Appeal decided to reduce Miss Sergeant’s full claim by £4,500 (just over a third). The full claim amounted to £750 in total for the period between November 1989 and early March 1990 when cancer was first diagnosed; about £980 per month for the period between March and October when a claim was advanced on the basis of 11 hours of care each day; and a total of about £3,300 for the final two-and-a-half months in which the cost of 14 hours’ care per day were being claimed. h

[24] We do not know the precise basis on which the Court of Appeal made its reduction. The report is not very illuminating in relation to the nature of the care involved in the first period, when Mr Mills had what appeared to be a cold which he had difficulty in shaking off, followed by a cough which would not go away. Perhaps they disallowed most (if not all) of it. For the remainder, they appear to have taken the broad-brush view that the claim was overvalued by about 40%. j

a They started from the proposition that no recompense was to be allowed for the tasks Mrs Mills would have been doing for her husband in any event, and went on to allow the claim for those elements of her care and attendance which went 'distinctly beyond that which is part of the ordinary regime of family life'. Whether they decided to reduce the number of hours claimed by 40% throughout the entire period after cancer was first diagnosed or, as is more likely, b they adopted a graded approach, with step changes as Mr Mills became iller, the fact remains that they considered a claim for an average of seven hours' services every day as a reasonable one, with a probable increase towards the end of his life. Although in this extempore judgment Dillon LJ used the words (at 137) 'well beyond the ordinary call of duty', he used the milder phrase (at 138) 'beyond what [a wife] would anyhow have been doing for her husband', and it is evident from c the calculations Mr Haddon-Cave showed us that it was this second test which the Court of Appeal actually applied.

[25] It is noteworthy that Mr Haddon-Cave was unable to show us any authoritative textbook or report which considered that *Mills'* case established any new point of principle. In its wide-ranging survey of the present law relating to d the recovery of medical or nursing expenses and other costs of care, the Law Commission in *Damages for Personal Injury: Medical, Nursing and Other Expenses* (Consultation Paper No 144) (1996) p 12, n 58 simply referred to it as authority for the proposition that the care given must be over and above that which would have been given in the ordinary course of family life. It also mentioned Dillon LJ's dictum that an award would only be made for care 'well beyond the e ordinary call of duty for the special needs of the sufferer'.

[26] I reject the contention that *Mills'* case presents any binding authority for the proposition that such awards are reserved for 'very serious cases'. This was not a point which had to be decided in *Mills'* case, which was on any showing a very serious case, and a proposition like this would be very difficult to police. f Where is the borderline between the case in which no award is made at all (unless, for example, a working mother incurs actual cost in hiring someone to look after her sick child when she was at work) and the case in which a full award of reasonable recompense is made? An arbitrary dividing line, which would be likely to differ from case to case, and from judge to judge, would be likely to bring the law into disrepute.

g [27] Mr Haddon-Cave's fall-back position was that the approach of Dillon LJ in *Mills'* case was based on sound reasoning and common sense, and that it should be followed even if it is not binding. He suggested that the underlying rationale of this type of award was to enable the carer to receive the reasonable value of the gratuitous services. In determining 'reasonable recompense' English law h should have regard to the fact that the services are rendered in a family context. It is not reasonable, he said, to recompense family members for mutual care falling within the ordinary regime of family life, in which family members would not expect to give or receive recompense for the services they rendered. He said that it is only where the care goes well beyond the ordinary call of duty that j recompense may be expected, reasonable and justified, and then only at a two-thirds rate to reflect the fact that the services are voluntary.

[28] It is, I think, worthwhile to look in rather more detail at the facts of some of these cases. B, a seven-year-old girl, returned from holiday with severe gastro-enteritis. She was so ill when she returned home that she had to be admitted to a children's hospital on the first day of her return. Her mother had also been taken ill, so that the child's grandmother had to look after the sandwich

bar which her daughter ran in a self-employed capacity. In any event B was unable to go back to school for 14 days and she had to have an adult at home to look after her. B's stools were very loose, and she would cry when she had to go to the toilet. When she was given some soup after two days, she was sick all over the carpet. She was very weak, pale and withdrawn for two weeks. She had no energy, and suffered from stomach pains, and her mother had to spend a lot of time trying to reassure her. The judge reduced the claim of £258.96, whose breakdown is shown at [7], above and did not include any claim for the cost of care at weekends, to £175. a
b

[29] A, a three-year-old boy, had had two or three episodes of gastric illness in the past, one of which was really quite severe. He, too, was extremely ill when he came home. He vomited frequently on the plane coming home, and was sick on the stairs coming off the plane. He, too, had to be taken to a children's hospital where he was placed in an isolation ward for one day. He was extremely clingy when he came home, and his mother had to spend eight hours with him on the first day. Thereafter she had to spend a lot of time with him, as is reflected in the hours claimed. A doctor expressed the view that a child of three could not cope with these symptoms on his own and would require a considerable degree of nursing support. In his case a claim for £209.16, based on a small number of hours of care for 14 days, was reduced to £150. c
d

[30] The cases of C and E call for no special mention. These were two other children of primary school age whose awards the judge reduced slightly (to £175 and £150 respectively) from the sums claimed for two weeks' care. D, however, fell into a slightly different category, because she was only 18 months old. She had remained on holiday with her family for 12 days after the onset of her acute gastro-enteritis. When she came home she was lethargic and very clingy, and her stools were very loose. Her mother had to spend far more hours each day caring for her than would have been usual. Her nappies had to be changed more often, and her bedding needed to be washed frequently because she soiled it. On the sixth day after her return, her health took a turn for the worse. She had a very high temperature and stomach pains, which caused her to scream and hold her stomach. She also had acute diarrhoea, and her nappies had to be changed every two hours. These symptoms continued all that night and through the next day, and she had to be supervised constantly. On the eighth day after her return her acute symptoms seemed to ease, but she needed a lot more care than usual for the next two days. Her mother had to continue to wash and change her regularly and ensure that she drank plenty of water. In her case there was a continuing claim for an extra four hours' care every three weeks for 27 weeks. The judge made an award of £275 as against a claim for £517.92. e
f
g

[31] In my judgment the judge was correct in principle to make an award for the cost of care in each of these cases. Anyone who has had responsibility for the care of a child with gastro-enteritis of the severity experienced by these children will know that they require care which goes distinctly beyond that which is part of the ordinary regime of family life. The fact that one of these mothers had a child who had suffered in this way in previous occasions provides no good reason or concluding that an award of some sort is not appropriate if there is an identifiable tortfeasor to blame. h
j

[32] I am therefore of the view that the judge's approach, as set out in [9] and [10], above, was correct as a matter of law, and that this appeal, which posits that no award at all should have been made in any of these cases, must fail. Even if the awards in fact made by the judge had been the subject of challenge on this

a appeal, I do not consider that they exceeded the bracket of awards properly available to him such that this court should interfere.

[33] In future, however, and echoing the words of Staughton LJ in *Mills'* case, I consider that any award for gratuitous care in excess of £50 a week at present day values in a case in which a child suffering from gastro-enteritis receives care from her family (so that there is no question of the cost of substitute care) should be reserved for cases more serious than these. This sum represents, in my judgment, a fair and proportionate balance, in cases of the type I have described at [28]–[30], above, between the consideration that some payment ought to be made for the unpleasant additional burden placed on the family carer and the consideration that the care is being rendered in a family context and that the remuneration on this account should be relatively modest. This may well be a situation in which appropriate representatives of claimants and defendants, perhaps under the auspices of the Civil Justice Council, might usefully try to agree a guideline tariff for gastro-enteritis cases generally, depending on the severity of the illness (founded around this award of £50 per week at 2004 values for the cases described in this judgment), so that the disproportionate cost of proving these small heads of damage may be avoided.

d [34] The claim of F, the one adult claimant, calls for no special comment now that the 'value of services' element no longer features in the appeal. It falls to be determined along the same lines.

[35] For these reasons I would dismiss these appeals.

e MANCE LJ.

[36] I agree.

PARK J.

[37] I also agree.

Appeals dismissed.

Kate O'Hanlon Barrister.

Myles v Director of Public Prosecutions

[2004] EWHC 594 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

KENNEDY LJ AND MACKAY J

19, 24 MARCH 2004

Human Rights – Right to a fair hearing – Criminal proceedings – Breach of right to a fair hearing within reasonable time – Just satisfaction – Appellant convicted for driving while unfit to drive through drink – Appellant seeking to appeal by way of case stated against conviction – Case stated not finalised for 20 months due to fault of recorder – Whether conviction to be upheld – Whether delay in stating case constituting special reasons for not disqualifying – Whether breach to be reflected in sentence by way of just satisfaction – Human Rights Act 1998, Sch 1, Pt I, art 6(1), 6(3)(c).

The defendant was convicted in the magistrates' court of an offence of failing without reasonable excuse to provide a specimen of blood contrary to s 7(6)^a of the Road Traffic Act 1988. He appealed to the Crown Court. Relying on 24 authorities mostly coming from Commonwealth jurisdictions, he submitted that as he had been unable to consult a solicitor, in accordance with s 58^b of the Police and Criminal Evidence Act 1984, prior to the commencement of the procedure for taking a specimen, his rights under art 6(3)(c)^c of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) had been breached. The recorder was of the opinion that the defendant had been properly required to give a specimen of blood and that while the court had to consider the principles of art 6(3)(c), domestic law stated clearly that the procedure for taking specimens should not be delayed to allow consultation with a solicitor. The defendant's conviction was upheld. He was fined £200, ordered to pay £75 costs, was disqualified from driving for 12 months and his driving licence was endorsed. Following conviction, the defendant applied to the recorder to state a case. The recorder took over six months to prepare his draft case. The defendant returned his comments promptly, but the recorder took a further ten months to consider those comments and at the end of the day, the defendant's solicitors were required by the court to type out the final case. The defendant acknowledged that under domestic law the recorder had come to the correct conclusion but submitted that the court should have had regard to the persuasive authorities from foreign jurisdictions. He also argued that the delay in stating the case amounted to a breach of the his convention right to a hearing within a reasonable time in violation of art 6(1)^d and that the breach of his rights should be reflected in his sentence by way of just satisfaction because the 12 months disqualification

^a Section 7(6) is set out at [9], below

^b Section 58, so far as material, is set out at [9], below

^c Article 6(3), so far as material, provides: 'Everyone charged with a criminal offence has the following minimum rights... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...'

^d Article 6(1) provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ...'

- a would have a harsher impact upon him than upon the average offender since he had been obliged to wait so long to begin it, it having been stayed pending appeal. The prosecution accepted that there had been a breach and pointed to the financial consequences of the conviction as an area where such just satisfaction could be achieved.
- b **Held** – (1) When interpreting art 6(3)(c) of the convention, domestic authorities outweighed any persuasive authorities from foreign jurisdictions. The clear view of the domestic courts was that the sample-taking process should not be delayed to any significant extent for the purpose of obtaining legal advice. It followed that the defendant had been correctly convicted (see [13], below); *Kennedy v CPS* (2002) 167 JP 267 applied.
- c (2) Special reasons for expunging or reducing a term of disqualification below the minimum period could not be widened so as to include and permit the granting of just satisfaction where that was required in response to an art 6 breach. The imposition of a term of disqualification was mandatory under the clear terms of the 1988 Act, which laid down the sentence appropriate on such a conviction. Moreover, as the delay was unrelated to the commission of the offence itself, being the product of tardy progress of the appeal outside the control of both the defendant and the prosecution, it was not a matter which the court could properly take into consideration. The delay, however, could be reflected by quashing the financial penalty imposed by the justices and upheld by the Crown Court and the appeal would be allowed to that extent (see [26]–[29], below); *R v Wickins* (1958) 42 Cr App R 236 applied.

Notes

For the right to have legal assistance, see 8(2) *Halsbury's Laws* (4th edn reissue) para 145.

- f For obligatory disqualification from driving and for special reasons for not imposing obligatory disqualification, see respectively, 40(2) *Halsbury's Laws* (4th edn reissue) paras 756 and 757.

For the Human Rights Act 1998, Sch 1, Pt 1, art 6 see, 7 *Halsbury's Statutes* (4th edn) (2002 Reissue) 554.

g Cases referred to in judgment

Campbell v DPP [2002] EWHC 1314 (Admin), (2002) 166 JP 742.

DPP v Billington [1988] 1 All ER 435, [1988] 1 WLR 535, DC.

Kennedy v CPS [2002] EWHC 2297 (Admin), (2002) 167 JP 267, DC.

Kirkup v DPP [2003] EWHC 2354 (Admin), [2004] Crim LR 230, DC.

- h *Ministry of Transport v Noort* [1992] 3 NZLR 260, NZ CA.

R v Anderson [1972] RTR 113, CA.

R v Bartle (1994) 118 DLR (4th) 83.

R v Prosper (1994) 118 DLR (4th) 118, Can SC.

R v Wickins (1958) 42 Cr App R 236, CCA.

- j *Whitley v DPP* [2003] EWHC 2512 (Admin), [2003] All ER (D) 212 (Oct), DC.

Case stated

David Anthony Myles appealed by way of case stated from the decision of Liverpool Crown Court on 26 February 2002, dismissing his appeal against conviction at South Sefton Magistrates' Court on 18 June 2001 for failing without

reasonable excuse to provide a specimen of blood for analysis contrary to s 7(6) of the Road Traffic Act 1988, for which he had been fined £200, was ordered to pay £75 costs, was disqualified from driving for 12 months and his licence endorsed. The questions for the opinion of the High Court are set out at [8], below. The facts are set out in the judgment of the court. a

Nigel Ley (instructed by *Byrne Frodsham*, Widnes) for the defendant. b
Steven Everett (instructed by the *Crown Prosecution Service*) for the prosecution.

Cur adv vult

24 March 2004. The following judgment of the court was delivered. c

MACKAY J (giving the judgment of the court at the invitation of Kennedy LJ).

[1] This is an appeal by way of case stated from a decision of the Crown Court at Liverpool on 26 February 2002. That decision was in respect of an appeal by the appellant against his conviction at South Sefton Magistrates' Court on 18 June 2001 of two offences: (i) failing to provide a specimen for a breath test contrary to s 6(4) of the Road Traffic Act 1988, in respect of which he had been fined £50 with his licence endorsed. And: (ii) failing without reasonable excuse to provide a specimen of blood for analysis, contrary to s 7(6) of the same Act, for which he had been fined £200, was ordered to pay £75 costs, was disqualified from driving for 12 months and his driving licence was endorsed. The appeal against the first of these convictions was abandoned at the Crown Court. This appeal now proceeds in relation to the second offence following the dismissal by the Crown Court of the appeal. d
e

THE FACTS

[2] The facts found by the Crown Court were as follows. At about 11.25pm on 20 September 2000 the appellant was driving a Vauxhall Corsa on Hall Lane in Liverpool. He was driving erratically and accordingly was stopped by the police. He was asked by the arresting officer if he had been drinking and replied that he had had 'two pints'. A request was made for him to take a roadside breath test which he failed. At the Police Station his legal rights were made known to him both verbally and in writing. The appellant indicated that he did not require the services of a solicitor and he signed documentation to that effect. f
g

[3] An attempt was made to use the Camic Datamaster Breathalyser Equipment for the purpose of taking a specimen of breath. When the appellant blew into the machine it indicated that mouth alcohol was present and accordingly an unreliable result might be obtained. The appellant was told that he might have to supply a specimen of blood or urine, but not which. h

[4] At 12.20 am on 9 September 2000 a police surgeon attended at the Police Station. At 12.25 in the presence of the doctor PC Hardy then lawfully required the appellant to provide a specimen of blood for analysis. The appellant refused to give a specimen of blood and in the opinion of the doctor he was being obstructive. The appellant was warned by PC Hardy about the consequences of failure to provide a specimen of blood for analysis (a possible prosecution) on at least two occasions. He persisted in his refusal. He maintained that he required 'further advice' according to the police officer (which the officer understood to mean legal advice) and, possibly, 'legal advice' according to the doctor. Having failed to provide the required specimen he was ultimately charged with the offence. j

THE APPEAL AND THE DECISION APPEALED AGAINST

a [5] The submissions to the Crown Court on behalf of the appellant were that by virtue of s 58 of the Police and Criminal Evidence Act 1984, the terms of which I will set out below, there was no case to answer; the evidence of the request for a sample should be disregarded as the appellant had been denied the right to the services of a solicitor in breach of that section, that art 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) applied and foreign and colonial case law should 'shape domestic law'.

b [6] In response it was argued that the domestic law applied, that the appellant had had the opportunity to speak to a solicitor but had declined it and that to allow the taking of a sample to be delayed for further advice would be contrary to decided domestic law. No fewer than 34 authorities were cited to the learned recorder and his justices, 24 of them by the appellant, mainly Commonwealth authorities.

c [7] The Crown Court was of the opinion that the appellant had been properly required to give a specimen of blood, that he understood his rights and previously declined the services of a solicitor, but while the court had to consider the principles of art 6(3)(c) of the convention, domestic law was clear and bound the Crown Court. The Crown Court did not find the foreign authorities persuasive or such as to require them to ignore the 'clear emphatic and repeated domestic law'. There was therefore a case to answer and as the appellant did not wish to give evidence and relied on his submissions the appeal would be dismissed.

d [8] The questions formulated for the opinion of this court by the Crown Court were as follows:

e '(1) In interpreting art 6(3)(c) of the convention were we right in finding that the clear, emphatic and repeated domestic law outweighed any persuasive authorities from foreign jurisdictions?

f '(2) On the facts found were we right to dismiss the appeal?'

THE RELEVANT LEGISLATION

[9] Section 5 of the 1988 Act, so far as relevant, provides:

g '(1) If a person—(a) drives or attempts to drive a motor vehicle on a road or other public place ... after consuming so much alcohol that the proportion of it in his ... blood or urine exceeds the prescribed limit he is guilty of an offence.'

Section 7 provides:

h '(1) In the course of an investigation into whether a person has committed an offence under section ... 5 of this Act a constable may ... require him—(a) to provide two specimens of breath for analysis by means of a device of a type approved by the Secretary of State, or (b) to provide a specimen of blood or urine for a laboratory test ...

i '(3) A requirement under this section to provide a specimen of blood or urine can only be made at a police station or at a hospital; and it cannot be made at a police station unless ... (bb) a device of the type mentioned in subsection (1)(a) above has been used at the police station but the constable who required the specimens of breath has reasonable cause to believe that the device has not produced a reliable indication of the proportion of alcohol in the breath of the person concerned ... but may then be made notwithstanding that the person

required to provide the specimen has already provided or been required to provide two specimens of breath. a

(4) If the provision of a specimen other than a specimen of breath may be required in pursuance of this section the question whether it is to be a specimen of blood or a specimen of urine shall be decided by the constable making the requirement, but if a medical practitioner is of the opinion that for medical reasons a specimen of blood cannot or should not be taken the specimen shall be a specimen of urine. b

(5) A specimen of urine shall be provided within one hour of the requirement for its provision being made and after the provision of a previous specimen of urine.

(6) A person who, without reasonable excuse fails to provide a specimen when required to do so in pursuance of this section is guilty of an offence. c

(7) A constable must, on requiring any person to provide a specimen in pursuance of this section, warn him that a failure to provide it may render him liable to prosecution.'

Section 58 of the Police and Criminal Evidence Act 1984 provides: d

'(1) A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time ...

(4) If a person makes such a request, he must be permitted to consult a solicitor as soon as is practicable except to the extent that delay is permitted by this section. e

(5) In any case he must be permitted to consult a solicitor within 36 hours from the relevant time, as defined in section 41(2) above.

(6) Delay in compliance with a request is only permitted—(a) In the case of the person who is in police detention for a serious arrestable offence; and, (b) if an officer of at least the rank of superintendent authorises it.' f

DOMESTIC CASE LAW

[10] It is common ground between the parties that all relevant decisions of English courts on this issue are to the effect that both questions posed by the Crown Court ought to be answered affirmatively. g

[11] Prior to the coming into force of the Human Rights Act 1998, in *DPP v Billington* [1988] 1 All ER 435, [1988] 1 WLR 535, the Divisional Court considered the inter-relationship of s 58 and the then equivalent of s 7 in four appeals. In each it had been argued for the appellants that where a person is subject to the procedures set out in what is now s 7, police had no discretion to refuse access to a solicitor. Even if no duty solicitor was to hand, said the appellants, the police had to wait until a solicitor could be found. Lloyd LJ rejected those arguments in these terms: h

'All that the Act of 1984 requires is that the defendant be permitted to consult a solicitor as soon as practicable. There is nothing in the Act which requires the police, whether expressly or by implication, to delay the taking of a specimen ... in the mean time.' (See [1988] 1 All ER 435 at 439, [1988] 1 WLR 535 at 551.) j

a [12] In *Kennedy v CPS* [2002] EWHC 2297 (Admin), (2002) 167 JP 267 this court revisited the question. Having considered *Billington's* case and other decided cases Kennedy LJ described (at [17]) the position thus:

b 'All that was said in *Billington* was that, in the public interest, [rights under s 58] cannot delay the operation of the procedures envisaged by the 1988 Act, a position which ... can easily be understood because, not only do specimens for obvious reasons need to be obtained as soon as possible, but also decisions which a driver has to make during the implementation of the procedures to obtain specimens involve simple choices, fully explained, in relation to which it is not immediately easy to see why anyone who is competent to drive should actually need legal advice.'

c Kennedy LJ proceeded to deal with certain Commonwealth authorities and the impact of the convention, which had been advanced in favour of the appellant in terms similar to those used by Mr Ley for the appellant in the present case. He also considered an earlier decision of the Administrative Court by Goldring J in *Campbell v DPP* [2002] EWHC 1314 (Admin), (2002) 166 JP 742 in which the art 6 argument had been advanced but not the Commonwealth authorities. Goldring J had held that art 6(3) did not impose a 'blanket requirement' that each time a person is detained legal advice must be obtained for him before he can be asked to do or say anything. The interests of the individual could be curtailed but only to the extent necessary to pursue the community's legitimate aims, which interests were self-evidently the suppression of drink driving to save lives and prevent serious injuries.

e [13] Kennedy LJ concluded that the right to a fair trial enshrined in art 6 could be said to be in play from the outset of a police investigation but it did not spell out a right to legal advice at any particular stage. He considered that the relevant domestic legislation fully satisfied the requirements of art 6. In practical terms that legislation had these consequences ((2002) 166 JP 742 at [31]):

f 'Plainly, as it seems to me, it is a question of fact and degree in any given case whether the custody officer has acted without delay to secure the provision of legal advice, and whether the person held in custody has been permitted to consult a solicitor as soon as is practicable. Where the matter under investigation is a suspected offence contrary to s. 5 of the Road Traffic Act 1988 it is really conceded by [the appellant's counsel], and in my view rightly conceded, that in this jurisdiction the public interest requires that the obtaining of breath specimens part of the investigation cannot be delayed to any significant extent in order to obtain a suspect to take legal advice. That, to my mind, means this—that if there happens to be a solicitor in the charge office whom the suspect says that he wants to consult for a couple of minutes before deciding whether or not to provide specimens of breath he must be allowed to do so. Similarly, if the suspect asks at that stage to speak on the telephone for a couple of minutes to his own solicitor or the duty solicitor, and the solicitor in question is immediately available. But where, as here, the suspect does no more than indicate a general desire to have legal advice, I see no reason why the custody officer should not simply continue to take details and alert the solicitors' call centre at the first convenient opportunity.' (My emphases.)

j Two other decisions of the Divisional Court, namely *Kirkup v DPP* [2003] EWHC 2354 (Admin), [2004] Crim LR 230 and *Whitley v DPP* [2003] EWHC 2512 (Admin), [2003] All ER (D) 212 (Oct), have followed the views of Kennedy LJ expressed

above. In the light of this body of authority it is unsurprising that the first question posed for this court's opinion describes the domestic law as 'clear, emphatic and repeated'. Those epithets are fully justifiable in my opinion, even though the recorder did not have the benefit of the last two authorities cited above. a

COMMONWEALTH AUTHORITIES

[14] Section 10(b) of the Canadian Charter of Rights and Freedoms is to a very similar effect as s 58 of the 1984 Act. It enacts that: b

'Everybody has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right.'

A later provision of the Charter gives a similar power to that contained in s 78 of the 1984 Act to exclude evidence obtained in breach of that right. In *R v Prosper* (1994) 118 DLR (4th) 118, the Supreme Court of Canada considered the impact of that right on the Canadian equivalent legislation dealing with drink driving. An impecunious accused had been advised of his right to counsel without delay under a Canadian equivalent of the duty solicitor scheme and expressed a wish to avail himself of that right. He made 15 calls without success because all the local counsel scheduled to be on duty that day were on strike over their pay. He was then given a telephone book but could not afford to instruct a private lawyer. The sampling procedure therefore continued in the absence of any legal advice for him. c

[15] The focus of the Supreme Court's decision appears to have been on whether the accused had acted with due diligence to exercise his right to counsel. Lamer CJC (at 182), giving the leading judgment of the court, summarised the principles involved, reiterating what he had said in an earlier case sitting in an identically constituted Supreme Court (see *R v Bartle* (1994) 118 DLR (4th) 83). Having stated that the Charter did not impose a substantive obligation on governments to ensure that duty counsel was available or to provide a guaranteed right to free and immediate legal advice on demand he continued: d

'However, in jurisdictions where a duty counsel service does exist but is unavailable at the precise time of detention, s 10(b) does impose an obligation on state authorities to hold off from eliciting evidence from a detainee, provided that the detainee asserts his or her right to counsel and is reasonably diligent in exercising it. In other words, the police must provide the detainee with what, in the circumstances, is a reasonable opportunity to contact duty counsel.' e

[16] So far as there is a statement of principle of general application in that case, as opposed to a response to the particular facts of it, I see no great distinction between the underlying principle in the Canadian authority and the approach taken by the English courts. When it comes to deciding what is and what is not reasonable of course it is to be expected that each jurisdiction will take its own approach and the approach of neither will greatly assist the other. In this last regard therefore very limited assistance is to be derived from the Canadian decisions given the unanimity of English authority on this issue. f

[17] The New Zealand authorities for their part address section 22 of that country's Bill of Rights, conferring a right in similar terms of that found in the Canadian Charter. They reach no very different conclusion. g

[18] In *Ministry of Transport v Noort* [1992] 3 NZLR 260 the Court of Appeal considered the right of persons detained to 'consult and instruct a lawyer without delay and to be informed of that right' enshrined in the Bill of Rights in the context h

a of two drink-driving appeals. One of them was a conviction; one of them was a refusal to allow a blood specimen.

[19] As to any statement of principle to be found in this decision, Cook P, seeking to answer the question of what practical effect should be given to the Bill of Rights in this context said (at 270–271):

b ‘What is practical effect can only be a question of fact dependant on the particular circumstances. As in innumerable situations with which the law has to deal, a test of reasonableness naturally falls to be applied. A person arrested or detained is not entitled to abuse his or her right. Anyone who deliberately delays will forfeit Bill of Rights Act protection ... No more in New Zealand than in anywhere else in the world can detailed rules be laid down in advance.

c They would be contrary to the spirit of a bill of rights.’

This passage leads me to suspect that for his part Cook P would have had little time for Mr Ley’s 15 minutes’ delay suggestion advanced in this case.

[20] Later in his judgment turning to the particular problem before the court Cook P said (at 274):

d ‘The opportunity [to consult counsel] is to be limited but reasonable. It is not necessarily restricted to one call, but there must be no unreasonable delay. A driver who cannot immediately contact his or her own lawyer should normally be allowed to try one or two others. If, despite a reasonable opportunity, no lawyer can be contacted (perhaps because of the hour of night),
e the test need not be delayed further ... Hard-and-fast rules cannot be laid down for all circumstances. Ultimately it must always be a question of fact and common sense whether a reasonable opportunity has been given.’

[21] Again therefore considering the approach of the courts in the New Zealand jurisdiction in terms of principle I see no clear distinction to be drawn with the
f English line of authorities which I have referred above.

[22] Mr Ley, for the appellant, accepts that in the context of this legislation he cannot contend for an unlimited right to delay the procedure in order to obtain advice. The reason for this is obvious and needs no support from evidence; specimens must be taken as close to the time of the alleged offence as possible, and the default position is there should be no delay. Hence he argues for some defined
g short period—he says 15 minutes—for which it should be permissible to hold up the sample-taking process for the purpose of obtaining advice. This runs counter to the clear views of this court, that the process should not be delayed ‘to any significant extent’. This in my view is a full and sufficient explanation of the position in law, and will also serve as a practical guide to those who have to deal
h with such matters on the ground.

[23] The law is therefore clear. The questions asked should both be answered in the affirmative.

DELAY

j [24] Mr Ley has prepared a helpful chronology of events following the hearing at the Crown Court. There is no doubt that very considerable delay outside the control of the appellant has taken place. It took over six months for the recorder to prepare his draft case. The appellant’s comments on that were promptly returned, whereupon a further ten months went by while the recorder considered the parties’ comments. At the end of that the appellant’s solicitors were required by the court to type out the final case. At all times the appellant and his solicitors acted with

commendable speed. Mr Ley's analysis shows that at least one year eight months of unnecessary delay has been injected into this appeal, which it seems to me it is not possible to explain or justify. a

[25] Mr Ley's argument is that this amounts to a breach of the appellant's rights under art 6(1) to 'a ... hearing within a reasonable time'. Correctly, in my view, the respondents do not challenge this proposition or that the breach of his rights should be reflected in the sentence upon him; they point to the financial consequences of his conviction as an area where such 'just satisfaction' can be achieved. b

[26] The problem lies with the term of disqualification, the imposition of which, and the minimum length of which, is mandatory under the terms of the 1988 Act. Absent 'special reasons' that part of the sentence cannot be expunged or reduced below the minimum period.

[27] In *R v Wickins* (1958) 42 Cr App R 236 special reasons were defined as extenuating circumstances which mitigated the offence, not amounting to a defence in law, but directly connected with the commission of the offence, and being matters which the court ought properly to take into consideration when imposing punishment. They do not include any circumstances particular to the offender, such as for example that he is a professional driver who will suffer hardship through disqualification. They would encompass such circumstances as a doctor speeding in response to an emergency call. In *R v Anderson* [1972] RTR 113, on very unusual facts, the Court of Appeal allowed events occurring after the offence to be treated as special reasons relating to the offence c

[28] Mr Ley says in the light of the Human Rights Act 1998 special reasons as traditionally defined should be widened so as to include and permit the granting of just satisfaction where that is required in response to an art 6 breach. The respondent argues that to do that would be to contravene the clear terms of the statute which lay down the sentence appropriate on such a conviction, and would not be permissible. The delay here complained of is, it should be noted, unrelated to the commission of the offence itself. It is subsequent to it and is the product of tardy progress of the appeal outside the control of both the appellant and respondent. In effect the appellant is arguing that the 12 months disqualification will have a harsher impact upon him than upon the average offender because he has been obliged to wait so long to begin it, it having been stayed pending appeal. Put this way, the consequences of the delay are close to a species of hardship peculiar to this appellant, or at least closer to that than to a feature of or adjunct to the offence itself. d

[29] In my judgment the step the court is invited to take by Mr Ley is neither warranted nor justifiable. In simple terms it requires the court to defy the clear words of the statute. I would however reflect the delay to this extent, by quashing the financial penalty imposed by the magistrates and upheld by the Crown Court. The conviction and costs orders below should remain untouched. To this extent only this appeal is allowed. e

Order accordingly.

Dilys Tausz Barrister. f

Re Transbus International Ltd

[2004] EWHC 932 (Ch)

CHANCERY DIVISION

LAWRENCE COLLINS J

27 APRIL 2004

Company – Administration order – Administrator – Powers – Administrators wishing to dispose of companies' assets before obtaining approval at creditors' meeting – Whether administrators entitled to do so without court's direction – Insolvency Act 1986, Sch B1, para 68.

The administrators of a company applied to the court for directions under Sch B1 to the Insolvency Act 1986 as amended by the Enterprise Act 2002. The application raised the question whether administrators had power under Sch B1 to sell assets of a company prior to approval by creditors of the administrators' proposals or whether they could do so only under the direction of the court. Before the amendment of the 1986 Act by the 2002 Act administrators had not been required to obtain directions; the relevant provision had been that '[t]he administrator shall manage the affairs, business and property of the company ... at any time before proposals have been approved ... in accordance with any directions given by the court'. The words 'in accordance with any directions given by the court' had meant 'in accordance with such directions, if any, as are given by the court' and not 'only to the extent specifically permitted by any directions given by the court. Paragraph 68(1)^a of Sch B1 of the 1986 Act provided that, '[s]ubject to sub-paragraph (2)' the administrator of a company 'shall manage its affairs, business and property in accordance with' proposals approved by creditors. Paragraph 68(2) provided that '[i]f the court gives directions' to the administrator in connection with any aspect of his management of the company's affairs, business or property, the administrator 'shall comply with the directions'. The court considered whether Sch B1 imposed a requirement on the administrators to seek the directions of the court in order to sell the company's assets in advance of their proposals being approved, in that (i) the word 'shall' in para 68(1) was mandatory, and authorised the administrators to act only in accordance with any approved proposals; (ii) accordingly, if no proposals were approved, then the administrators could not act; and (iii) the words 'subject to sub-paragraph (2)' did not alter that conclusion since sub-para (2) only applied if the court gave directions.

Held – Administrators were permitted to sell the assets of a company, in advance of their proposals being approved by creditors, without the direction of the court. Paragraph 68(2) of Sch B1 to the 1986 Act required administrators to act in accordance with directions of the court 'if the court gives [them]'. The adoption of that wording mirrored the interpretation put on the provisions of the 1986 Act prior to its amendment by the 2002 Act. There would be many cases where the administrators were justified in not laying proposals before a meeting of creditors. If, in such administrations, administrators were prevented from acting without the direction of the court it would mean that they would have to seek the directions of the court before carrying out any function throughout the whole of the

^a Paragraph 68 is set out at [6], below

administration. The 2002 Act reflected a conscious policy to reduce the involvement of the court in administrations, where possible (see [12]–[14], below). a

Re T & D Industries plc (in administration), Re T & D Automotive Ltd (in administration) [2000] 1 All ER 333 considered.

Notes

For the general powers of administrators and for the consideration of proposals at a creditors' meeting, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) paras 2097, 2112. b

For the Insolvency Act 1986, Sch B1, para 68, see 4 *Halsbury's Statutes* (4th edn) (Current Statutes Service), 102.

Case referred to in judgment c

T & D Industries plc (in administration), Re, Re T & D Automotive Ltd (in administration) [2000] 1 All ER 333, [2000] 1 WLR 646.

Application

The administrators of Transbus International Ltd applied to the court for directions under para 63 of Sch B1 to the Insolvency Act 1986. d

Antony Zacaroli (instructed by Denton Wilde Sapte) for the administrators.

LAWRENCE COLLINS J. e

[1] This is an application by the administrators of Transbus International Ltd for directions under para 63 of Sch B1 to the Insolvency Act 1986 (the Schedule). The application raises the question whether administrators have power under the Schedule to sell the assets of the company prior to the approval by creditors of the administrators' proposals, or whether they can do so only under the direction of the court. f

[2] This is an issue which had been the subject of conflicting decisions under the provisions of the 1986 Act prior to its amendment by the Enterprise Act 2002, but was resolved by Neuberger J in *Re T & D Industries plc (in administration), Re T & D Automotive Ltd (in administration)* [2000] 1 All ER 333, [2000] 1 WLR 646, in which it was decided that administrators had the power to sell the assets of the company prior to the approval of their proposals by the creditors without the direction of the court. g

[3] The relevant provisions in the Schedule are, however, slightly different from those in the unamended 1986 Act.

[4] Paragraph 59(1) of the Schedule provides that '[t]he administrator of a company may do anything necessary or expedient for the management of the affairs, business and property of the company'. h

[5] Paragraph 60 of the Schedule gives an administrator the powers specified in Sch 1 to the Act.

[6] Paragraph 68 of the Schedule provides as follows: j

'(1) Subject to sub-paragraph (2), the administrator of a company shall manage its affairs, business and property in accordance with—(a) any proposals approved under paragraph 53, (b) any revision of those proposals which is made by him and which he does not consider substantial, and (c) any revision of those proposals approved under paragraph 54.

- a (2) If the court gives directions to the administrator of a company in connection with any aspect of his management of the company's affairs, business or property, the administrator shall comply with the directions.'

[7] By s 14 of the 1986 Act:

- b 'The administrator of a company—(a) may do all such things as may be necessary for the management of the affairs, business and property of the company, and (b) without prejudice to the generality of paragraph (a), has the powers specified in Schedule 1 to this Act ...'

[8] Section 17(2) further provided as follows:

- c 'The administrator shall manage the affairs, business and property of the company—(a) at any time before proposals have been approved (with or without modifications) under section 24 below, in accordance with any directions given by the court, and (b) at any time after proposals have been so approved, in accordance with those proposals as from time to time revised ...'

- d [9] In the *T & D Industries* case it was held that the words 'in accordance with any directions given by the court' in s 17(2) meant 'in accordance with such directions, if any, as are given by the court'; and not 'only to the extent specifically permitted by any directions given by the court'. Consequently administrators were not required to obtain the directions of the court before selling the company's assets. The purpose of the administration provisions, to create a more flexible, cheaper and comparatively informal alternative to liquidation, suggested a powerful argument for saying that the fewer applications which need to be made to the court the better.

- e [10] There is a slight difference in the structure and wording as between the 1986 Act and the Schedule. In addition it is possible, under the Schedule, to appoint an administrator out of court, whereas under the unamended 1986 Act all appointments are made by the court.

- f [11] The potential argument, to the effect that the provisions of the Schedule impose a requirement on the administrators to seek the directions of the court in order to sell the company's assets in advance of their proposals being approved, would be: (a) the word 'shall' in para 68(1) is mandatory—and authorises the administrators to act only in accordance with any proposals approved under para 53; (b) accordingly, if no proposals are approved, then the administrators cannot act; (c) the words 'subject to sub-paragraph (2)' do not alter this conclusion since sub-para (2) only applies if the court gives directions.

- g [12] But I am satisfied that the better view would be that administrators are permitted to sell the assets of the company in advance of their proposals being approved by creditors as much under the provisions of the Schedule as they were under the provisions of the unamended 1986 Act.

- h [13] Paragraph 68(2) of the Schedule requires the administrators to act in accordance with directions of the court '[i]f the court gives [them]'. This appears to be a deliberate choice to adopt wording which mirrors the interpretation which Neuberger J had put upon the previous provisions. The same policy arguments apply.

- j [14] There will be many cases where the administrators are justified in not laying any proposals before a meeting of creditors. This is so where they conclude that the unsecured creditors are either likely to be paid in full, or to receive no payment, or where neither of the first two objectives for the administration can be

achieved: see para 52 of the Schedule. If, in such administrations, administrators were prevented from acting without the direction of the court it would mean that they would have to seek the directions of the court before carrying out any function throughout the whole of the administration. The 2002 Act reflects a conscious policy to reduce the involvement of the court in administrations, where possible. a

Order accordingly.

Celia Fox Barrister.

a **Waters and others v Welsh Development Agency**
[2004] UKHL 19

b HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD WOOLF, LORD STEYN, LORD SCOTT OF FOSCOTE
AND LORD BROWN OF EATON-UNDER-HEYWOOD

9–11 FEBRUARY, 29 APRIL 2004

c *Compulsory purchase – Compensation – Assessment – Development scheme – Compulsory purchase in pursuance of scheme – Construction of barrage in river estuary causing loss of wetlands – Claimants' land acquired for wetlands nature reserve to replace lost habitat – Whether value of compensation including increase in value of land due to necessity to replace lost habitat – Whether scheme consisting of nature reserve only or including barrage – Land Compensation Act 1961, s 6.*

d
e Planning towards constructing a barrage in Cardiff Bay began in 1985 and work on the barrage started in June 1994. One of the anticipated environmental consequences was the loss of local wetlands and several possible locations were considered for the establishment of a wetlands nature reserve. By October 1995 the United Kingdom government was under pressure from the European Commission to implement mitigating environmental measures. In about November 1995 an area which included land owned by the claimants was selected and eventually acquired using compulsory powers by the predecessor to the defendant authority. Following *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendant of Crown Lands* [1947] AC 565 (the *Pointe Gourde* rule) compensation
f for the compulsory acquisition of land could not include an increase in value arising from the use made or proposed to be made of other land also being acquired which was entirely due to the scheme underlying the acquisition. Under the code in s 6^a of the Land Compensation Act 1961 value attributable to development of land other than the land acquired was to be disregarded in
g specified circumstances. The Lands Tribunal, in assessing the measure of compensation due to the claimants considered as preliminary issues, inter alia, whether the scheme underlying the acquisition of the claimants' land was its intended use as a nature reserve or the construction of the barrage, and whether it was necessary to discount for the purposes of valuation any increase in the value of the subject land due to the need to acquire it as a palliative measure because of
h the environmental consequences of the barrage. The tribunal held that the subject land had to be valued leaving out of account any effect of the proposal to provide land for a nature reserve to compensate for the loss of wetlands due to the

j a Section 6, so far as material, provides: (1) ... no account shall be taken of any increase or diminution in the value of the relevant interest which, in the circumstances described in any of the paragraphs in the first column of Part I of the First Schedule to this Act, is attributable to the carrying out or the prospect of so much of the development mentioned in relation thereto in the second column of that Part as would not have been likely to be carried out if—(a) (where the acquisition is for purposes involving development of any of the land authorised to be acquired) the acquiring authority had not acquired and did not propose to acquire any of that land; and (b) (where the circumstances are those described in one or more of paragraphs 2 to 4B in the said first column) the area or areas referred to in that paragraph had not been defined or designated as therein mentioned.'

construction of the barrage, and that the construction of the barrage was the scheme underlying the acquisition of the subject land. The Court of Appeal dismissed the claimants' appeal and they appealed to the House of Lords, contending that the compulsory acquisition of their land could not have been an integral part of the barrage project, which had contained no proposals whatever for mitigating its damaging environmental effects and plainly had not envisaged the acquisition of their particular land, and that even if it had been part of the scheme, the particular potential worth of their land as means of unlocking the value of the barrage development which the European Commission might otherwise have thwarted (the key value) fell to be regarded, not disregarded. The House considered the interaction of the statutory code in the 1961 Act and the *Pointe Gourde* principle.

Held – (Per Lord Nicholls of Birkenhead, Lord Woolf, Lord Steyn, and Lord Brown of Eaton-under-Heywood) The *Pointe Gourde* principle applied where the compulsory acquisition of the subject land was an integral part of a project to carry out certain works for a particular purpose or purposes. Both the proposed works and the purpose for which they were being carried out, were material when deciding which works were to be regarded as a single scheme. The purpose of the *Pointe Gourde* principle, in separating 'value to the owner' from 'value to the purchaser' was to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land. They were to receive fair compensation, but not more than fair compensation. That was the overriding guiding principle when deciding the extent of a scheme. While there was no magical detailed formula providing a ready answer in every case in applying that general principle the following pointers could be useful: (i) the *Pointe Gourde* principle should not be pressed too far; it should be applied in a manner which achieved a fair and reasonable result; (ii) a result was not fair and reasonable where it required a valuation exercise which was unreal or virtually impossible; (iii) a valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which were not being acquired; (iv) when applied as a supplement to the code in s 6 of the 1961 Act, as would usually be the position, the *Pointe Gourde* principle was to be applied by analogy with the provisions of the code; (v) while normally the scope of the intended works and their purpose would appear from the formal resolutions or documents of the acquiring authority, that formulation was not to be regarded as conclusive; (vi) when in doubt a scheme should be identified in narrower rather than broader terms. In the instant case the authority's need to acquire the claimants' land as a palliative measure necessary as a result of the environmental consequences of the barrage was to be disregarded. Although the acquisition of the claimants' land had not been identified at the outset of the barrage project, the project had proceeded throughout on the basis that some such compensatory measures would be provided. It was fair and reasonable to regard the acquisition of the claimants' land, after it had been identified as part of the intended compensatory site, as an integral part of the barrage project. The potential of the land as a result of the barrage scheme, including any key value it might have, was to be disregarded. Once the scheme under which the land was being compulsorily acquired had been identified to include some wider project, as in the instant case and as in *Pointe Gourde*, the unrealised potentiality of the land due to the scheme fell to be disregarded no less than its realised potentiality. Accordingly, the appeal

- a would be dismissed (see [58]–[63], [67]–[71], [73], [150]–[152], [156], [161], [163], [164], below).

Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565, *Batchelor v Kent CC* (1989) 59 P & CR 357 applied.

Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam [1939] 2 All ER 317 considered.

- b Decision of the Court of Appeal [2003] 4 All ER 384 affirmed.

Notes

For the general rule as to the assessment of purchase money or compensation in the compulsory acquisition of land, and disregard for the scheme for which the land is taken, see 8(1) *Halsbury's Laws* (4th edn) (2003 reissue), paras 244, 270.

- c For the Land Compensation Act 1961, s 6, see 9 *Halsbury's Statutes* (4th edn) (2000 reissue), 173.

Cases referred to in opinions

- d *Batchelor v Kent CC* (1989) 59 P & CR 357, CA; *affg* (1988) 56 P & CR 320, LT.
Bird v Wakefield Metropolitan DC (1978) 37 P & CR 478, CA.
Birmingham DC v Morris and Jacombs Ltd (1976) 33 P & CR 27, CA.
Blandrent Investment Developments Ltd v British Gas Corp [1979] 2 EGLR 18, HL.
Bolton Metropolitan BC v Tudor Properties Ltd (2000) 80 P & CR 537, CA.
Camrose (Viscount) v Basingstoke Corp [1966] 3 All ER 161, [1966] 1 WLR 1100, CA.
- e *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, [1914–15] All ER Rep 571, PC.
Davy v Leeds Corp, Central Freehold Estates (Leeds) Ltd v Leeds Corp [1965] 1 All ER 753, [1965] 1 WLR 445, HL; *affg* [1964] 3 All ER 390, [1964] 1 WLR 1218, CA.
Director of Buildings and Lands v Shun Fung Ironworks Ltd [1995] 1 All ER 846, [1995] 2 AC 111, [1995] 2 WLR 404, PC.
- f *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 1 All ER 929, [2000] 2 AC 307, [2000] 2 WLR 438, HL.
Fraser v Fraserville City [1917] AC 187, PC.
Gough and Aspatia, Silloth and District Joint Water Board, Re [1903] 1 KB 574; *affd* [1904] 1 KB 417, [1904–7] All ER Rep 726, CA.
- g *Horn v Sunderland Corp* [1941] 1 All ER 480, [1941] 2 KB 26, CA.
IRC v Clay, IRC v Buchanan [1914] 3 KB 466, [1914–15] All ER Rep 882, CA.
Kaye v Basingstoke Corp (1968) 20 P & CR 417, LT.
Lambe v Secretary of State for War [1955] 2 All ER 386, [1955] 2 QB 612, [1955] 2 WLR 1127, CA.
- h *Lucas and Chesterfield Gas and Water Board, Re* [1909] 1 KB 16, [1908–10] All ER Rep 251, CA.
Melwood Units Pty Ltd v Comr of Main Roads [1979] 1 All ER 161, [1979] AC 426, [1978] 3 WLR 520, PC.
Myers v Milton Keynes Development Corp [1974] 2 All ER 1096, [1974] 1 WLR 696, CA.
- j *Ossalinsky (Countess) and Manchester Corp, Re* (1883) Browne and Allan's Law of Compensation, 2nd edn, p 659, DC.
Ozanne v Herts CC [1991] 1 All ER 769, [1991] 1 WLR 105, HL.
Pentrehobyn Trustees v National Assembly for Wales [2003] RVR 140, LT.
Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565, PC.

Pye (JA) (Oxford) Ltd v Kingswood BC [1998] 2 EGLR 159, CA.

Roads and Traffic Authority of New South Wales v Perry (23 August 2001, unreported), NSW CA. a

Rugby Joint Water Board v Footit [1972] 1 All ER 1057, [1973] AC 202, [1972] 2 WLR 757, HL.

South Eastern Rly Co v London CC [1915] 2 Ch 252, CA.

Stebbing v Metropolitan Board of Works (1870) LR 6 QB 37, DC. b

Stokes v Cambridge Corp (1961) 13 P & CR 77, LT.

Vyricherla Narayana Gajapatiraju Bahadur Garu (Sri Raja) v Revenue Divisional Officer, Vizagapatam [1939] 2 All ER 317, [1939] AC 302, PC.

Wards Construction (Medway) Ltd v Barclays Bank plc and Kent CC (1994) 68 P & CR 391, CA. c

Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302, CA.

Cases referred to in list of authorities

Collins v Livingstone Shire Council (1972) 127 CLR 477, Aust HC. d

Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Comrs [1927] AC 343, PC.

Fraser v R (1963) 40 DLR (2d) 707, Can SC.

Housing Commission of New South Wales v San Sebastian Pty Ltd (1978) 140 CLR 196, 20 ALR 385, Aust HC. e

Hughes v Doncaster Metropolitan BC [1991] 1 All ER 295, [1991] 1 AC 382, [1991] 2 WLR 16, HL.

Penny v Penny (1868) LR 5 Eq 227.

R v Murphy (1990) 64 ALJR 593.

Sidney v North Eastern Rly Co [1914] 3 KB 629, [1914–15] All ER Rep 341, DC. f

St John the Baptist Hospital v Canterbury City Council, St John the Baptist Hospital v Kent CC (1970) RVR 608, LT.

Appeal

The claimants, Melville John Waters, Elizabeth Lillian Waters, William Neville Waters, Henry Dyson Preece, Sarah Preece, Roger Williams and Stephen Waters, appealed with the permission of the Court of Appeal (Schiemann, Laws and Carnwath LJ) from its decision on 28 June 2002 ([2002] EWCA Civ 924, [2003] 4 All ER 384) dismissing the claimants' appeal from the decision of the Lands Tribunal (George Bartlett QC, President) on 3 January 2001 ([2001] 1 EGLR 185) on the preliminary issues set out at [12], below, arising from their claims to compensation from the defendant, the Welsh Development Agency, following the compulsory acquisition of land owned by the claimants at Nash, near Newport, Gwent. The facts are set out in the opinion of Lord Nicholls of Birkenhead. g
h
j

David Holgate QC and Timothy Morshead (instructed by Jacklyn Dawson, Newport) for the claimants.

Anthony Porten QC and Adrian Trevelyan Thomas (instructed by Nicholas G Neal, Cardiff) for the acquiring authority.

a Their Lordships took time for consideration.

29 April 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

b [1] My Lords, compulsory purchase of property is an essential tool in a modern democratic society. It facilitates planned and orderly development. Hand in hand with the power to acquire land without the owner's consent is an obligation to pay full and fair compensation. That is axiomatic: see *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846 at 852, [1995] 2 AC 111 at 125.

c [2] Unhappily the law in this country on this important subject is fraught with complexity and obscurity. To understand the present state of the law it is necessary to go back 150 years to the Lands Clauses Consolidation Act 1845. From there a path must be traced, not always easily, through piecemeal development of the law by judicial exposition and statutory provision. Some of the more recent statutory provisions defy ready comprehension. Difficulties and uncertainties abound. One of the most intractable problems concerns the '*Pointe Gourde* principle' or, as it is sometimes known, the 'no-scheme rule'. On this appeal your Lordships' House has the daunting task of considering the content and application of this principle.

d [3] In the Court of Appeal ([2002] EWCA Civ 924, [2003] 4 All ER 384), Carnwath LJ, a judge with unrivalled expertise in this field, was moved to say at the conclusion of his impressive judgment:

f '[116] The right to compensation for compulsory acquisition is a basic property right. It is unfortunate that ascertaining the rules upon which compensation is to be assessed can involve such a tortuous journey, through obscure statutes and apparently conflicting case law, as has been necessary in this case. There can be few stronger candidates on the statute book for urgent reform, or simple repeal, than s 6 of and Sch 1 to the [Land Compensation Act 1961].'

g [4] I echo Carnwath LJ's views. Meanwhile, until Parliament takes action I suggest your Lordships' House, so far as it may properly do so, should seek to simplify the law, always having in mind that the aim of compensation is to provide a fair financial equivalent for the land taken.

h THE APPEAL

[5] This appeal concerns the basis on which compensation should be assessed for the compulsory acquisition of 225 acres of land belonging to the claimants. The land consists of low-lying farmland adjacent to the Severn estuary near Newport, Gwent.

j [6] The background to the acquisition was the construction of the barrage across the mouth of Cardiff Bay, undertaken pursuant to the Cardiff Bay Barrage Act 1993. The project was under active consideration for many years before then. It received governmental support in November 1985. In 1987 the Cardiff Bay area became an urban development area under the Local Government, Planning and Land Act 1980. The Cardiff Bay Development Corporation was established as an urban development corporation for the purpose of regenerating this

development area. The corporation was empowered by the 1993 Act to carry out the barrage works. a

[7] The gestation period of the project was prolonged by problems. There were several abortive attempts to promote a parliamentary Bill. One item of controversy concerned the effect the barrage scheme would have on inter-tidal mudflats in the Taff/Ely estuary designated as a site of special scientific interest (SSSI). The permanent inundation of Cardiff Bay would destroy these mudflats. b
The Nature Conservancy Council, succeeded later by the Countryside Council for Wales, vigorously opposed the project from the outset. So did the Royal Society for the Protection of Birds. The proposals would involve an unacceptable loss of nationally important bird habitats. The European Commission also exerted pressure. The new barrage would be incompatible with this country's obligations under EC Council Directives regarding the conservation of wild birds c and their habitats.

[8] Ultimately work on the barrage started in June 1994. The project proceeded on governmental assurances that compensatory provision would be made by creating suitable new wetland habitats. Several possible sites alongside the Severn estuary were considered and rejected. In January 1996 the Secretary of State for Wales announced the proposal for the Gwent Levels Wetland Reserve. This would be developed so that within five years it would qualify for Special Protection Area status. The site of this reserve, comprising 1000 acres, would be about ten miles up the coast from the Cardiff Bay barrage. It included the claimants' land. d

[9] In 1997 Land Authority for Wales (LAW) used its statutory powers to acquire this site compulsorily, under the Land Authority for Wales (Gwent Levels Wetlands Reserve, Newport) Compulsory Purchase Order 1997. The Cardiff Bay Development Corporation provided the money needed for the acquisition. The claimants' land, along with other land, was vested in LAW on 25 February 1998, which is the valuation date. LAW thereupon transferred the e
land to the Cardiff Bay Development Corporation which, in turn, vested the site in the Countryside Council for Wales. Welsh Development Agency, the respondent to this appeal, is the successor to LAW under the provisions of the Government of Wales Act 1998. The history of the project is more fully set out in the judgment of the Court of Appeal ([2003] 4 All ER 384 at [2]–[22]), and in the decision of the Lands Tribunal ([2001] 1 EGLR 185). The further detail is not material on this appeal. The dispute between the parties is primarily one of legal principle. f

[10] Detailed valuation evidence has not yet been submitted to the Lands Tribunal. The claimants put forward three different measures of valuation of the subject land. (1) Agricultural value, said by them to be £4,500 per acre at the g
relevant date. (2) Value as a nature reserve, said by the claimants to be £13,000 per acre. (3) A measure said by the claimants to comprise the 'particular value' of the land 'consequent upon its indispensable status vis-à-vis the Cardiff Development Scheme'. The President of the Lands Tribunal, Mr George Bartlett QC, described this measure of value as 'ransom value'. The claimants h
estimate that, valued on this basis, their land was worth £28,000 per acre. j

[11] There is no dispute over measures (1) and (2). In principle the claimants are entitled to the higher of these two measures of value, whichever that may prove to be. The Land Compensation Act 1961 allows a claimant the benefit of an actual or assumed permission for the authority's proposed development: see ss 14(1), (2) and 15(1). The dispute is over measure (3). The issue is whether the

a claimants are entitled to compensation based on the increased value their land is said to have possessed because of its important ('indispensable') role as part of the compensatory wetlands provision required by the Cardiff Bay barrage project.

[12] Faced with this dispute the Lands Tribunal, on the application of the claimants, considered two preliminary issues: (1) whether or not the intended use of the subject land as a nature reserve amounts to a purpose to which the land could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory market powers. This issue is a reference to the 'disregard' provision in s 5, r (3) of the 1961 Act; (2) whether the scheme underlying the acquisition is the intended use of the subject land as a nature reserve or the construction of the Cardiff Bay barrage; and whether or not it is necessary to discount for the purposes of valuation any increase in the value of the subject land due to the need to acquire it as a palliative measure because of the environmental consequences of the Cardiff Bay barrage, following *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

[13] The President answered the first issue in favour of the claimants. Rule (3) does not apply in this case. The subject land has no special suitability or adaptability for the purpose of providing a nature reserve to compensate for the loss of the Taff/Ely SSSI. The President answered the second issue in favour of the acquiring authority. The subject land must be valued leaving out of account any effect on value of the adoption or implementation of the proposal to provide land for the development of a nature reserve to compensate for the loss of the Taff/Ely SSSI through the construction and impoundment of water by the Cardiff Bay barrage. The President added that the scheme underlying the acquisition was the Cardiff Bay barrage although, on his reasoning, this was not an issue which needed to be resolved.

[14] The claimants appealed. The acquiring authority did not appeal against the President's decision on the first preliminary issue. The Court of Appeal, comprising Schiemann, Laws and Carnwath LJ, dismissed the appeal.

'VALUE' IN THE 1845 ACT

[15] The 1845 Act used the undefined expression 'value' as the yardstick for compensation. When assessing the amount of compensation regard should be had to the value of the land being taken: see s 63. The Act did not enlarge on what was meant by 'value' in this context. On the face of the statute nothing could be simpler or fairer. In exchange for his land the owner should receive its financial equivalent. The financial equivalent, at least ordinarily, is the price obtainable by the owner if he had himself sold the land at the relevant time. In other words, the value of land is the price the owner could reasonably expect if he had sold the land in the open market.

[16] Implicit in this 'open market value' approach is the notion that, in the customary jargon, the owner would be a willing seller and the purchaser a willing buyer. Compensation would be assessed by reference to the price a willing seller might reasonably expect to obtain from a willing buyer. The seller should not be regarded as disinclined to sell, nor should the buyer be regarded as under any urgent necessity to buy, to adapt the words of Lord Romer in *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317 at 321, [1939] AC 302 at 312.

[17] On an arm's length sale in the open market a seller would normally expect to realise any enhanced value possessed by the land because its location

makes it specially valuable to a particular buyer or class of buyers. The land might have particular attraction, and therefore value, to an adjoining landowner. Or the land might be particularly adaptable for a certain purpose. Illustrations in the nineteenth century cases include use as a reservoir or use as part of the route for a railway line. Examples today would include development for housing or as a light industrial estate. A willing seller could reasonably expect to benefit from these characteristics of the land if he were to sell it to an adjoining landowner or a water undertaking or a railway company or a developer. The special suitability, or adaptability, of the land for this or that purpose is part of its market value. Thus a house, worth £750 as a house but £1,000 as an annex to an adjoining nursing home, has a market value of £1,000: see *IRC v Clay*, *IRC v Buchanan* [1914] 3 KB 466, [1914–15] All ER Rep 882.

[18] In principle, subject to one qualification, this approach is equally applicable when assessing value for the purposes of compensation. It is this qualification which has given rise to difficulty. The qualification is that enhancement in the value of the land attributable solely to the particular purpose for which it is being compulsorily acquired, and an acquiring authority's pressing need of the land for that purpose, are to be disregarded. If statute authorises an authority to acquire some ancient graveyards in the City of London and use the land for new buildings and a new street from Blackfriars to the Mansion House, the increased value the land will have when applied to these more profitable secular purposes should be left out of account. This is implicit in the yardstick of 'value' in the 1845 Act. When granting a power to acquire land compulsorily for a particular purpose Parliament cannot have intended thereby to *increase* the value of the subject land. Parliament cannot have intended that the acquiring authority should pay as compensation a larger amount than the owner could reasonably have obtained for his land in the absence of the power. For the same reason there should also be disregarded the 'special want' of an acquiring authority for a particular site which arises from the authority having been authorised to acquire it.

[19] This approach is encapsulated in the time-hallowed pithy, if imprecise, phrase that value in this context means value to the owner, not value to the purchaser. In *Stebbing v Metropolitan Board of Works* (1870) LR 6 QB 37 at 42, the graveyards case, Cockburn CJ said:

'When Parliament gives compulsory powers, and provides that compensation shall be made to the person from whom property is taken, for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss; and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it.'

[20] Another early application of this principle concerned the acquisition of land bounding Thirlmere in the Lake District for use as a reservoir to supply water to Manchester: *Re Countess of Ossalinsky v Manchester Corp* (1883), reported in Browne and Allan's *Law of Compensation* (2nd edn, 1903) p 659. The prospect that the land, because of its particular characteristics, would be likely to be developed as a reservoir was a matter which might give the land an enhanced value. That should be taken into account. The particular purpose to which the Manchester Corporation was going to put the land should not be taken into account. But the fact of the acquisition of the land for this particular purpose might have evidential value showing that suggested alternative reservoir

a development schemes 'are not visionary, but are schemes with a certain probability in them': see *Grove J* at p 662.

[21] Drawing a distinction between value to the owner and value to the purchaser makes it necessary to distinguish the one from the other. It is necessary to separate from the market value of land any enhancement in value attributable solely to the presence of the acquiring authority in the market as a purchaser of the land in exercise of its statutory powers. It is important to recognise that, for this purpose, it is not the existence of a power of compulsory acquisition which increases the value of land. What is relevant, because this may affect the value of the land, is the use the acquiring authority proposes to make of the land it is acquiring. Accordingly, in identifying any enhanced value which must be disregarded it is always necessary to look beyond the mere existence of the power of compulsory purchase. It is necessary to identify the use proposed to be made of the land under the scheme for which the land is being taken. Hence the introduction of the concept of the 'scheme' or equivalent expressions such as project or undertaking.

d [22] Thus in *Re Gough and Aspatria, Silloth and District Joint Water Board* [1903] 1 KB 574 at 576, another reservoir case, *Wright J* said that if the site had 'peculiar natural advantages' for the supply of water that could be taken into account, but 'there is no value for which compensation ought to be given on this head if the value is created or enhanced simply by the Act or by the scheme of the promoters' (my emphasis). This passage was cited with approval by Lord Alverstone CJ in the Court of Appeal ([1904] 1 KB 417 at 422–423).

e [23] To the same effect are the well-known observations of Fletcher Moulton LJ in *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16 at 29–30, [1908–10] All ER Rep 251 at 255. He observed that the value to the owner, as distinct from the value to the purchaser, is 'to be estimated as it stood before the grant of the compulsory powers'. He continued:

'The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses.' (My emphasis.)

g [24] Fletcher Moulton LJ ([1909] 1 KB 16 at 31, [1908–10] All ER Rep 251 at 256) carried this principle further. Where the special adaptability of land gives the land a special value which exists only for a particular purchaser with compulsory powers, that value cannot be taken into consideration when fixing the price. It is otherwise where the special value exists also for other possible purchasers so as to create a real though limited market for that special value.

h [25] In *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, [1914–15] All ER Rep 571, a case concerning a power generation scheme on the St Lawrence River, the opinion of the Board was given by Lord Dunedin. He emphasised ([1914] AC 569 at 576–577, [1914–15] All ER Rep 571 at 574) that value does not mean the value of 'the realized undertaking as it exists in the hands of the undertaker'. It means the price possible undertakers would give. This should be tested by the imaginary market which would have ruled if the land had been exposed for sale 'before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility'.

THE ACQUISITION OF LAND (ASSESSMENT OF COMPENSATION) ACT 1919

[26] The 'value to the owner' judicial interpretation of 'value' in the 1845 Act might have been expected to limit the amount of awards. But by 1918 it had become notorious that the compensation paid for the acquisition of property for public purposes was in many cases excessive. That was the view of the Scott Committee in its *Second Report on the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes* (Cd 9229) (1918). The committee identified several causes, including the absence of any definition of value in the 1845 Act. In its report the committee made recommendations aimed at reducing the amounts awarded. These included recommendations that the customary allowance added to the price of the land should be abolished, and that the standard of value to be paid to the owner should explicitly be stated as the market value of the land as between a willing seller and a willing buyer.

[27] The Acquisition of Land (Assessment of Compensation) Act 1919 gave effect to these recommendations in rr (1) and (2) of s 2. Rule (2) provided that the value of land should be taken to be the amount which 'the land if sold in the open market by a willing seller might be expected to realise'. This reversed 'the old sympathetic hypothesis of the unwilling seller and the willing buyer, which underlay judicial interpretation of the 1845 Act': see *Horn v Sunderland Corp* [1941] 1 All ER 480 at 490, [1941] 2 KB 26 at 40 per Scott LJ. Rules (1) and (2) in s 5 of the 1961 Act are to the same effect.

[28] The Scott Committee also considered the principle that in assessing compensation the special adaptability of the land for a particular purpose could be taken into account, even where that was the very purpose for which the land was being acquired, provided its adaptability was such as to render it available for sale to persons other than the promoters. The committee was of the opinion that this should not be so in respect of potential competition between statutory undertakers. This recommendation led to r (3) in s 5 of the 1919 Act. As enacted this rule appears to have been legislative affirmation of the approach adopted on this point by Fletcher Moulton LJ in *Lucas's case* [1909] 1 KB 16 at 31, [1908–10] All ER Rep 251 at 256. Rule (3) also reversed, for compensation purposes, the effect of the decision in *IRC v Clay*. In its present form the successor rule, r (3) in s 5 of the 1961 Act, provides:

'The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers.'

THE INDIAN CASE

[29] Fletcher Moulton LJ's enunciation of the 'value to the owner' principle is capable of working hardly where the only person likely to develop a valuable feature of the subject land is an authority with compulsory powers. In *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302 the Privy Council rejected this rigorous application of the principle. This case, normally known by the shorthand title of the 'Indian case', concerned land adjoining a harbour at Vizagapatam which at that time was malarial. The land contained a spring of clean water. The only potential purchaser of the special adaptability of the land

a as a water supply was the harbour authority. The High Court valued the land as partly waste and partly cultivated.

[30] The Privy Council disagreed. Lord Romer delivered the advice of the Board. In a carefully reasoned judgment he said that the value to be ascertained is not the price a 'driven' buyer would pay to an unwilling seller. Nor should the price be enhanced by the fact that compulsory powers have been obtained for carrying into effect a particular scheme for the profitable use of the subject land's b potentiality. The valuation must always be made as though no such powers had been obtained. But the possibility that the acquiring authority, as a willing buyer in a friendly negotiation, might be willing to pay more for land with its potentiality than without was not to be disregarded. That would not be to allow the existence of the scheme to enhance the value of the land. Lord Romer c continued ([1939] 2 All ER 317 at 328, [1939] AC 302 at 323):

d '... even where the only possible purchaser of the land's potentiality is the authority which has obtained the compulsory powers, the arbitrator, in awarding compensation, must ascertain to the best of his ability the price which would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers ...'

[31] Their Lordships disapproved of the contrary observations of Fletcher Moulton LJ in *Lucas's case* [1909] 1 KB 16 at 31, [1908–10] All ER Rep 251 at 256.

e [32] Lord Romer's exposition of this aspect of the 'value to the owner' principle is persuasive. It yields a result which, in a broad sense, is fairer than the more rigorous approach of Fletcher Moulton LJ. The resultant compensation, which takes potentiality into account in all cases, approximates more closely to the price an owner could reasonably expect if the property were sold in the open market between a willing seller and a willing buyer. Compulsory purchase is f intended to reflect a voluntary sale. Rule (2) so provides. So far as possible the assessment of compensation should reflect what would be likely to happen if the property were actually sold at the relevant date.

[33] In one passage in his judgment, on which the claimants in the present appeal relied, Lord Romer said ([1939] 2 All ER 317 at 326, [1939] AC 302 at 319–320):

g 'It must, of course, be conceded that the existence of the scheme must not be allowed to enhance the price, *if by "scheme" is meant the fact that compulsory powers of acquisition have been obtained* for the purpose of carrying into effect a particular scheme for the profitable use of the potentiality. The valuation h must always be made as though no such power had been acquired, and the only use that can be made of the scheme is as evidence that the acquiring authority can properly be regarded as possible purchasers.' (My emphasis.)

[34] This passage is open to the interpretation that in valuing the subject land the particular use proposed to be made of the land by the acquiring authority can j be taken into account. All that has to be disregarded is the 'scheme', meaning thereby the bare fact that compulsory powers have been obtained for that purpose.

[35] It may be that, as applied to the facts of the Indian case, this narrow interpretation of 'scheme' was unremarkable: see Carnwath LJ's suggested explanation in the present case ([2003] 4 All ER 384 at [92]). Certainly, if applied generally, this narrow interpretation would be at odds with the law as well settled

before the Indian case and as applied ever since. If applied generally, this interpretation would empty the 'value to the owner' principle of much of its content as traditionally understood and applied. a

[36] I do not think Lord Romer can have so intended. That is not how his observations have been understood. In practice, this aspect of the Indian case seems to have been left largely on one side by the higher courts of this country. Potentiality is part of the market value of land and must be taken into account when assessing compensation. Potentiality should be valued even if the only likely purchaser is the acquiring authority itself. That was decided in the Indian case. But market value does not include enhanced value attributable solely to the particular use proposed to be made of the land under a scheme of which compulsory acquisition of the subject land is an integral part. This element of value is not part of market value because it is not an element the owner could have realised in the open market. That is the traditional view, which has long been acted upon in this country. It is much too late now for judicial interpretation to set the law on an altogether different course, even if that were otherwise appropriate. Potentiality is to be assessed and valued as matters stood before the particular scheme, of which the subject land's acquisition is part, came into being. b
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[37] In one case the Court of Appeal expressly applied Lord Romer's 'friendly negotiation' approach: see *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612. As applied in that case this approach was not at odds with the traditional understanding. There the acquiring authority was the sitting tenant and the compulsory purchase order related to the freehold reversion. The Court of Appeal rightly held that r (3) was inapplicable. The marriage value which a reversion has for a sitting tenant does not clothe the land with a special suitability within that rule. The court decided that the correct measure of value was the price the acquiring authority, in the course of Lord Romer's friendly negotiation, would have been willing to pay for the reversion if it had no compulsory powers. This included the marriage value. In my view this decision was correct. Any other result would have been most unfair. A freehold reversion is invariably worth more to the sitting tenant. Why should the landlord be paid less because the tenant acquires the reversion in the exercise of statutory powers? e
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[38] One further point calls for mention. The legislation under consideration in the Indian case contained no equivalent of r (3). Rule (3) is expressed in absolute terms which appear to leave no room for taking into account a potential use of the land where the acquiring authority is the only person who could turn this potentiality into an actuality. In this regard r (3) is more restrictive of compensation than the 'value to the owner' principle as clarified on this point by the decision of the Privy Council in the Indian case. g
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[39] Over the years the courts have interpreted r (3) narrowly. In an illuminating report the Law Commission said that in practice r (3) appears to have little remaining purpose. It has effectively become redundant: see *Towards a Compulsory Purchase Code: (1) Compensation* (2003) (Law Com No 286) (Cm 6071) pp 203, 216 (paras D.94, D.131). Some of the court decisions restricting the scope of r (3) are open to criticism. But, like my noble and learned friend Lord Brown of Eaton-under-Heywood, I would let them be. They do not seem to give rise to difficulties in practice. Where r (3) is not applied the 'value to the owner' principle operates. Essentially this is a sound basic principle, although in recent years some difficulties have arisen. Subject to statutory provision to the contrary it should continue to be applied generally. j

THE POINTE GOURDE CASE

- a [40] The 'value to the owner' principle, as discussed so far, concerns cases where the value of the subject land is enhanced by the acquiring authority's proposed use of *that* land. But it would be artificial to confine the scope of the principle to such cases. It would be irrational to exclude cases where the value of the subject land is enhanced by the authority's use or proposed use of *other* land
- b which is being acquired as an integral part of a single scheme. If a hydro-electric project comprises construction of a reservoir upstream and use of the river falls downstream, it would be extraordinary if the compensation payable for the river falls were inflated by the construction of the reservoir. If the subject land were to comprise both the river falls and the reservoir site, the 'value to the owner' principle would exclude the increased value attributable to both limbs of the project. That should equally be so if the reservoir site and the river falls, both
- c acquired compulsorily, happen to be in separate ownership.

- [41] The courts, rightly, have regarded this wider application of the 'value to the owner' principle as a self-evident aspect of the same principle. The 'value to the owner' principle is apt to embrace enhanced value arising from the proposed
- d use of the subject land and also enhanced value arising from the use made or proposed to be made of other land also being acquired. *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 concerned enhanced value arising from the proposed use of other land. But, not surprisingly, Lord MacDermott's much quoted observation in the *Pointe Gourde*
- e case refers to the applicable principle in terms covering both sources of enhanced value. Lord MacDermott (at 572) said, in quite general terms, that '[c]ompensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition'.

- [42] In consequence, the phrase 'the *Pointe Gourde* principle' is often used as a compendious reference covering both types of cases. This can be confusing. It is
- f important to keep in mind that, despite its late arrival on the scene, the expression 'the *Pointe Gourde* principle' is not a reference to a principle separate and distinct from the 'value to the owner' principle. It is no more than the name given to one aspect of the long established 'value to the owner' principle. In *Rugby Joint Water Board v Footitt* [1972] 1 All ER 1057 at 1061, [1973] AC 202 at 213, Lord Pearson
- g described the authorities I have referred to above on the 'value to the owner' principle, including the Indian case, as illustrations of the application of the *Pointe Gourde* principle. Lord Cross of Chelsea ([1972] 1 All ER 1057 at 1095, [1973] AC 202 at 253), observed that the decision in the *Pointe Gourde* case appeared to him entirely in accord with and not to be in any way an extension of the principle
- h stated in the *Countess of Ossalinsky* case.

- [43] Notoriously the practical difficulty with the *Pointe Gourde* principle lies in identifying the area of the 'scheme' in question. This difficulty does not arise when the enhanced value arises from the authority's proposed user of the subject land. Then, by definition, what is in issue is the proposed use of the subject land.
- j But when regard is had to the authority's use or proposed use of other land the application of the principle is not self-defining. A major development project of a general character, covering a wide geographical area, may proceed in several phases, each phase taking years to implement, and the detailed content and geographical extent of each phase being subject to change and finalised only as the phase nears the time when the work will be carried out. Is that one scheme or several?

[44] This question arose in one of the earliest cases where the *Pointe Gourde* principle was applied to enhanced value arising from use of land other than the subject land: *Fraser v Fraserville City* [1917] AC 187. One of the grounds on which the arbitrators' award was set aside was that, in valuing the falls of a river and adjacent land acquired for electricity generation purposes, the arbitrators had taken into account the enhanced value emanating from a reservoir being built by the acquiring authority higher up the river. In a much quoted passage (at 194) Lord Buckmaster said that, in ascertaining the value of the property to the owner with all its advantages and possibilities, there should be excluded 'any advantage due to the carrying out of the scheme for which the property is compulsorily acquired', the question of what is the scheme being a question of fact. a
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[45] The Privy Council did not decide whether the reservoir works and the work proposed to be carried out at the river falls were two parts of one scheme. That was a question for the fact-finding tribunal. Nor did the Board vouchsafe guidance on the criteria to be applied by the fact-finding tribunal when deciding this 'question of fact'. c

[46] This is essentially a problem which has arisen since the Second World War. Sir Michael Rowe QC, sitting in the Lands Tribunal, drew on his experience when he said in *Kaye v Basingstoke Corp* (1968) 20 P & CR 417 at 455: d

'Before the 1939 war it is broadly, perhaps entirely, true to say that the application of the common law rule was comparatively simple in so far as discovering what "the scheme underlying the acquisition" was. There was usually an Act, public but more often private, or an Order which defined the scheme and the area wherein it was to operate. But in the post-war years a new conception of planning led to a series of measures which gave to local authorities, of one kind or another, planning powers of a much less detailed although more far-reaching character.'

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[47] The Town and Country Planning Act 1947, the New Towns Act 1949 and the Town Development Act 1952 exemplified this trend. When seeking to identify the ambit of a scheme it was no longer sufficient to look to the primary or secondary legislation which empowered the acquisition. It became necessary to look more widely. f

THE 1961 ACT

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[48] In 1959 Parliament had in mind the problems arising from these new forms of development schemes when restoring the compensation position to what it had been before the enactment of the 1947 Act. Parliament sought to make provision for them in the Town and County Planning Act 1959, followed by the 1961 Act. h

[49] Their complexity makes summary difficult. For present purposes it is sufficient to say that the broad thrust of s 6 of the 1961 Act as amended appears to be as follows. The value attributable to development, or prospect of development, of land other than the subject land is to be disregarded in a variety of circumstances specified in Pt I of Sch 1. These are: that the other land and the subject land are within the same compulsory purchase order (case 1), or within an area of comprehensive development (case 2) or within a site designated under the New Towns Act 1946 (case 3) or the extension of such a site (case 3A) or a town development area (case 4) or an urban development area (case 4A) or a housing trust action area (case 4B). In these cases changes in the value of the subject land attributable to development or the prospect of development for the j

- a same purposes of other land in the same compulsory purchase order are to be disregarded if 'the development ... would not have been likely to be carried out if ... the acquiring authority had not acquired and did not propose to acquire any of [the land comprised in the compulsory purchase order]': see s 6(1)(a). Additionally, where land is within cases 2–4B the disregard extends to the effect in value on the subject land of any development, past or prospective, which
- b would not have been likely to be carried out if the area had not been designated, for example, in case 4B, as an urban development area: see s 6(1)(b).

- [50] In the case of urban development areas the disregard net is cast even wider by paras 10 and 11 of Sch 1, introduced by the Local Government, Planning and Land Act 1980. A change in value is not to be excluded from the scope of the disregard merely because it is attributable to a development which was carried
- c out before the area was designated as an urban development area, or to a development of land outside the urban development area, or to development by an authority other than the acquiring authority: para 10. Further, in an apparent reference to the *Pointe Gourde* principle, para 11 provides that para 10 shall apply also to any change in value to be left out of account 'by virtue of any rule of law
- d relating to the assessment of compensation in respect of compulsory acquisition'.

- [51] The first and most obvious oddity of this enactment is that it makes no provision regarding value attributable to the prospect of development of the subject land itself. It is frankly impossible to believe that Parliament intended that enhancement of value attributable to the prospect of development of associated land should be disregarded but not enhancement in value attributable to the
- e prospect of development of the subject land itself. The statutory assumptions regarding planning permissions in respect of the subject land, set out in ss 14–16, do not provide an adequate explanation for this difference in treatment. Planning permission is one thing, the prospect of development is another.

- [52] In *Viscount Camrose v Basingstoke Corp* [1966] 3 All ER 161, [1966] 1 WLR
- f 1100 the Court of Appeal rightly declined to accept that Parliament intended this result. A possible explanation for the absence of a statutory disregard in respect of enhanced value attributable to proposed development of the subject land itself is that, as already noted, in such cases the difficulties inherent in identifying the ambit of the scheme do not arise. This being so, the exclusion of these cases from the scope of the statutory disregard is not to be construed as implicitly changing the law. Rather it is the recognition of a well-known situation for which
- g legislation was not necessary: see [1966] 3 All ER 161 at 167, [1966] 1 WLR 1100 at 1111 per Russell LJ. Accordingly, in these cases the *Pointe Gourde* principle should continue to be applied.

- [53] Had the matter rested there s 6 might well have been open to the
- h interpretation that in all other respects the new statutory code was exhaustive. But there is at least one further gaping lacuna in the code. This is illustrated by *Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302, where an authority acquired some of the land needed for a scheme of development by
- j agreement and made a compulsory purchase order in respect of the remainder. Enhancement in value of the subject land attributable to the development of the land bought by agreement would be outside case 1. Here again, that cannot have been intended by Parliament.

[54] The courts therefore found themselves driven to conclude that the statutory code is not exhaustive and that the *Pointe Gourde* principle still applies. This conclusion is open to the criticism that in many instances this makes the

statutory provisions otiose. This is so, but this is less repugnant as an interpretation of the Act than the alternative.

IDENTIFYING THE EXTENT OF THE SCHEME

[55] The co-existence of the s 6 code and the *Pointe Gourde* principle means that the problems associated with identifying the ambit of the 'scheme' for the purposes of the *Pointe Gourde* principle remain live problems. Undoubtedly the present state of the law gives rise to serious valuation difficulties. It is unreal to require land to be valued on the basis of what would have been the position if a major development which took place years ago had not been carried out. Lord Denning MR, in his accustomed style, referred to a valuer having to 'conjure up a land of make-believe' and 'let his imagination take flight to the clouds': see *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096 at 1102, [1974] 1 WLR 696 at 704. In a recent case in the Lands Tribunal, the President had to rewrite the history of Mold in North Wales over 17 years. He described this as a 'virtually impossible task': see *Pentrehobyn Trustees v National Assembly for Wales* [2003] RVR 140 at 154 (para 98).

[56] There is an even more fundamental problem. This goes to the very fairness of the *Pointe Gourde* principle as currently applied. The wider the scheme, the greater the potential for inequality between those outside the area of acquisition, whose land values rise by virtue of the scheme, and landowners whose properties are acquired at a value which disregards the scheme. Conversely, the narrower the scheme, the greater the potential for an authority being called upon to pay compensation inflated by its own investment in improved infrastructure or other regeneration activities. Holding the balance between these conflicting interests is pre-eminently a subject for decision by Parliament. But, as matters stand, there are indications that in some cases the application of the *Pointe Gourde* principle has become too wide-ranging.

[57] The Law Commission, in its report already mentioned (see [39], above), recommended enactment of a new compensation code which would include provision for a 'statutory project'. This would replace the *Pointe Gourde* principle, s 6 of the 1961 Act and much else beside. In several respects this 'statutory project' provision is not compatible with s 6. Whilst s 6 remains on the statute book, therefore, the Law Commission's 'statutory project' recommendation does not lend itself to adoption by the courts as a model for the future in place of the existing *Pointe Gourde* principle. For present purposes what is important is that, after consulting widely, the Law Commission recognised the need to restrict the area of schemes.

[58] I turn, then, to the question of how the extent of a scheme should be identified in today's conditions. A scheme essentially consists of a project to carry out certain works for a particular purpose or purposes. If the compulsory acquisition of the subject land is an integral part of such a scheme, the *Pointe Gourde* principle will apply accordingly. Both elements of a project, the proposed works and the purpose for which they are being carried out, are material when deciding which works should be regarded as a single scheme when applying the *Pointe Gourde* principle to the subject land.

[59] The extent of a scheme is often said to be a question of fact. Certainly, identifying the background events leading up to a compulsory purchase order may give rise to purely factual issues of a conventional character. But selecting from these background facts those of key importance for determining the ambit of the scheme is not a process of fact-finding as ordinarily understood.

a [60] Take the present case. The purpose for which the claimants' land was acquired can be identified at two different levels of generality: for use as a nature reserve, or for use as a nature reserve to compensate for loss of the Taff/Ely SSSI through construction of the Cardiff Bay barrage. Factually each of these stated purposes is correct. Which of these purposes is to be regarded as the more appropriate when identifying the scheme within the meaning of the *Pointe Gourde* principle is a matter for the tribunal's judgment.

b [61] A similar judgmental exercise is required with regard to the works said to comprise one scheme for the purposes of the *Pointe Gourde* principle. When deciding, for instance, whether a phased development constitutes a single scheme or more than one scheme the tribunal will consider all the circumstances and decide how much weight, or importance, to attach to the various relevant features. The tribunal will attach to these features the degree of importance it considers appropriate having regard to the purpose of the *Pointe Gourde* principle. What, then, is the purpose of this principle? Its purpose, in separating 'value to the owner' from 'value to the purchaser', is to forward Parliament's objective of providing dispossessed owners with a fair financial equivalent for their land.

c They are to receive fair compensation but not more than fair compensation. This is the overriding guiding principle when deciding the extent of a scheme.

d [62] This statement of general principle does no more than articulate the approach already adopted intuitively by tribunals when faced with making a choice between competing views of the extent of a scheme in a particular case. It is to be hoped that bringing this principle into the open will assist decision-making in difficult cases.

e [63] In applying this general principle there is of course no magical detailed formula which will provide a ready answer in every case. That is in the nature of things, circumstances varying so widely. But some pointers may be useful.

f (1) The *Pointe Gourde* principle should not be pressed too far. The principle is soundly based but it should be applied in a manner which achieves a fair and reasonable result. Otherwise the principle would thwart, rather than advance, the intention of Parliament. (2) A result is not fair and reasonable where it requires a valuation exercise which is unreal or virtually impossible. (3) A valuation result should be viewed with caution when it would lead to a gross disparity between the amount of compensation payable and the market values of comparable adjoining properties which are not being acquired. (4) When applied as a supplement to the s 6 code, which will usually be the position, the *Pointe Gourde* principle should be applied by analogy with the provisions of the statutory code. Thus in the class 1 type of case the area of the scheme should be interpreted narrowly, for instance, so as to embrace the property acquired under

g the compulsory purchase order and property which would probably have been so acquired had it not been bought by agreement. In other cases, such as case 2, Parliament has spread the 'disregard' net more widely. Then it may be appropriate to give the scheme a wider scope. (5) Normally the scope of the intended works and their purpose will appear from the formal resolutions or documents of the acquiring authority. But this formulation should not be

j regarded as conclusive. (6) When in doubt a scheme should be identified in narrower rather than broader terms.

RANSOM VALUE

[64] One last point should be noted before returning to the present case. This concerns so-called 'ransom' value or, less pejoratively, 'key' value. I have already

mentioned that under the 'value to the owner' principle or the *Pointe Gourde* principle, whichever nomenclature is preferred, the pressing need of an acquiring authority for the subject land as part of a scheme should be disregarded when assessing its value for compensation purposes. The value of the land is not the price a 'driven' buyer would be prepared to pay. But a strip of land may have special value if it is the key to the development of other land. In that event this feature of the land represents part of its value as much for purposes of compensation as on an actual sale in the open market. a
b

[65] The intersection of these two principles was identified neatly by Mann LJ in *Batchelor v Kent CC* (1989) 59 P & CR 357 at 361:

'If a premium value is "entirely due to the scheme underlying the acquisition" then it must be disregarded. If it was pre-existent to the [scheme] it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence.' c

[66] In the present case the claimants contend their land had key value because of its importance as compensatory wetlands required for completion of the Cardiff Bay barrage project. Whether this contention is well founded for compensation purposes depends, in accordance with the principle enunciated by Mann LJ, on the ambit of the scheme of which the subject land's acquisition was an integral part. d

THE PRESENT CASE e

[67] Both the President of the Lands Tribunal ([2001] 1 EGLR 185) and the Court of Appeal ([2003] 4 All ER 384) held that, for the purposes of the *Pointe Gourde* principle, the acquisition of the claimants' land for a nature reserve was an integral part of the barrage project. I agree. f

[68] The claimants' land was acquired to meet a need generated by the barrage project. That fact does not of itself mean that the taking of this land was an integral part of the barrage project. Indeed, the claimants' strongest point is that the acquisition of their land was not identified at the outset of the barrage project. It was not identified until October 1995 and by then the barrage project was under way. g

[69] The short answer to this point is that, although the acquisition of the claimants' land was not identified at the outset of the barrage project, the project proceeded throughout on the basis that some such compensatory measures would be provided. In the absence of governmental assurances that a compensatory nature reserve would be provided it is unlikely the Cardiff Bay Barrage Act 1963 would have become law, certainly in its enacted form. The President so found. This being so, it seems to me appropriate to regard the acquisition of the claimants' land, after this was identified as part of the intended compensatory site, as an integral part of the barrage project. This is fair and reasonable. There has been no suggestion that the value of the claimants' land had been enhanced as a possible compensatory nature reserve site before the choice of this site in October 1995. h
j

[70] I would dismiss this appeal. When assessing compensation payable for the claimants' land the authority's need to acquire the land as a palliative measure necessary as a result of the environmental consequences of the Cardiff Bay barrage is to be disregarded.

LORD WOOLF CJ.

- a [71] My Lords, I was intending to deliver a speech of my own. However, having read and re-read the speeches of Lord Nicholls of Birkenhead and Lord Brown of Eaton-under-Heywood in draft, I am satisfied that any contribution that I could make would serve no purpose since I am in complete agreement with what they say so clearly, in their speeches. Indeed for me to deliver a separate
b speech could detract from the result which I hope will follow from their speeches. This is that tribunals and practitioners in future will not find it necessary to refer to any other authority apart from this on the matters covered by their speeches. The process of valuation should be a matter of experienced evaluation of the facts of a particular transaction or transactions within broad general parameters laid
c down by the law. So far as possible valuation should eschew technical distinctions.

[72] I have also read Lord Scott of Foscote's speech. At an earlier date there would have been much to be said for his approach.

LORD STEYN.

- d [73] My Lords, I would dismiss the appeal for the reasons given by my noble and learned friend Lord Brown of Eaton-under-Heywood in his opinion. I am also in agreement with the opinion of Lord Nicholls of Birkenhead.

LORD SCOTT OF FOSCOTE.**BACKGROUND**

- [74] My Lords, the appellants' land at Nash, near Newport, Gwent, comprising about 225 acres, was acquired by the Land Authority for Wales
f (LAW) under a compulsory purchase order made on 15 January 1997 and confirmed by the Secretary of State for Wales on 14 November 1997. The land, at the time of the compulsory purchase order, was agricultural land. The land was acquired by the LAW in order that it should form part of an area of about 1000 acres bordering the Severn estuary and intended to become the Gwent Levels Wetlands Reserve, a nature reserve and habitat for birds. The other
g 775 acres had been acquired by LAW by agreement with the landowners and not under compulsory powers. The respondent before your Lordships, the Welsh Development Agency (the WDA), is the LAW's statutory successor.

- [75] The appellants are, of course, entitled to compensation for the land that has been compulsorily acquired but there is disagreement as to the basis on which
h the compensation should be assessed. It is common ground that, under s 15 of the Land Compensation Act 1961, the land must be assumed to be entitled to the benefit of planning permission for use as a nature reserve. And it is common ground that the appellants are entitled to compensation calculated by reference to whichever of agricultural use and nature reserve use would yield the higher
j value. I would observe in passing, my Lords, that it is a woeful commentary on the state of agriculture in this country if a non-commercial use of land such as use as a nature reserve would produce a higher value than would use of the land for the purpose of agriculture. But that is not to the point on this appeal. The issue is whether a particular reason why the land, with the other 775 acres, was needed for transformation into a nature reserve should, or can, be taken into account in assessing its value for compensation purposes.

[76] The particular reason can be shortly described. The Cardiff Bay Barrage Act 1993, which received the Royal Assent on 5 November 1993, empowered the Cardiff Bay Development Corporation (the CBDC) to construct a barrage across the mouth of Cardiff Bay and to carry out various related works in a development area adjacent to the bay. These works were of social and economic importance. a

[77] One of the effects of the construction of the barrage would be to raise the level of the water in the bay. The raising of the water level would flood the mudflats of the Taff/Ely estuary and cause serious damage to an area of that estuary which in 1980 had been designated a site of special scientific interest (SSSI). The mudflats within the SSSI were an important breeding site for dunlin and redshank. b

[78] Serious concerns about the environmental damage that the barrage across Cardiff Bay would cause were expressed by the Nature Conservancy Council (the NIC) and the Royal Society for the Protection of Birds (the RSPB). In addition, the United Kingdom had obligations under Council Directive (EEC) 79/409 (on the conservation of wild birds) (1979 OJ L103 p 1) and, later, under Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) (1992 OJ L206 p 7). So the proposals for the Cardiff Bay barrage led to correspondence between the European Commission of Human Rights (the Commission) and the United Kingdom government. The Commission was insisting that, in order to comply with its obligations under these directives, the government provide in the Severn estuary additional natural habitat land to compensate for the loss of the Taff/Ely estuary habitat. c

[79] Consideration was given by the United Kingdom authorities to a number of possible Severn estuary areas which might constitute the requisite compensatory habitat. First there was an area of 400 acres odd at Wentlooge Levels east of Cardiff. Next an area of about 650 acres at Redwick, to the east of the Usk estuary was favoured. But for various reasons these two sites were in turn discarded. Eventually it was decided that the most suitable site for providing the compensatory habitat would be the 1000 acres also lying east of the Usk estuary but to the west of the Redwick land. It is convenient to refer to this 1000 acres as the Uskmouth site. The appellants' land is part of the Uskmouth site. d

[80] The construction of the Cardiff Bay barrage began in June 1994. A firm decision that the Uskmouth site was to constitute the compensatory nature reserve had been taken before the end of 1995. A letter of 21 December 1995 from the Welsh Office to the Commission so stated. As I have said, the compulsory purchase order under which the appellants' land was taken was made by LAW on 15 January 1997 and confirmed by the Secretary of State on 14 November 1997. In its statement of reasons for making the compulsory purchase order LAW said: e

‘The proposal for the Gwent Levels Wetlands Reserve arises from the need for an agreement between the UK Government and the European Commission to provide compensatory measures for the loss occasioned by the construction of the Cardiff Bay Barrage of the site of Special Scientific Interest in the Taff/Ely Estuary.’ f

[81] A public inquiry into the compulsory purchase order and LAW's application for planning permission for the use of the 1000 acres as a nature reserve was held in May 1997. The inspector recommended that the compulsory purchase order should be confirmed and the planning permission granted. The g

a Secretary of State accepted the recommendation. In his decision letter of 14 November 1997 he said:

‘... the provision of a [nature] reserve has been proposed because of the need for compensatory measures due to the construction of Cardiff Bay Barrage and the consequent loss of the inter-tidal mud flats when impoundment of the water in the Bay occurs.’

b [82] The appellants contend that the value of their land was enhanced by the pressing need of the government, in order to comply with its obligations under the two directives, to establish the proposed Gwent Levels Wetlands Reserve as compensation for the damage to the Taff/Ely estuary SSSI. This enhancement of value should, they say, be taken into account in the assessment of the compensation to which they are entitled. In the Lands Tribunal the President
c held that this enhancement of value (if it existed, which is yet to be determined) should not be taken into account. On appeal Carnwath LJ, with whose judgment the other two members of the court agreed, agreed that the alleged enhancement should not be taken into account. The appellants have appealed against this
d ruling to your Lordships’ House.

[83] So far, my Lords, the issues which have been presented for adjudication, first to the Lands Tribunal ([2001] 1 EGLR 185), then to the Court of Appeal ([2002] EWCA Civ 924, [2003] 4 All ER 384) and now to this House, have been issues of principle. No one knows whether nature reserve use would justify a higher value for the land than agricultural use. No one knows whether the
e government’s need for a compensatory nature reserve on the Severn estuary would increase the value of the land, or, if so, by how much. The issues are simply issues of principle.

THE STATUTORY BACKGROUND

f [84] Compulsory expropriation of land is a creature of statute. There is no common law right or extant Crown prerogative that allows such a thing. So it might reasonably be thought that the basis on which compensation would be paid for land compulsorily acquired would be provided for by statute. And so it is. The Law Commission Report *Towards a Compulsory Purchase Code*:
g (1) *Compensation* (Law Com No 286) (Cm 6071), presented to Parliament in December 2003 and largely prepared while Carnwath J (as he then was) was Chairman of the Law Commission, contains in its App C a valuable summary of the historical development of statutory compensation provisions. These were originally to be found in the respective private Acts passed in the late eighteenth and early nineteenth centuries whereby the compulsory purchase of land for the
h construction of canals, railways, harbours and reservoirs was authorised. Standard clauses were developed which were consolidated in the Lands Clauses Consolidation Act 1845. Thereafter Acts authorising compulsory purchase were treated as incorporating the 1845 Act clauses.

j [85] Over the period between 1845 and the end of the First World War case law, interpreting and applying the 1845 Act clauses, established the principle that compensation was to be assessed on the basis of the value of the land to the owner, not its value to the acquiring undertaker or authority. The principle of ‘equivalence’ became established. The owner was to receive in money the equivalent of his land.

[86] Probably the most important and influential of the pre-1919 cases was *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, [1908–10] All ER Rep

251. This was a reservoir case. Land, geographically very suitable for construction of a reservoir, was the subject of a compulsory purchase for that purpose. The circumstances made it very unlikely that anyone other than the water board would have wanted, or been able, to construct the reservoir and exploit the water collected in it. In these circumstances, and bearing in mind the 'value to the owner' principle, could the site's suitability for use as a reservoir enhance its value to the owner for which the water board should pay? The Court of Appeal said that a distinction had to be drawn between the possibility of that use, for which the water board should pay, and the realisation of that possibility, for which the water board should not have to pay. As Vaughan LJ said ([1909] 1 KB 16 at 28, [1908–10] All ER Rep 251 at 255): '[The arbitrator] ought to value the possibility and not the realized possibility.' Fletcher Moulton LJ expressed the solution to the problem thus ([1909] 1 KB 16 at 31, [1908–10] All ER Rep 251 at 256):

'... where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes.'

[87] The *Lucas* approach was adopted in two Privy Council cases. The first was *Cedars Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569, [1914–15] All ER Rep 571. The other was *Fraser v Fraserville City* [1917] AC 187. Both were appeals from Quebec, both related to expropriations of land in or near a river for the purpose of constructing works to exploit the water power. In the *Cedars Rapids* case Lord Dunedin, giving the judgment of the Board, said that the principles of compensation had nowhere been stated with greater precision than in *Lucas's* case and continued ([1914] AC 569 at 576, [1914–15] All ER Rep 571 at 573–574):

'For the present purpose it may be sufficient to state two brief propositions: (1) The value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. (2) The value to the owner consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking ... the value ... is merely the price, enhanced above the bare value of the ground which possible intended undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.'

I would venture respectfully to suggest that the principles of compensation, relating in particular to the relevance of the special adaptability or suitability of

a the land for some particular purpose, have never been more succinctly and clearly expressed.

[88] In *Fraser's* case [1917] AC 187 at 194, Lord Buckmaster, having cited *Lucas's* case and the *Cedars Rapids* case, said:

b '... the value to be ascertained is the value to the seller of the property in its actual condition at the time of expropriation with all its existing advantages and with all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired ...'

c [89] In 1919 the Acquisition of Land (Assessment of Compensation) Act 1919 was passed. The Act followed upon the report of the Scott Committee that in 1918 had been appointed to review the rules relating to the assessment of compensation (*Second Report on the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes* (Cd 9229) (1918)). In s 2 of the 1919 Act six rules, that had been recommended by the committee, were enacted. The first three of these rules are relevant to the issues in the present appeal. Section 2 provided as follows:

d 'In assessing compensation, an official arbitrator shall act in accordance with the following rules:—(1) No allowance shall be made on account of the acquisition being compulsory.

e (2) The value of land shall, subject as hereinafter provided be taken to be the amount which the land if sold in the open market by a willing seller, might be expected to realise ...

f (3) The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any Government Department or any local or public authority ...'

g There is, in my opinion, no doubt but that these first three rules were intended to lay down with statutory authority, first, the principle that compensation was to be assessed on the basis of the value of the land to the seller—the compulsory acquisition was not to add to or detract from the value; second, the principle that that value was to be taken to be market value, assuming a willing seller and a willing buyer; and third, that any special suitability of the land was not to be taken into account if the case could be brought with r(3). Rule (3) was the parliamentary solution to the problem referred to in *Lucas's* case, the *Cedars Rapids* case and *Fraser's* case. It follows also, in my opinion, that post the coming h into effect of the 1919 Act, and until some important statutory amendments were made following the Second World War, any special suitability or adaptability of land that was not caught and excluded by r(3) ought to have been taken into account as constituting an enhancement to value to be reflected in the compensation.

j [90] The post-Second World War statutory amendments start with the Town and Country Planning Act 1947 under which compensation for compulsorily appropriated land was to be assessed at existing use value. Under that system there could be no question of the value of the land for compensation purposes being enhanced by reference to the suitability of the land for some other use or to the likelihood or even certainty of the land being put to that use. But the Town and Country Planning Act 1959 restored the pre-1947 Act principles and at the

same time added additional statutory disregards to those which had been specified in the 1919 Act. These are the principles and rules which, broadly speaking, are still applicable under ss 5 and 6 of the 1961 Act. In a case like the present one might think that it ought to be possible, by applying ss 5 and 6 of the 1961 Act to the facts of the case, to resolve the issue raised by this appeal. But it seems, unfortunately, to be not that simple. And the reason it is not is because a few cases between 1919 and the coming into effect of the 1959 Act have been taken to have established principles of compensation which are not based on any statutory language and which have led, in many subsequent cases, including the present, to complexities and uncertainties, both factual and conceptual, of formidable proportions. The President in the Lands Tribunal and the Court of Appeal understandably felt themselves bound by the jurisprudence that has been created. But your Lordships are not. In my respectful opinion this appeal affords an opportunity for a careful re-examination of the basis and justification of the judge-made additions to, and to some extent substitutions for, the statutory principles.

[91] I would start, although chronologically it is not the first of the cases that need to be examined, with *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565. This was a Privy Council case on appeal from Trinidad and Tobago. Under a wartime agreement in 1941 the government of this country agreed to lease to the United States government some land in Trinidad on which the United States could establish a naval base. In order to give effect to this agreement the Crown acquired the Pointe Gourde land, using compulsory powers to do so. Compensation was to be assessed under local legislation, namely, the Land Acquisition Ordinance 1941, s 11(2), r (3) of which was in the same terms as s 2, r (3), of the 1919 Act. Part of the land acquired consisted of a limestone quarry which, at the time of acquisition, was being conducted as a profitable going concern. The quarry stone had a particular value to the United States authorities because they needed stone for the purpose of building the naval base. The tribunal which assessed the compensation awarded for the quarry land a total sum of \$101,000, of which \$86,000 represented the value of the quarry as a going concern and the balance of \$15,000 was awarded on account of the special value of the quarry having regard to the special needs of the United States for the stone. Those needs would, in the tribunal's view, have increased the profits of the quarry if it had remained in the hands of the appellants. So the sum of \$15,000 was the measure of the appellants' loss in being deprived of that prospective profit, additional to the future profits the expectation of which had been taken into account in the \$86,000 going concern value.

[92] It seems, from the summary of counsels' arguments contained in the law report, that the only point argued by the distinguished counsel who appeared in the case was whether the \$15,000 was excluded by r (3). Lord MacDermott, in an ex tempore judgment, held (at 572) that the references in r (3) to 'a purpose' to which the land could be applied connoted 'a use, actual or potential, of the land itself' and could not be regarded as meaning a purpose 'which is only concerned with the use of the products of the land elsewhere'. The United States authority's special need for the stone was not, his Lordship held, 'a special suitability or adaptability of the land for any purpose' within the meaning of r (3). But Lord MacDermott then went on to consider a point that, so far as the report of the case reveals, had not been addressed by counsel. He referred to two pre-1919 Act cases, namely, *South Eastern Ry Co v London CC* [1915] 2 Ch 252 where Eve J had said (at 258) that 'increase in value consequent on the execution of the

a undertaking for or in connection with which the purchase is made must be disregarded—a restatement of the ‘value to the seller’ principle—and *Fraser v Fraserville City* [1917] AC 187 to which I have already referred. In reliance on these two authorities Lord MacDermott (at 572) said that it was—

b ‘well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition.’

c [93] The dictum of Lord MacDermott’s that I have cited has, in the subsequent case law, been examined, pored over and construed as though it had been a sentence in an Act of Parliament. This process, as may be seen from the judgments of the courts below in the present case, is still continuing. In my respectful opinion the process has been and is unwarranted. Lord MacDermott, in his two-page ex tempore judgment, came to a conclusion which, if I may respectfully say so, was clearly correct. It was correct because the realisation of the \$15,000 depended on what the purchasing authority might do with the quarry after acquisition. The \$15,000 did not represent an element of value to the seller at the time of acquisition. The \$86,000, the going concern value of the quarry, took into account the future profitability of the quarry; and, in assessing the future profitability, the possibility of a purchaser wanting to use the stone to construct buildings on the land being acquired should have been taken into account. So the \$15,000 was either double counting or, if it was not, was attributable to some special need which the United States naval authority and only the United States naval authority would have. If the later analysis of the facts is the correct one, it is difficult to see why the special need would not have been excluded by r (3). The unquarried stone at the valuation date was a part of the land. Its commercial potential was an element in the value of the land. The distinction drawn by Lord MacDermott between use of the land and use of its products was, in my respectful opinion, unsound. But Lord MacDermott unquestionably came to the correct conclusion and had no reason to suppose that his ex tempore judgment would come later to achieve the doctrinal elevation that it did.

g [94] In both of the courts below particular attention was paid to an earlier Privy Council case, *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302 (the ‘Indian case’, for short). This was an appeal from the High Court at Madras and concerned the compulsory expropriation of land with a spring which yielded a good supply of clean drinking water. The expropriating authority, the Vizagapatam Harbour Authority, had a particular need for this water in order to make it available to those working on or near the harbour. It would have been difficult but not impossible for the water to have been made available by anyone else. The question was whether, or to what extent, the abundance of good, clean water on the expropriated land (the equivalent of the limestone in the Pointe Gourde quarry) represented a value to be reflected in the compensation. The relevant Indian statute was the Land Acquisition Act of 11 September 1933. The terms of this Act as to compensation differed in no material respect from those of the 1845 Act before the coming into operation of the 1919 Act: see Lord Romer ([1939] 2 All ER 317 at 321, [1939] AC 302 at 311). Section 23 of the Indian Act required the compensation to be based on the market value of the land. Section 24 specified a number of things that the valuer should not take into consideration. Among these disregards was ‘the degree of urgency which has led

to the acquisition' and 'any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired'.

[95] If ss 23 and 24 of the Indian Act are compared with s 2, rr (1)–(3) of the 1919 Act, it is apparent that r (3) of the 1919 Act, in its codification of the manner in which special suitability or adaptability is to be dealt with, adds an element not to be found in the Indian Act. But, apart from that, the effect of the two Acts seems to be much the same. Perhaps the Indian Act spells out more explicitly than does s 2 of the 1919 Act that the value to be assessed is the value to the seller. In my opinion, however, the 'value to the seller' rule is at least implicit in r (2) of s 2 of the 1919 Act. It may be noted also that, if the Indian Act had been the Act in force in Trinidad, s 24 would have made it crystal clear that the \$15,000 had to be disallowed. Lord MacDermott's judgment could have been even shorter.

[96] The problem in the Indian case was that since, on one view of the facts, there was only one likely potential purchaser, namely, the Harbour Authority, it was difficult to see how the statutory criterion of 'market value' could be applied. Lord Romer, who gave the judgment of the Board, said that a willing buyer and a willing seller had to be assumed and that it also had to be assumed that the willing buyer would be willing to pay a reasonable sum for the water potentiality of the expropriated land. He said, in conclusion ([1939] 2 All ER 317 at 328, [1939] AC 302 at 323):

'... even where the only possible purchaser of the land's potentiality is the authority which has obtained the compulsory powers, the arbitrator, in awarding compensation, must ascertain to the best of his ability the price which would be paid by a willing purchaser to a willing vendor of the land with its potentiality in the same way that he would ascertain it in a case where there are several possible purchasers ...'

[97] My Lords I can see no conflict of principle between the *Pointe Gourde* case and the Indian case. In the *Pointe Gourde* case the \$15,000 was attributed to the United States naval authority's special need for the stone. That was not a need that any other potential purchaser of the land would have had, or so one must assume. The tribunal that assessed the compensation had already taken into account the commercial possibilities and value of the stone in the quarry and had come up with the figure of \$86,000. The \$15,000 was an add-on, a valuation, in *Lucas* terms, of a realised potentiality, not merely of a potentiality. In the Indian case, on the other hand, the arbitrator was told to assess the commercial potential of the water in the spring. He was not to do so on the footing that the harbour authority would, after its purchase, be using the water, but on the footing that a potential purchaser, which might, but would not necessarily, be the harbour authority, might exploit the water in the spring. The valuation assessment might be very difficult, but the principle seems to me clear enough and to be consistent with the *Pointe Gourde* case.

[98] The Indian case was applied in the Court of Appeal in *Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612. This was an ex tempore judgment given by Parker LJ. A property was under lease to a Territorial Army entity. The Secretary of State for War acquired the reversion using compulsory powers. The compensation assessment problem was whether the extra value that would follow from the merger of the freehold with the leasehold interest should be reflected in the compensation and, if so, how? The Court of Appeal held ([1955] 2 All ER 386 at 390, [1955] 2 QB 612 at 623) that r (3) did not apply and, purporting to apply the Indian case, that the assessment should be—

a 'on the basis of the value which the acquiring authority, in a friendly negotiation, would be willing to pay in acquiring a freehold interest for his purposes and as though no powers of compulsory acquisition had been obtained.'

b [99] My Lords, I do not think *Lambe's* case was rightly decided. The merger value was a value that the Secretary of State, and only the Secretary of State, could realise. Unlike the Indian case water or the *Pointe Gourde* case limestone, the merger was not a part of the land being sold. It was not an element of the value of the land to the seller. It was an element of value only to a purchaser who happened to own, or control, the leasehold interest, namely, the Secretary of State. It was an element that did not form part of the value of the land for r (2) purposes. The Indian case was quite different. There the water supply was a part of the land being sold. The water's commercial possibilities, and therefore its value, had to be taken into account and assessed. In *Lambe's* case there was nothing comparable to be assessed.

d [100] In tracing the development of the jurisprudence I should next refer to the advent of the Town and Country Planning Act 1959. This Act, as I have already said, introduced new statutory disregards. They are to be found in s 9(2) of the Act. None is directly relevant to the present case but the terms of sub-s (1) should be noted. Section 1 of the Act restored the 1919 Act s 2 rules and got rid of existing use value as the basis on which compensation was to be assessed. Section 9(1) said:

e 'In addition to the rules applicable in accordance with section two of the Act of 1919 ... the following provisions of this section shall have effect for the purpose of assessing the compensation payable in respect of compulsory acquisitions to which section one of this case applies ...'

f Then follow the new disregards. My Lords, it seems to me very difficult, in the face of this statutory language, to take the view that there are other disregards, established by case law and to be found neither in the language of the 1919 Act nor in that of the 1959 Act, which have to be applied in order to reduce the value for compensation purposes of land that has been compulsorily acquired.

g [101] *Davy v Leeds Corp, Central Freehold Estates (Leeds) Ltd v Leeds Corp* [1965] 1 All ER 753, [1965] 1 WLR 445 was a decision of this House. The case arose out of a Leeds slum clearance scheme. The corporation declared an area in which the appellants owned some slum houses to be a slum clearance area and made a compulsory purchase order for the acquisition of the houses in that area. h Compensation fell to be assessed under the 1919 Act and the 1959 Act. The appellants were entitled to receive in compensation the value of their land as sites cleared of buildings and available for redevelopment. The issue was whether this value was to be assessed on the footing that all the other buildings in the clearance area would be cleared away. This would have enhanced the value of the appellants' land. It was held in the Court of Appeal ([1964] 3 All ER 390, [1964] 1 j WLR 1218) and in this House that the disregards introduced by s 9 of the 1959 Act prevented any such enhancement of value being reflected in the compensation. The interest of the case for present purposes is that Viscount Dilhorne, with whose opinion Lord Cohen expressed agreement, referred to the *Pointe Gourde* case, cited Lord MacDermott's sentence that I have cited in [92], above, and continued ([1965] 1 All ER 753 at 758, [1965] 1 WLR 445 at 453):

'By s. 9(2) of the Act of 1959, Parliament, it seems to me, has given statutory expression to the principle which LORD MACDERMOTT stated was well settled. Just as it would be wrong if the price to be paid for land compulsorily acquired was to be reduced if compulsory acquisition reduced its value, so, equally, would it be wrong if the price to be paid was increased as a result of what was proposed.'

My Lords, it must be right that s 9(2) of the 1959 Act, coupled with s 2, r (3) of the 1919 Act, constituted the statutory intention as to the matters to be excluded from the value of compulsorily acquired land for the purpose of assessment of compensation.

THE COURT OF APPEAL CASES

[102] A number of Court of Appeal cases have, however, sought to supplement, and in effect have de facto replaced, the statutory disregards. The first of these is *Viscount Camrose v Basingstoke Corp* [1966] 3 All ER 161, [1966] 1 WLR 1100. The corporation was the acquiring authority. Basingstoke was being expanded under the Town Development Act 1952 to receive overspill population from London and the corporation contracted to purchase about 550 acres from a landowner on terms that the price would be assessed as though the land had been compulsorily acquired under the 1952 Act. About 383 of the 550 acres were, in the town development plan, designated for residential development. The question was whether the increase in the value of the intended residential land brought about by the town development scheme should be reflected in the compensation. The relevant Act for assessment of compensation purposes was the Land Compensation Act 1961, a consolidating Act, in which s 5 reproduced s 2 of the 1919 Act, and s 6 replaced s 9 of the 1959 Act. Such differences as there are between the 1961 Act and its statutory predecessors are not material for present purposes.

[103] Section 6 of the 1961 Act has been subjected to a good deal of deserved criticism prompted by the lack of lucidity in its drafting. The first question which arose in *Camrose's* case was whether the case fell within one of the new statutory disregards. Lord Denning MR, with whose judgment Davies LJ agreed, held that, on a literal reading of the statutory provisions, any increase in value of the relevant land attributable to the development, or the prospect of development, of the rest of the land in the town development plan was to be excluded, but that any increase in value of the relevant land due to its own inclusion in the town development plan was not excluded. But Lord Denning MR ([1966] 3 All ER 161 at 164, [1966] 1 WLR 1100 at 1107) described this conclusion as 'contrary to commonsense'. He then sought to explain s 6:

'The explanation of s. 6(1) is, I think, this. The legislature was aware of the general principle that, in assessing compensation for compulsory acquisition of a defined parcel of land, you do not take into account an increase in value of that parcel of land if the increase is entirely due to the scheme involving the acquisition. That was settled by [the *Pointe Gourde* case], where the Privy Council disallowed the \$15,000 increase in value of the quarry ... which was due to the scheme for a naval base. That decision has since been approved by the House of Lords in (*Davy's* case). It is left untouched by s. 6(1), but there might be some doubt as to its scope. So the legislature passed s. 6(1) and Sch. 1 in order to make it clear that you were not to take into account any increase due to the development of the other land, i.e., land other than

a the claimed parcel. I think that the decision in the *Pointe Gourde* case covers one aspect, and s. 6(1) covers the other, with the result that the tribunal is to ignore any increase in value due to the Town Development Act, 1952, both on the relevant land and on the other land.'

b [104] I do not think Lord Denning MR's approach was correct. First, it was not accurate to say that *Davy's* case had approved the *Pointe Gourde* case. Viscount Dilhorne (and Lord Cohen) said that s 9(2) of the 1959 Act (the predecessor of s 6(2) of the 1961 Act) had given 'statutory expression' to the *Pointe Gourde* principle'. Approval or disapproval was not in point. Second, Lord Denning MR's reference to a 'scheme involving the acquisition' (emphasis added) stretches the concept of the 'scheme' much further than Lord c MacDermott could have had in mind. The *Pointe Gourde* scheme was simply the purchase of land, including the quarry land, for a United States naval base. The word 'involving' introduces an elasticity into the concept of 'scheme' that does not derive from the *Pointe Gourde* case.

d [105] Russell LJ, agreeing in the result, said ([1966] 3 All ER 161 at 166–167, [1966] 1 WLR 1100 at 1110):

e 'The argument [for the landowner] I take to be this. Since the relevant land is excepted [from the s 6(1) disregards], the section accepts that the prospect of its development in the course of the town development scheme *does* contribute to its valuation, though not the prospect of such development of other land. The only merit of this argument is that, like most fallacies, it can be simply and briefly stated, and has a surface plausibility. The objection to it lies in the history of compensation for compulsory acquisition, in which it has long been judicially established that the prospect of the direct impact of the relevant scheme on the land to be acquired is to be ignored. It is not f possible against that background to construe the section as tacitly or by implication altering the law. Rather is the exclusion of the relevant land a recognition of a well known situation for which legislation was not necessary.'

g Here, too, I must respectfully disagree with the reasoning. Over the years 1947–1959, compensation had had to be assessed on an existing use basis. The question at issue in *Camrose's* case would not have arisen while compensation continued to be restricted to existing use value. Pre-1947, as I have endeavoured to show, the only relevant compensation principles that had been judicially established were that the value of land for compensation purposes was its value to h the seller and that any special suitability of the land for the purposes for which the acquiring authority was acquiring the land was to be ignored. These principles had been incorporated into the statutory regime prescribed by the 1919 Act. The need to extend in 1959 the statutory disregards was surely attributable, first, to the abandonment of the 'existing use' restriction and, second, to the special planning j considerations brought about by the advent of slum clearance schemes, town development plans, schemes for new towns and the like. Compensation in the pre-Second World War era had been based on market value, subject to the two principles, value to the seller and the 1919 Act disregards. There was, in my opinion, no justification after the 1959 Act for depriving landowners whose land had been compulsorily acquired of any part of the value of that land to the sellers save such part as fell within one or other of the statutory disregards.

[106] The *Camrose* land that had been designated for residential use had to be valued on the footing that it had planning permission for residential development (see s 15 of the 1961 Act). Since the existence of the town development plan in relation to all the land comprised therein other than the *Camrose* land had to be ignored, its relevance to the *Camrose* land itself would, I suspect have been minimal. The valuer would have had to estimate when the various parts of the *Camrose* land would have been wanted for actual development, and attribute value accordingly. He would have had to assume that the infrastructure incorporated into the development of the other land was non-existent. This is very like the process of valuation that the valuer in fact undertook, a process that was affirmed by the Court of Appeal. But on the points of principle laid down by the Court of Appeal I think the decision was wrong and should be overruled.

[107] In *Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302 a similar valuation issue arose as that which had arisen in *Camrose's* case. The claimants owned 74 acres of an area of 391 acres in Liverpool which the corporation wanted to acquire for residential development. The compensation award included a reduction, estimated by the tribunal, attributable to the corporation's 'scheme' underlying the acquisition. Lord Denning MR said ([1971] 1 All ER 628 at 634, [1971] 1 WLR 302 at 309):

'It is suggested that that provision [ie s 6(1) and Sch 1, Pt 1, in the 1961 Act] contains a code which defines exhaustively the increases which are *not* to be taken into account, so that any other increase is to be taken into account; and, accordingly, there is no room for the *Pointe Gourde* principle. But this court has rejected that argument. In [*Camrose's* case] we held that the *Pointe Gourde* principle still applies to development which is not mentioned in Sch 1 to the 1961 Act. Counsel for the claimants recognises that that decision is binding on this court but he may desire to challenge it in the House of Lords.'

Lord Denning MR then went on to amplify the concept of a 'scheme'. He said:

'A scheme is a progressive thing. It starts vague and known to few. It becomes more precise and better known as time goes on. Eventually it becomes precise and definite, and known to all. Correspondingly, its impact has a progressive effect on values. At first it has little effect because it is so vague and uncertain. As it becomes more precise and better known, so its impact increases until it has an important effect. It is this increase, whether big or small, which is to be disregarded as at the time when the value is to be assessed.'

Widgery and Megaw LJ agreed. Widgery LJ ([1971] 1 All ER 628 at 635, [1971] 1 WLR 302 at 310) said:

'... the purpose of the so called *Pointe Gourde* rule is to prevent the acquisition of the land being at a price which is inflated by the very project or scheme which gives rise to the acquisition.'

[108] My Lords, my objections in principle to treating the *Pointe Gourde* case as an authority justifying these dicta in *Wilson's* case are the same as those I have already expressed. If the 'scheme' underlying a compulsory acquisition has become known and has increased the value of the land to the seller (not being attributable to something that would only be of value to the acquiring authority), and if none of the statutory disregards applies, the seller is, in my opinion, entitled

a in principle to compensation that reflects that increase in value. There is no principled basis entitling the courts to authorise the expropriation without compensation of that element of the land's value.

[109] In *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096, [1974] 1 WLR 696 the Court of Appeal again applied the *Pointe Gourde* case and *Camrose's* case. The particular issue was whether the required disregard of any increase in value attributable to the 'scheme' meant that the valuer should disregard the scheme altogether or permitted him to have regard to it when identifying the 'proposals of the acquiring authority' in accordance with which the valuer had to assume planning permission would be granted (see s 15 of the 1961 Act). In other words, was there a conflict between s 15 and the *Pointe Gourde* rule as it had been interpreted and applied? Lord Denning MR gave the judgment of the court. He said ([1974] 2 All ER 1096 at 1102, [1974] 1 WLR 696 at 704):

d '... what is to be assumed about the Walton Manor estate itself? Here again one thing is clear. You are not to assume that it would have been developed in accordance with the proposals of the development corporation. You are to disregard any increase by reason of the estate itself being developed in accordance with their proposals: see (*Camrose's* case). But you are to assume that after ten years planning permission would be available for development as a residential area.'

The ten years was the period that, according to the development maps that had been prepared by the corporation, would elapse before the development of the area that included the Walton Manor estate would commence. So the valuation was to be carried on the basis of an assumed planning permission for residential development 'in accordance with the proposals of the acquiring authority' (see s 15(1) of the 1961 Act). The rest of the development scheme was to be disregarded. But it should have been disregarded, I suggest, not because of some extant rule deriving from the *Pointe Gourde* case but because any enhancement of value attributable to the development scheme as it affected the land other than the Walton Manor estate fell within one or other of the s 6 statutory disregards. The case was correctly decided but, I suggest, for the wrong reason. The judgment of Lord Denning MR in this case demonstrates how the judicial development of the so-called *Pointe Gourde* principle had, de facto, ousted and become a substitute for the statutory disregards enacted by Parliament.

[110] In *Bird v Wakefield Metropolitan DC* (1978) 37 P & CR 478 the Court of Appeal further developed the *Pointe Gourde* principle. Browne LJ, with whose judgment Shaw and Megaw LJ agreed, said (at 487):

h 'It is true that [the scheme] did not provide for the compulsory acquisition of any land for industrial development. I do not, however, think it necessary for the scheme to provide for the acquisition; it is enough that it "underlies" it.'

This amplification of the 'scheme' principle may be logical enough if it is right to abandon the statutory disregards in favour of the judicially developed *Pointe Gourde* disregard. The complexities inherent in the amplification are obvious.

[111] *Batchelor v Kent CC* (1989) 59 P & CR 357 was a case in which the council had compulsorily acquired a plot of land for highway improvement purposes. The plot was within a larger area shown on the town map as scheduled for residential development. Outline planning permission for the residential development of land to the south and east of the plot had been granted but the development could

not proceed until the road improvements, including the construction of a roundabout, had been carried out. The compulsorily acquired plot was the site of the roundabout. The Lands Tribunal ((1988) 56 P & CR 320) assessed the compensation for the plot on the basis that it was the key to the residential development. The Court of Appeal ((1989) 59 P & CR 357) held that the value of the plot had to be assessed by reference to its value prior to the acquisition and disregarding any increase in value attributable to the residential development. On the facts, however, the court took the view (at 361 per Mann LJ) that there was no ground for holding that the tribunal had failed to have regard to the principle that any such increase in value had to be disregarded. Mann LJ (at 362) considered also the s 5, r (3) disregard and the meaning of the statutory words 'special suitability'. The tribunal had found that 'the most suitable access to the land to the south [ie part of the land to be residentially developed] is that which has been formed on the order land [ie the roundabout]', but found also 'it was unable to find that the order land would have been the only access to the land to the south'. Mann LJ said that those findings were 'decisive against a finding of special suitability'. He said:

'The order land may have been the most suitable land for access to the south but it was not specially suitable for that purpose. Most suitable does not correspond with specially suitable.'

[112] My Lords, while I would accept that 'most suitable' may not be an apt synonym for 'specially suitable' it is not necessary, in my opinion, for the land in question to have a unique suitability. The second r (3) requisite must be borne in mind. Either the special suitability must be for a purpose that can only be achieved with statutory powers or the purpose must be a purpose for which only an authority with compulsory purchase powers would want to acquire the land. In the case of the compulsorily acquired plot, it seems to me that neither alternative would have been satisfied. The suitability of the plot to provide access to unlock the residential development could have been exploited by a private developer; and a private developer might well have been in the market to acquire the plot for that purpose. If an over-strict and narrow meaning is attributed to 'special suitability', r (3) will be excluded in many cases in which one or other of the second criterion alternatives is satisfied and in which the 'special suitability' of the acquired land is a suitability not available for exploitation by anyone other than the acquiring authority. In these cases, r (3) should in principle be applied. The r (3) disregard is not, in my opinion, looking for a unique suitability that is not shared with any other land; it is looking for a particular suitability that only the acquiring authority, or an authority with statutory powers, is able to exploit. Your Lordships should, in my opinion, overrule the interpretation in *Batchelor's* case of 'special suitability'.

THE COMPENSATION PRINCIPLES

[113] The Court of Appeal jurisprudence to which I have referred has, in my opinion, done no favours either to landowners or to acquiring authorities. A compulsory acquisition will always be in pursuance of some scheme or other. A compulsory purchase order may sometimes be self-contained but often is the final stage in the evolution over years of some public project. The project may have different limbs, interlinking but in important respects separate. Each limb may have added some value to land in the vicinity of the project. Lord Denning MR's comments in *Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp*

- a [1971] 1 WLR 302 show very clearly how inchoate the concept of a 'scheme' may be. But my objection to this jurisprudence is not based upon the complexities it has generated, and is likely, unless curbed, to continue to generate. It is based on its lack of any sound foundation. It is statute that authorises compulsory acquisition; and it does so on the footing that compensation in accordance with the prescribed statutory regime will be paid for what is being taken from the landowner. The statutory compensation regime is based upon an assessment of the value of the land to the expropriated owner. He must be taken to be a willing seller. He is entitled to be compensated for all commercially valuable attributes possessed by the land while in his hands, subject only to the statutory disregards. The statutory disregards properly construed and applied would, I think, produce very much the same answers as those produced in most of the cited cases by application of the judicially constructed *Pointe Gourde* disregard. But if, and to the extent, that the statutory disregards do not go as far as the *Pointe Gourde* disregard, the former should rule. A landowner is entitled to be compensated for his expropriated land on the basis of disregards enacted by Parliament and not disregards constructed by judges in substitution for the statutory disregards.
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- c
- d [114] The proposition that Parliament enacted the 1961 Act on the basis that the statutory disregards would be supplemented by the *Pointe Gourde* disregard is not a tenable one. First, the 1961 Act was a consolidating Act, re-enacting provisions of the 1919 Act and the 1959 Act. Second, the authorities purporting to establish the *Pointe Gourde* rule as a continuing disregard supplementing the statutory disregards are Court of Appeal authorities post-dating the 1959 Act, and
- e also, for that matter, post-dating the 1961 Act. Third, it is not believable that Lord MacDermott in his short *ex tempore* judgment thought that he was doing other than applying the valuation principles set out in the 1919 Act and adopted in the local Trinidad Act.
- f [115] My Lords, the present case is, in my opinion, a simple one in which the President of the Lands Tribunal ([2001] 1 EGLR 185) and the Court of Appeal ([2003] 4 All ER 384) came to the correct conclusion. But they did so after an extensive and laborious trawl through the case law in order to decide whether the 'scheme' that 'underlay' the compulsory purchase order of 15 January 1997 was a scheme that fell within the judicially developed *Pointe Gourde* rule and whether the assumed enhancement of value of the appellants' land brought about by the government's need for that land in order to comply with its obligations under European law had to be left out of account under that rule. The President and the Court of Appeal had no alternative, given the content of the earlier Court of Appeal decisions that were binding on them and to which I have referred. But I wish to make a plea for simplicity. That trawl should not have been necessary.
- g
- h All that was necessary, since it was clear that the s 6 disregards were irrelevant to the case, was to ask, first, whether the case fell within r (3) of s 5 and, second, if it did not, to ask whether the alleged enhancement of value was part of the value of the land to the seller.
- i [116] As to the first question, the President held, following the ruling given by Mann LJ in *Batchelor's* case that the enhancement was not ruled out of account by r (3) of s 5. This point was not appealed. But since, for reasons I have already given, Mann LJ's rule was, in my opinion, in error, it follows that I think the President was wrong on the r (3) point. The appellants' land was specially, not uniquely but specially, suited to constitute part of the compensatory nature reserve that the government had to provide to comply with its obligations under the directives. Only the government, or some other state authority acting on

behalf of the government, could exploit that particular suitability and so only the government would have been in the market to acquire the land for that particular purpose. I think the case falls squarely within r (3). a

[117] It is not necessary, however, for the WDA to rely on r (3). If it is right that the government's need to provide an adequate nature reserve to compensate for the damage to the Taff/Ely estuary SSSI means that the land at Uskmouth is worth more to the government than its normal nature reserve value or agricultural value, that extra value is not part of the value of the land to the seller. It is a value only to the government. If it really is a commercial attribute of the land it is an attribute that could not have been exploited by any purchaser other than the government and could only have been realised by a sale to LAW or some other state authority. On the facts of this case the 'value to the seller' principle and r (3) march hand in hand and produce the same result. b
c

[118] I would, for these reasons, dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD.

INTRODUCTION d

[119] My Lords, the Gwent Levels Wetlands Reserve occupies some 1,000 acres of low-lying farmland along the Severn estuary near Newport in Gwent. The land on which it was created was compulsorily acquired by the Land Authority for Wales (LAW), now the Welsh Development Agency (WDA), early in 1998 and immediately then transferred successively to the Cardiff Bay Development Corporation (CBDC) and the Countryside Council for Wales (CCW) who undertook the necessary development work: the creation of saline pools, seedbeds and managed grassland. e

[120] The primary reason for the acquisition and creation of this new nature reserve was to compensate for the loss of inter-tidal mudflats some 15 miles away in Cardiff Bay upon the impoundment of the water there following the construction of the Cardiff Bay barrage. Some such compensatory measure had long been recognised to be an essential element of the barrage scheme and as the years passed the government came under ever-increasing pressure, in particular from the European Commission of Human Rights, to provide it. The Gwent Levels land, by the date of its compulsory purchase, appeared the most suitable site for what by then had become an urgently needed compensatory nature reserve. f
g

[121] Some 225 acres of the land belonged to the appellants and at issue before your Lordships is the correct approach to its valuation. The appellants have been offered the land's agricultural value or, if they can show it to be higher, its value as a nature reserve. What, however, they seek is substantially more than this. They say that its acquisition was indispensable to the realisation of the Cardiff Bay barrage project and that its valuation must recognise and reflect this fact. They claim, in short, what is sometimes called the land's 'ransom' or 'key' value—the value of land needed to unlock the development potential of a linked site—called in the court below the land's 'barrage inhibition value'. Are they entitled to it? That fundamentally is the question raised in these proceedings. h
j

THE PROCEEDINGS THUS FAR

[122] It was originally sought to resolve the question by reference to two preliminary issues identified for determination by the Lands Tribunal ([2001] 1

a EGLR 185). The first was concerned with whether r (3) of s 5 of the Land Compensation Act 1961 applies in the circumstances of this case:

b 'The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the requirements of any authority possessing compulsory purchase powers.'

c [123] The President of the Lands Tribunal, applying the restricted approach adopted by Mann LJ in *Batchelor v Kent CC* (1989) 59 P & CR 357 at 362—'Most suitable does not correspond with specially suitable'—held ([2001] 1 EGLR 185 at 191) that the subject land has no special suitability or adaptability for the purpose of providing a compensatory nature reserve: '... there are other areas along the Severn estuary that could have performed the same function.' He indicated, however, that, had it been relevant, he would have found for WDA on the other aspect of r (3): he thought there would have been no market for a nature reserve apart from the requirements of an authority possessing compulsory purchase powers.

d [124] The second preliminary issue was formulated in these terms:

e 'Whether the scheme underlying the acquisition is the intended use of the land taken as a nature reserve or the construction of the Cardiff Bay barrage; and whether it is necessary to discount, for the purposes of valuation, any increase in the value of the land taken as being due to the need to acquire it as a palliative measure necessary as a result of the environmental consequences of the construction of the Cardiff Bay barrage: following (*Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565).'

f [125] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 has long been regarded as authority for the principle that compensation for compulsory purchase 'cannot include any increase in value which is entirely due to the scheme underlying the acquisition'—the so-called *Pointe Gourde* rule or 'no-scheme rule'.

g [126] This second issue the President resolved in favour of WDA: he held that the scheme underlying the acquisition was the construction of the barrage and that accordingly it is necessary to disregard any increase in value resulting from the need to acquire the subject land as a palliative measure.

h [127] The issues developed before the Court of Appeal ([2002] EWCA Civ 924, [2003] 4 All ER 384) were somewhat different. Since WDA had not cross-appealed on the r (3) issue, this was discussed only in so far as it bore upon the *Pointe Gourde* rule. As for the *Pointe Gourde* issue, the appellants advanced two main contentions: first, that 'the scheme underlying the development' was simply the nature reserve project itself and not the construction of the barrage; secondly, that on a true understanding of the *Pointe Gourde* rule, WDA must in any event pay the price that it would have been willing to pay in friendly negotiations having regard to the barrage scheme, a price which would include the land's key value. This second submission, as I shall come to explain, rested heavily upon the Privy Council's decision in the so-called Indian case: *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317, [1939] AC 302.

[128] The Court of Appeal rejected both those arguments. It held ([2003] 4 All ER 384 at [117]) that '[i]t was open to the President to find on the facts that the nature reserve for which [the] land was needed was an integral part of the barrage project', and it rationalised the Indian case as a two-scheme rather than single-scheme case, thereby defeating the appellants' reliance upon it. a

[129] It is the appellants' contention before your Lordships that the Court of Appeal was wrong on both points. Success on either, of course, would bring them victory. If the scheme underlying this development were to be determined as narrowly as the appellants contend for, the second question, as to the extent of the disregard, would simply not arise. Unless the scheme encompassed the barrage and thus the nature reserve's central role as compensation for the environmental losses entailed, on no view would the increased value of the land attaching to that compensatory role fall to be disregarded: such increase would self-evidently not be 'due to the scheme'. Similarly, of course, if, however the scheme is defined, WDA are required to pay whatever it would willingly have paid in friendly negotiations, then too the appellants will recover whatever key value the subject land may have. b

[130] These, then, were the issues debated at length before the House and upon which your Lordships' decision was invited. Are they, however, the real questions which your Lordships should be determining or do they arise only upon a fundamentally false legal premise, namely that compensation for compulsory purchase is indeed properly to be determined by reference to the *Pointe Gourde* rule rather than simply by applying the governing provisions of the 1961 Act? c

HAS THE POINTE GOURDE RULE SURVIVED THE 1961 ACT?

[131] I have had the advantage of reading in draft the speech to be given by my noble and learned friend, Lord Scott of Foscote, and this, I readily acknowledge, makes a telling case for regarding the *Pointe Gourde* rule, certainly as it has developed, as no more than a misconceived accretion to the legislative scheme which itself, therefore, ought henceforth to be disregarded. But is it not, I wonder, too late in the evolution of this branch of the law to attempt a return to basics of this sort? d

[132] Put aside the long series of post-1961 Act Court of Appeal authorities, all decided by reference to the *Pointe Gourde* rule and all treating it as not merely supplementing but in large part supplanting the complexities of the legislation (itself regularly excoriated for its many obscurities): see, for example, *Viscount Camrose v Basingstoke Corp* [1966] 3 All ER 161, [1966] 1 WLR 1100, *Wilson and anor (personal representatives of FH Wilson (decd)) v Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302, *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096, [1974] 1 WLR 696, *Birmingham DC v Morris and Jacombs Ltd* (1976) 33 P & CR 27, *Bird v Wakefield Metropolitan DC* (1978) 37 P & CR 478, *Batchelor v Kent CC* (1989) 59 P & CR 357, *Wards Construction (Medway) Ltd v Barclays Bank plc and Kent CC* (1994) 68 P & CR 391, *Pye (JA) (Oxford) Ltd v Kingswood BC* [1998] 2 EGLR 159, and *Bolton Metropolitan BC v Tudor Properties Ltd* (2000) 80 P & CR 537. e

[133] Put aside too the many references to the *Pointe Gourde* rule in the opinions given by your Lordships' House and the Privy Council, not, it is true, in cases necessarily dependent for their outcome upon the rule's continuing soundness and application but where invariably that assumption is made: see, for example, *Davy v Leeds Corp, Central Freehold Estates (Leeds) Ltd v Leeds Corp* [1965] 1 All ER 753, [1965] 1 WLR 445, *Rugby Joint Water Board v Footit* [1972] 1 All ER f

a 1057, [1973] AC 202, *Melwood Units Pty Ltd v Comr of Main Roads* [1979] 1 All ER 161, [1979] AC 426, *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846, [1995] 2 AC 111 and *Fletcher Estates (Harlescott) Ltd v Secretary of State for the Environment* [2000] 1 All ER 929, [2000] 2 AC 307.

b [134] Put aside further the Law Commission's report *Towards a Compulsory Purchase Code: (1) Compensation* (2003) (Law Com No 286) (Cm 6071) and the entire consultation process underlying it, all of which proceeded on the footing that the existing law is not simply that to be found in the legislation but also, unsatisfactory though this too may be, in the case law surrounding the *Pointe Gourde* rule. As the report explains (p 193 (para D.68)):

c 'Although the new statutory rules were seen as giving effect to the *Pointe-Gourde* principle, it was not clear whether they were intended to be a self-contained code, or merely to supplement the existing judicial version of the rule. Further, the convoluted wording of the section, made it very difficult to interpret or apply. The solution eventually adopted by the Courts was to treat section 6 and the judicial rule as existing side-by-side as part of a single legal principle, so that in practice little distinction was made between the two, and literal interpretation of the statute was largely abandoned.'

e [135] What to my mind makes it particularly inappropriate at this late stage simply to ignore all the cases over the last 45 years save those few which have sought to construe and apply the governing legislation is what I take to be Parliament's own recognition, which itself dates back to 1980, that compensation may not fall to be assessed exclusively by reference to the statutory code but may also have to be determined, as to disregards, by 'rule of law'. Paragraph 11 of Sch 1 to the 1961 Act, added by s 145(2) of the Local Government, Planning and Land Act 1980, provides:

f 'Paragraph 10 of this Schedule [which makes special provision for urban development areas] shall have effect in relation to any increase or diminution in value to be left out of account by virtue of any rule of law relating to the assessment of compensation in respect of compulsory acquisition as it has effect in relation to any increase or diminution in value to be left out of account by virtue of section 6 of this Act.'

g [136] As Lord Scott notes in para [107], above, Lord Denning MR in *Wilson's* case [1971] 1 All ER 628 at 634, [1971] 1 WLR 302 at 309, contemplated that counsel might wish to challenge in the House of Lords his earlier decision in *Camrose's* case—to the effect that other disregards remain permissible beyond those to be found in the legislation. To attempt this over 30 years later, however, and despite the further entrenchment of the rule in our jurisprudence, is quite another thing.

j [137] Nor, moreover, tempting though in one sense it might be to return to the unadorned language of the statute, should your Lordships regard with any particular enthusiasm the prospect of subjecting the next generation of litigants to the very real problems which that language has itself created, admirably summarised by Carnwath LJ ([2003] 4 All ER 384 at [70]–[80]).

[138] In my opinion, therefore, it is better that your Lordships should now seek to apply, and where necessary modify, the case law as it has evolved over recent years than discard it in its entirety. In this way, moreover, English law will remain in harmony with that of other jurisdictions substantially modelled upon

it. Take, for example, s 56 of the Land Acquisition (Just Terms Compensation) Act 1991, operating in New South Wales:

“Market Value” of land ... means the amount that would have been paid for the land if it had been sold ... by a willing but not anxious seller to a willing but not anxious buyer, disregarding ... (a) any increase or decrease in the value of the land caused by the carrying out of, or the proposal to carry out, the public purpose for which the land was acquired.’

As was observed by the New South Wales Court of Appeal in *Roads and Traffic Authority of New South Wales v Perry* (23 August 2001, unreported):

“The first part of this definition embodies the basic principle stated in [the Indian case]. Paragraph (a) of the definition embodies the *Pointe Gourde* principle.’

The Indian case is sufficiently described in [94]–[96] of Lord Scott’s speech, above. What, of course, it established was that even where land has a particular value only for one potential purchaser, that purchaser will none the less be willing to pay for it. The case, in short, resolved the differing views on this question which were expressed in the cases prior to the Acquisition of Land (Assessment of Compensation) Act 1919, most notably in *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16, [1908–10] All ER Rep 251. More particularly it may be taken to have determined the proper approach to what were first enacted as rr (1) and (2) of s 2 of the 1919 Act, now substantially reproduced in s 5 of the 1961 Act:

‘(1) No allowance shall be made on account of the acquisition being compulsory; (2) The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise ...’

[139] Scott LJ, the chairman of the committee whose report in 1918 (*Second Report on the Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes* (Cd 9229)) had led to the 1919 Act, was later to say in *Horn v Sunderland Corp* [1941] 1 All ER 480 at 490, [1941] 2 KB 26 at 40, that r (1) had abolished ‘the 10 per cent. addition for compulsory purchase’ and that r (2) had reversed ‘the old sympathetic hypothesis of the unwilling seller and the willing buyer, which underlay judicial interpretation of the 1845 Act’. Section 24 of the local legislation under consideration in the Indian case precluded the court from taking into consideration—

‘first, the degree of urgency which has led to the acquisition; secondly, any disinclination of the person interested to part with the land acquired ...’

Those provisions to my mind mirror our own rr (1) and (2).

[140] True it is that in the Indian case, *Sri Raja Vyricherla Narayana Gajapatiraju Bahadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317 at 321, [1939] AC 302 at 312, Lord Romer said:

‘The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion.’

It by no means follows, however, that the open market value to the seller will exclude whatever key value the land may have. On the contrary, any such value properly falls to be taken into account, just as it was in *Stokes v Cambridge Corp*

- a (1961) 13 P & CR 77, where the Lands Tribunal, determining the value of land compulsorily acquired by the corporation, recognised that the landowner would himself have had to pay the key value of other land in order to realise the development potential of his own, and reduced the valuation of the order land accordingly. The recognition of the land's key value to a particular purchaser is merely an extreme manifestation of the approach taken in the Indian case.
- b [141] As for the *Pointe Gourde* principle itself, said to be embodied in s 56(1)(a) of the New South Wales statute, it hardly needs to be pointed out that a disregard in these terms is different, not merely from the various statutory disregards provided for under s 6 of the 1961 Act (none of which, of course, can ever apply to the order land itself) but also, and no less strikingly, from that to be found in r (3).
- c [142] I share entirely Lord Scott's view, expressed in para [93] above, that the unquarried stone in the *Pointe Gourde* case was a part of the land whose commercial potential, therefore, represented an element in the value of the land, and accordingly that any special need for the stone for the building of the naval base could and should properly have been disregarded under r (3), rather than
- d under some common law principle which, on a strict view, might well be thought not to have survived the 1919 Act. But, as I have already observed, many years have since passed and not merely has the *Pointe Gourde* principle apparently survived but r (3) itself has been increasingly marginalised and the common law principle expanded to fill its place. Paragraphs D.93 and D.94 of the Law Commission's report are instructive in this regard:
- e 'D.93 We have already referred to the narrow interpretation of rule (3), adopted in *Pointe Gourde*, as the same time as the judicial rule was expanded to fill its place. Subsequent cases have followed that lead, and the rule has been further cut down by statute [this is a reference to the repeal in 1991 of the original disregard, which had extended also to the "the special needs of a particular purchaser"] ...
- f D.94 In practice, it appears to have little remaining purpose. This sequence of decisions has established:
- g (1) That the "adaptability" must be a quality of the subject land itself, not a quality of its product (*Pointe Gourde*), or of the nature of the interest (*Lambe v Secretary of State for War* [1955] 2 All ER 386, [1955] 2 QB 612);
- (2) That "special" implies something "exceptional in character, quality or degree", rather than qualities shared with other possible sites (*Batchelor v Kent CC* (1989) 59 P & CR 357 at 362 per Mann LJ);
- h (3) That the purchase requiring use of statutory powers must relate to the subject land, not to other land (*Ozanne v Herts CC* [1991] 1 All ER 769 [1991] 1 WLR 105 per Lord Mackay of Clashfern LC)
- (4) That the need for general forms of consent, such as planning permission or stopping-up orders, is not sufficient to bring the rule into play (*Ozanne's case* again);
- j (5) That the "market" may include a mere speculator, with no direct interest in the use of the land (*Blandrent Investment Developments Ltd v British Gas Corp* [1979] 2 EGLR 18 at 22 per Lord Scarman).'

[143] Again in common with Lord Scott (see [112], above), I believe that r (3) has hitherto been too narrowly construed, in particular by the Court of Appeal in *Batchelor v Kent CC* (1989) 59 P & CR 357. But again, rather than attempt to put back the clock and reinstate r (3) at the expense of the *Pointe Gourde* rule, I am

inclined to treat the latter as the prevailing law. For my part, therefore, I propose to address the arguments advanced on the appeal on the footing that the principle embodied in the *Pointe Gourde* line of decisions remains a rule of law. But it must also be recognised that on this approach any key value that land may have is to be included within its open market value and is to be disregarded, if at all, solely by reference to the *Pointe Gourde* rule.

ARGUMENT 1: WHAT WAS THE RELEVANT SCHEME OR PROJECT?

[144] The first of the appellants' arguments is, as stated, that the Court of Appeal erred in concluding that the nature reserve was an integral part of the barrage project. The concept of determining the ambit of the *Pointe Gourde* rule by reference to whether or not the order land 'forms an integral part' of the scheme postulated to have increased its value first appears in Lord Russell of Killowen's opinion in *Melwood Units Pty Ltd v Comr of Main Roads* [1979] 1 All ER 161 at 165, [1979] AC 426 at 434 and was later crystallised in Lord Nicholls of Birkenhead's succinct statement of the rule in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846 at 861, [1995] 2 AC 111 at 136:

'A landowner cannot claim compensation to the extent that the value of his land is increased by the very scheme of which the [compulsory acquisition] forms an integral part.'

[145] The appellants submit that the compulsory acquisition of their land was not an integral part of the barrage project. That statutory project, they point out, itself contained no proposals whatever for mitigating its damaging environmental effects, and plainly did not envisage the acquisition of their particular land. Nor did those promoting and executing the barrage project, in particular CBDC, themselves ever obtain powers of compulsory acquisition over the appellants' land; rather the land was acquired by LAW which itself had no statutory function with regard to the barrage project. All these factors, submit the appellants, in particular taken together, were inconsistent with a conclusion that the creation of the nature reserve was an integral part of the barrage project. Of course the need for the nature reserve arose out of the barrage project, but that is not to say that it was integral to it; rather it was a distinct project and to be regarded as such for the purposes of compensation.

[146] Mr Holgate QC for the appellants invited us to examine this argument in the light of the Law Commission's report, the most directly relevant part of which, under the heading 'The Statutory Project rule—Preferred version of the rule', reads:

'7.16 In the Consultation Paper, we noted the variety of formulations of the rule in cases over the last 100 years, and the different terms used (including "scheme", "project", "undertaking", "purpose"). Although generally presented as different formulations of the same rule, they seemed to us to embody at least three conflicting views of its scope:

(1) The narrow version: the purpose of the acquisition is not ignored; the valuer simply disregards the fact that the acquisition is compulsory, but he takes account of what the authority would have paid in "friendly negotiations" to acquire the land for the same purpose. [This version is said in a footnote to be exemplified by the Indian case].

(2) The wide version: the valuer disregards, not only the purpose of the particular acquisition, but also the "underlying scheme", which may extend

a to the planning history over a much wider area, and dating back many years. [This version is said in a footnote to be taken from the *Pointe Gourde* case as interpreted in later cases starting with *Wilson and anor* (personal representatives of *FH Wilson* (dec'd)) v *Liverpool City Council* [1971] 1 All ER 628, sub nom *Wilson v Liverpool Corp* [1971] 1 WLR 302].

b (3) The middle version: the valuer disregards altogether the immediate project for which the acquisition is made (not merely the element of compulsion), but not the underlying planning history.

7.17 We preferred the last. We summarised our thinking in the Overview:

c We propose to discard the word “scheme”, as it is too imprecise and it carries too much historical baggage. We take as our starting-point a more precise definition of the “relevant project”, which is supported by existing authority. The definition is intended to provide an analogy with the kind of project, which might in the past have been the subject of a special Act. It is intended to direct attention to the particular project, for which the acquisition of the subject land is authorised, and of which the works or uses on the subject land will be an integral part. Such a definition would be a marked improvement over the present mixture of statutory and judicial versions.

7.18 There was general agreement with this approach, which we have accordingly taken as the starting-point for our recommendations.’

e [147] Those recommendations are to be found in r13 of the Law Commission’s proposed New Code as follows:

“The statutory project and blight
A new Code

f (1) All previous rules, statutory or judge-made, relating to disregard of “the scheme” will cease to have effect.

Defining the project

(2) In this Code, “the statutory project” means the project, for a purpose to be carried out in the exercise of a statutory function, for which the authority has been authorised to acquire the subject land.

g (3) In cases of dispute, the area of the statutory project shall be determined by the Tribunal as a question of fact, subject to the following: (a) The statutory project shall be taken to be the implementation of the authorised purpose within the area of the compulsory purchase order, save to the extent that it is shown (by either party) that it is part of a larger project; (b) Save by agreement or in special circumstances, the Tribunal shall not permit the authority to advance evidence of a larger project, other than one defined in the compulsory purchase order or the documents published with it.

Disregarding the project

j (4) In valuing the subject land at the valuation date: (a) it shall be assumed that the statutory project has been cancelled on that date; and (b) the following matters shall be disregarded: (i) the effects of any action previously taken (including acquisition of any land, and any development or works) by a public authority, wholly or mainly for the purpose of the statutory project; (ii) the prospect of the same, or any other project to meet the same or substantially the same need, being carried out in the exercise of a statutory function, or by the exercise of compulsory powers.

(5) Sub-rule (4) does not require or authorise (save to the extent specified in (b)) consideration of whether events or circumstances at any time (before or after the valuation date) would have been different in the absence of the statutory project.

[It has been convenient to include at this stage of the judgment sub-rr (4) and (5) although their relevance is rather to the second of the appellant's arguments on the appeal.]

[148] In so far as 'the wide version' of the rule described in para 7.16(2) of the report involves the disregard of 'the planning history over a much wider area [than the order land], and dating back many years', I too would deprecate it. If, indeed, that is thought to be the approach required following *Pointe Gourde's* reference to the 'underlying scheme' as subsequently interpreted, then in my opinion the rule has been developed impermissibly far and should now be narrowed down. Clearly, for example, it cannot be right that the valuer must let his imagination 'take flight to the clouds' as Lord Denning MR suggested in *Myers v Milton Keynes Development Corp* [1974] 2 All ER 1096 at 1102, [1974] 1 WLR 696 at 704 (see [2003] 4 All ER 384 at [78] per Carnwath LJ). As, however, Carnwath LJ also observed (at [89]), although the words in the *Pointe Gourde* case—'the scheme underlying the acquisition'—were new, it is clear from their context that they were not intended to differ from the words used by Lord Buckmaster in *Fraser v Fraserville City* [1917] AC 187 at 194, 'the scheme for which the property is compulsorily acquired'.

[149] It will readily be seen from the proposed new r 13(3) that where the meaning of 'the statutory project' is disputed, its area would in any event fall to be determined by the Lands Tribunal as a question of fact and it would be open to the acquiring authority (or, of course, the landowner, in a case involving depreciation due to blight) to establish that the order land is part of a larger project, provided, ordinarily, this had been defined in the compulsory purchase order or the documents published with it.

[150] The proposed new r 13 seems to me to point the way forward quite admirably and indeed to represent a sensible approach to the *Pointe Gourde* principle as it presently stands. To my mind, however, it is clear that, even assuming the principle were to be applied in that way—or, indeed, that such a rule were already in force—the appellants' argument would fail: the statutory project here would inevitably be found as a question of fact to be the creation of the nature reserve as part of the larger project of the barrage development, that larger project being time and again referred to in the statement of reasons for the compulsory purchase order which included, under the heading 'History of the Scheme', the following paragraphs:

'3.11 On 17 January 1996 the planning application was submitted and the Secretary of State for Wales, William Hague, announced to Parliament that "Plans to provide a bird reserve on the Gwent Levels between Uskmouth and Goldcliff to compensate for the loss of the Cardiff Bay habitat will proceed immediately."

3.12 Mr Hague went on to say "I have invited [CBDC] to work with the [LAW] and [CCW] to take the project forward."

[151] Although describing the appellants' argument under this head as their 'strongest point', Carnwath LJ rejected it for reasons appearing in [2003] 4 All ER 384 at [101]–[117]. I agree with them.

a [152] Since drafting this opinion I have had the advantage of reading the speech to be given by my noble and learned friend Lord Nicholls of Birkenhead. He turns to consider (at [58], above) 'how the extent of a scheme should be identified in today's conditions', a most important issue which he then addresses in paras [58]–[63] inclusive. I respectfully agree with everything there said, all of which I believe to be entirely consistent with my own thoughts on the matter.

b

ARGUMENT 2: WHAT PROPERLY MUST BE DISREGARDED?

c [153] I turn to the appellants' second argument by which they contend that, even assuming the statutory project ('the scheme for which the property [was] compulsorily acquired', to use Lord Buckmaster's formulation in *Fraser's* case) to be the barrage project, the key value of their land—its particular worth as a means of unlocking the value of the Cardiff Bay development which the European Commission of Human Rights might otherwise have thwarted—nevertheless falls to be regarded, not disregarded. Summarised in the appellant's printed case the argument is put thus:

d

'Once the scheme has been identified, whether a single or composite undertaking, the effect of the scheme disregard rule is only to ignore the acquisition of land and the actual carrying out of the works. The law does not require the motivation of the promoter to obtain land in order to carry out the scheme to be left out of account and there is therefore no basis for distinguishing between single and linked schemes.'

e

[154] Reformulated in writing during the hearing the argument runs:

f

'The judicial "no scheme" rule recognises that one potential head of claim not found in the open market is the effect on land's value of a power of compulsory acquisition. It requires the effect of this power to be disregarded in order to prevent the landowner from recovering more than he could get in the open market, in which such powers are not available. For example, this disregard may require the valuer to make a deduction reflecting the extra speed that compulsory powers can bring to a development project: the acceleration of value due to the use of compulsory powers is to be disallowed. The cases on the "no scheme" rule also show that the land must be valued for its unrealised potentiality as distinct from its realised potentiality ... this aspect of the judicial "no scheme" rule ... deal[s] with the special facts of compulsory acquisition, recognising that compulsory powers are typically invoked in order to assemble land from more than one source. So the valuer must not value land on the assumption that development elsewhere has actually occurred, only that it might occur ... The principle is that acquiring authorities should not pay a price *inflated above open market value*. But open market value includes the price that the acquiring authority would be willing to pay in friendly negotiations with the landowner, including having regard to the effect on its bid of the acquiring authority's motives, no less than the effect on their bids of the motives of everyone else in the market. For the judicial "no scheme" rule to place the acquiring authority in a privileged position in this respect would contravene the principle of equivalence ... Potentiality is not excluded by the judicial rule. However, r (3) goes one stage further by excluding potentiality as well as realisation in the limited circumstances described in that rule. Accordingly, the two rules are in harmony.'

j

[155] What the argument comes to is this. All that can be disregarded is, first, 'the effect on land's value of a power of compulsory acquisition' and, second, 'the actual carrying out of the works'. As to the first, the valuer must disregard the fact that, in the hands of a purchaser with powers of compulsory acquisition, the land will be more valuable because of that purchaser's power both to acquire such other land as is necessary to develop the order land's potential and also to do so more speedily than would be achievable by a purchaser without such powers. As to the second, the valuer must not assume that the proposed works have already been carried out in pursuance of the scheme (whether on the order land itself or on any other land comprised within the scheme), but only that there is now the potential to carry them out. That potential, however, is to be brought into account in assessing the open market value of the land. It would only fall to be disregarded if r (3) were to apply. It is not to be disregarded under the *Pointe Gourde* rule.

[156] I would firmly reject the argument. If correct, it would emasculate the no-scheme rule to the point of extinction. Of course it is right to disregard those particular matters which Mr Holgate recognises must be disregarded. But they would surely fall to be disregarded in any event and without reference to the no-scheme rule: indeed, I find it difficult to see them as enhancing the land's open market value in the first place, particularly in the light of rr (1) and (2). The potential of the land as a result of the scheme (including any key value it may have) is, however, as I readily accept, a factor which enhances the land's open market value and something, therefore, which either is, or is not, to be disregarded under the *Pointe Gourde* rule. In my judgment it is and there is nothing in the Indian case, on which the appellants' arguments so strongly relies, to gainsay this.

[157] The first point to be made is this. The relationship between the *Pointe Gourde* principle and *Stokes v Cambridge Corp* (1961) 13 P & CR 77 was considered, apparently for the first time, in *Batchelor v Kent CC* (1989) 59 P & CR 357 and on this issue certainly I find Mann LJ's judgment (at 361) entirely convincing:

'I find no difficulty with the relationship. If a premium value is "entirely due to the scheme underlying the acquisition" then it must be disregarded. If it was pre-existent to the acquisition it must in my judgment be regarded. To ignore the pre-existent value would be to expropriate it without compensation and would be to contravene the fundamental principle of equivalence (see [*Horn v Sunderland Corp* [1941] 1 All ER 480, [1941] 2 KB 26]).'

[158] Assuming, however, that any premium value, or indeed any other particular value, of the land were 'entirely due to the scheme underlying the acquisition' (or, if one prefers, Lord Nicholls' formulation in *Director of Buildings and Lands v Shun Fung Ironworks Ltd* [1995] 1 All ER 846, [1995] 2 AC 111 due to the 'very scheme of which the [acquisition] forms an integral part'), then in my judgment, notwithstanding that it represents the land's 'unrealised potentiality' (to use Mr Holgate's expression), it clearly falls to be disregarded.

[159] Section 6 of the 1961 Act, which is clearly related to the *Pointe Gourde* rule, has as its sidenote 'Disregard of actual or prospective development in certain cases', and, where it applies, it requires the disregard of—

'any increase ... in ... value ... attributable to the carrying out or the prospect of so much of the development mentioned ... as would not have

a been likely to be carried out if ... the acquiring authority had not acquired and did not propose to acquire any of that land.'

The Law Commission's proposed new r 13(4)(b)(ii), it may be noted, would similarly require in respect of the order land the disregard of 'the prospect of' the relevant project.

b [160] This approach is entirely consistent too with that adopted in the New South Wales legislation (see [138], above), requiring as it does the disregard of any increased value in the land 'caused by the carrying out of, or the *proposal to carry out*, the public purpose for which the land was acquired' (my emphasis).

c [161] What, then, of the Indian case? Can this avail the appellants? In my judgment not. If the Indian case is properly to be characterised as a two-scheme case—'the ... acquisition ... of the shallow basin forming the catchment area of the spring, the site of the spring itself, and a narrow strip of land below the spring' (as Lord Romer described it ([1939] 2 All ER 317 at 320, [1939] AC 302 at 310)) being separate from the harbour project—then plainly there could be no disregard of the enhanced value of the water supply through its proximity to the harbour which Lord Romer rightly recognised the acquired land to have. I have no doubt that Carnwath LJ was right to regard the Indian case in that way—see [2003] 4 All ER 384 at [93]—and note that his approach precisely mirrors that adopted by the New South Wales Court of Appeal in *Perry's* case. As Handley JA said: 'The distinction between [the Indian case] and the *Pointe Gourde* case therefore is that in the former there were two schemes and in the latter only one.'

e [162] Hodgson JA added:

f '[The Indian case] can then be reconciled with the *Pointe Gourde* principle on the basis that the scheme for the purposes of which the acquisition was made in [the Indian case] was a scheme for the provision of water to land to the south of the harbour which was being developed, and not the original scheme for the development of the harbour and adjacent land. Accordingly, compensation could be assessed on the basis of potentialities arising from the original scheme.'

g [163] I would, accordingly hold that, once the scheme under which the land is being compulsorily acquired has been identified to include some wider project (as here and as in the *Pointe Gourde* case but not in the Indian case), the 'unrealised potentiality' of the order land due to the scheme falls to be disregarded no less than its 'realised potentiality'. That, indeed, is why the Law Commission's proposed new r 13(4)(a) requires the valuer to assume the scheme's cancellation. The appellants' contrary case as to the true nature of the disregard could succeed h only if the *Pointe Gourde* rule was henceforth to be applied altogether more restrictively than ever before (or, indeed, as Lord Scott would hold, if it were to be found not to have survived the 1961 Act), and if r (3) (which, of course, Mr Holgate recognises *does*, where it applies, require unrealised potentiality to be disregarded) was as impotent as for many years it has been thought to be j (although which, on Lord Scott's approach, would now be revived). That the appellants should be right on both limbs of the argument cannot be countenanced. For my part I would hold that their argument fails on the first limb.

[164] In the result I would dismiss this appeal. In doing so, however, I would acknowledge the present highly unsatisfactory state of the law and echo Carnwath LJ's plea in the court below for fresh parliamentary consideration of

this important area of the law. There can be, as he put it ([2003] 4 All ER 384 at [116]), 'few stronger candidates on the statute book for urgent reform, or simple repeal, than s 6 of and Sch 1 to the 1961 Act'. It is to be hoped that your Lordships' opinions on this appeal coupled with the Law Commission's exemplary report may pave the way for further legislation. a

Appeal dismissed.

Kate O'Hanlon Barrister.

a **R (on the application of Denny) v Acton Youth Court Justices (Director of Public Prosecutions, interested party)**
[2004] EWHC 948 (Admin)

b

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)

MAURICE KAY LJ AND CRANE J

21 APRIL 2004

c

Magistrates – Jurisdiction – Youth court – Remittal for sentence to adult magistrates' court – Seventeen-year-old charged with offence triable in relation to an adult only on indictment – Youth court finding offender guilty and remitting him for sentence to adult magistrates' court as he had attained the age of 18 – Whether remittal lawful – Magistrates' Courts Act 1980, s 142(1) – Powers of Criminal Courts (Sentencing) Act 2000, s 9(1).

d

The claimant was charged with an offence of attempted robbery when he was 17 years old. He entered a plea of not guilty at the youth court. By the time the matter came on for trial and he was found guilty, he was 18 years old. Under s 9(1)^a of the Powers of Criminal Courts (Sentencing) Act 2000, when a person who appeared or was brought before a youth court charged with an offence subsequently attained the age of 18, the youth court could, at any time after conviction and before sentence, remit him for sentence to a magistrates' court (other than a youth court). The youth court remitted the claimant to the adult court. The offence of attempted robbery, in the case of an adult, was triable only on indictment and an adult magistrates' court had no sentencing powers in relation to it. An issue concerning jurisdiction therefore arose. The deputy district judge considered herself to be without jurisdiction in relation to an offence which, in relation to an adult, was not triable summarily and without power to remit the case back to the youth court for sentence as the claimant was then aged 18. She therefore adjourned the matter to be listed in the youth court for that court to reconsider its decision to remit, having in mind that such a reconsideration might take place pursuant to s 142(1)^b of the Magistrates' Courts Act 1980, under which a magistrates' court could vary or rescind a sentence or other order imposed or made by it when dealing with an offender. That power extended 'to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make'. The claimant objected to any such reconsideration and the youth court adjourned the case for an application for judicial review to be made to the High Court. The prosecution submitted that the remittal to the adult court for sentence had been unlawful. The claimant contended, inter alia, that it would not have been open to the youth court to rescind the remittal under s 142 of the 1980 Act because the youth court had ceased to be seised of the case once it had made the order, or at the latest, once the adult court had become involved.

g

h

j

a Section 9, so far as material, is set out at [2], below

b Section 142, so far as material, is set out at [4], below

Held – A remittal to an adult court by reference to s 9 of the 2000 Act was legally defective in the case of an offence triable only on indictment. A remittal under s 9 was ‘an order ... made ... when dealing with an offender’ within s 142 of the 1980 Act; it was clear from the language of s 142 that ‘sentence’ and ‘other order’ were disjunctively linked by the word ‘or’ and that whereas sentences were ‘imposed’ other orders were ‘made’. In the instant case the defect ought to lead to the quashing of the remittal with the result that the matter remained in the youth court where it had begun and belonged. While there would come a point in time when a youth court could not re-visit a case under s 142 of the 1980 Act, that point had not been reached in the instant case. The adult court had taken up the case on the basis that there was an issue, effectively one of jurisdiction, to be resolved before it could proceed further. It had never reached the stage of considering sentence. Accordingly, the application for judicial review would be refused, the remittal order quashed, and the matter be listed in the youth court for sentence (see [9]–[11], [14], [15], [18], below).

Per curiam. Youth courts should never remit under s 9 of the 2000 Act in relation to an offence which would be triable only on indictment in the case of an adult. Unless the offence is such that it warrants committal to the Crown Court for trial, even in the case of a young person, it must be completed in the youth court (see [17], [18], below).

Notes

For magistrates’ power of altering the decision, and for the power of youth courts to remit an offender to magistrates’ court for sentence, see 29(2) *Halsbury’s Laws* (4th edn reissue) paras 762, 774.

For the Magistrates’ Courts Act 1980, s 142, see 27 *Halsbury’s Statutes* (4th edn) (2000 reissue) 226.

For the Powers of Criminal Courts (Sentencing) Act 2000, s 9, see 12 *Halsbury’s Statutes* (4th edn) (2002 reissue) 1779.

Case referred to in judgment

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Application for judicial review

The claimant, Richard Denny, applied with permission of Beatson J granted on 2 January 2004, for judicial review of a reconsideration by Acton Youth Court of its order on 6 August 2003 to remit the claimant to Ealing Magistrates’ Court for sentence for the offence of attempted robbery. The facts are set out in the judgment of Maurice Kay LJ. The Acton Youth Court did not participate in the proceedings. The Director of Public Prosecutions appeared as an interested party.

Daniel Bunting (instructed by *Harrow Law Partnership*) for the claimant.
Andrew Ramsubhag (instructed by the *Crown Prosecution Service*) for the interested party.

MAURICE KAY LJ.

[1] Richard Denny was born on 15 June 1985. He was charged with an offence of attempted robbery, alleged to have been committed on 2 July 2002 (at which

a time he was aged 17). At Acton Youth Court on 27 August 2002 he entered a plea of not guilty. For reasons which have not been fully explained, and for which it is difficult to believe that there can be an acceptable justification, he was not tried in the youth court for over a year.

b [2] The eventual finding of guilt in the youth court was on 6 August 2003 (by which time he was aged 18). The youth court then adjourned sentence and remitted him to Ealing Magistrates' Court, as the local adult court. That remittal was said to be pursuant to s 9(1) of the Powers of the Criminal Courts (Sentencing) Act 2000, which provides:

c 'Where a person who appears or is brought before a youth court charged with an offence subsequently attains the age of 18, the youth court may, at any time after conviction and before sentence, remit him for sentence to a magistrates' court (other than a youth court) acting for the same petty sessions area as the youth court.'

Section 9(2)(b) then provides:

d 'Where an offender is remitted under subsection (1) above, the youth court shall adjourn proceedings in relation to the offence and ... (b) ... the court to which the offender is remitted ... may deal with the case in any way in which it would have power to deal with it if all proceedings relating to the offence which took place before the youth court had taken place before the other court.'

e [3] An issue then arose concerning the jurisdiction of the adult court. The case was listed for legal argument before a deputy district judge on 13 October 2003. The issue related to the jurisdiction of the adult court in view of the fact that the offence of attempted robbery is not an either-way offence: in the case of an adult it is triable only on indictment. An adult magistrates' court has no sentencing f powers in relation to it.

g [4] The deputy district judge considered that the order of remittal from the youth court had been lawful because the wording of s 9(1) of the 2000 Act is not limited to 'either-way' offences. However, she considered herself to be without jurisdiction in relation to an offence which, as regards an adult, is not triable summarily. She further considered herself powerless to remit the case back to the youth court for sentence as the offender was now aged 18, and powerless to commit him to the Crown Court for sentence because ss 3–6 of the 2000 Act apply only to 'either way' offences. She therefore adjourned the matter in the adult court to 10 November, remanding the claimant on conditional bail, whilst, at the same time, inviting the youth court in the meantime to reconsider the h order to remit. She had established that the youth court could list the matter for reconsideration on the next day, 14 October. She had in mind that such reconsideration might take place pursuant to s 142(1) of the Magistrates' Courts Act 1980 as amended. Section 142(1) provides that a magistrates' court—

i 'may vary or rescind a sentence or other order imposed or made by it when dealing with an offender ... and it is hereby declared that this power extends to replacing a sentence or order which for any reason appears to be invalid by another which the court has power to impose or make.'

[5] At one time for that section to be resorted to the exercise of the power had to take place within a period of 28 days following the original sentence or order. However, that time limit has been removed by subsequent amendment.

[6] On 14 October in the youth court objection was taken on behalf of the claimant to any such reconsideration. The matter was adjourned to enable an application to be made to this court for judicial review. On 2 January 2004 Beatson J granted permission for such an application. The primary basis of that application was that s 142 does not apply in the present circumstances. a

[7] In his skeleton argument on behalf of the prosecution, as an interested party, Mr Ramsubhag sought to raise an issue about the lawfulness of the original order of the youth court to remit to the adult court for sentence. b

[8] It had been the case for the prosecution before the deputy district judge that the remittal was unlawful but she had not agreed. Mr Bunting, on behalf of the claimant, concedes that he is not taken by surprise by the matter being re-opened at this stage. He is in a position to deal with it without the need for an adjournment. We have indicated to counsel the view of the court that we ought to allow the issue to be argued before us, notwithstanding that the youth court, as defendant, may not be on notice as to it. It is common for magistrates' courts, and similar bodies of a judicial nature, not to participate in proceedings such as this. The youth court as defendant has shown no previous sign of participating in these proceedings, although there is before us a witness statement of the deputy district judge who sat in the adult court. c
d

[9] The point made by Mr Ramsubhag is a fundamental one: although s 9 does not, in terms, exclude indictable only offences from the power to remit to the adult court, it plainly makes no sense to remit a person to an adult court for the specific purpose of sentence when, as is common ground, the adult court has no power to sentence him. I can envisage no circumstances in which it would be appropriate to remit (by reference to s 9) in the case of an offence triable only on indictment. In my judgment, it is implicit from the wording of s 9(2)(b) that any such remittal must be legally defective. e

[10] Mr Bunting's submission is that whilst he concedes that the remittal in the present case was *Wednesbury* unreasonable (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223), it was not inherently unlawful so as to render it a nullity, and that the most that this court should do at this stage is to declare the defect without returning the claimant to the youth court for sentence. f

[11] I do not accept this submission. Whether the defect is one of illegality or unreasonableness—and I take the view that it is primarily the former—in my judgment it ought to lead to the quashing of the remittal with the result that the matter remains in the youth court where it began and belongs. g

[12] Relief is of course a matter of discretion but, notwithstanding the passage of time, I can see no good reason why the public interest in seeing those convicted of offences sentenced for them should not be fully respected in the circumstances of this case. As it is, we know nothing of the circumstances of the offence, save that by definition it is a serious one, or the personal history of the claimant, save for his age. They are matters to be taken into consideration by the sentencing court, which can only give such weight as it sees fit for the delay. Again the reasons for it are not wholly within our cognisance, although it seems that at least some of the delay between remittal and the hearing before the deputy district judge was the fault of the claimant himself. h
j

[13] The quashing of the remittal, on the grounds to which I have referred, effectively disposes of this case. However, it is appropriate to address the points raised by Mr Bunting in his original application. They were to the effect that it would not have been open to the youth court to rescind the remittal pursuant to

a s 142 because an order of remittal under s 9 is not 'a sentence or other order imposed or made by it when dealing with an offender', and/or because the youth court had ceased to be seised of the case once it had made the order or, at the latest, once the adult court had become involved and, for example, granted bail.

b [14] In my judgment, a remittal under s 9 is 'an order ... made ... when dealing with an offender'. I do not accept that it is merely a lesser step of a preparatory or procedural nature, as Mr Bunting suggests. It is clear from the language of s 142 that 'sentence' and 'other order' are disjunctively linked by the word 'or' and that whereas sentences are 'imposed' other orders are 'made'. It is significant that they both relate to a time 'when dealing with an offender'. I have no doubt that, all other things being equal, a youth court can rescind a remittal by reference to s 142 and could have done so in this case.

c [15] I agree with Mr Bunting when he submits that a point will come when the youth court cannot re-visit the case under s 142 because it has been overtaken by the adult court. However, I do not accept that that point had been reached in this case. From the moment the adult court took up the case it did so on the basis that there was an issue, effectively one of jurisdiction, to be resolved before it could proceed further. It never reached the stage of considering sentence. All it did was
d arrange a hearing date for legal argument; determine that argument in the way I have described; adjourn and grant bail. In my view, that did not put s 142 beyond the reach of the youth court, especially when the adult court itself was encouraging the youth court to resort to s 142 and creating the circumstances in which it might do so.

e [16] In summary, I would refuse the application for judicial review as sought by the claimant, but would quash the remittal order for the reasons I have given. I would direct that the matter be listed in the youth court for sentence as soon as possible and further direct that the claimant attend when it is so listed. Failure to attend in such circumstances would be punishable as a contempt of this court.
f The result of such orders would be to render further proceedings in the adult court nugatory.

[17] It may be helpful to youth courts and their advisers to have their attention drawn to this judgment, the effect of which is that they should never remit under s 9 in relation to an offence which would be triable only on indictment in the case of an adult. Unless the offence is such that it warrants committal to the Crown
g Court for trial, even in the case of a young person, it must be completed in the youth court. Whether this apparent lacuna is desirable is a matter which Parliament may wish to consider.

CRANE J.

h [18] I agree with the decision, the reasoning and the proposed order.

Application dismissed. Order for remittal quashed.

Dilys Tausz Barrister.

Duggan v Governor of Full Sutton Prison and another

[2004] EWCA Civ 78

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, CHADWICK AND KEENE LJJ

13 JANUARY, 10 FEBRUARY 2004

Prison – Prisoner – Property of a prisoner – Cash of prisoner at prison – Prison rules providing that such cash to be paid into account under control of governor and prisoner to be credited with amount in prison books – Whether rule imposing trust on moneys paid into account under that rule – Prison Rules 1999, rr 43(3), 44.

The claimant was a convicted prisoner. Rule 43(3)^a of the Prison Rules 1999 provided that any cash which a prisoner had at a prison 'shall be paid into an account under the control of the governor and the prisoner shall be credited with the amount in the books of the prison'. Rule 44(2)^b of the 1999 rules, when read in conjunction with r 44(1), provided that any cash sent to a convicted prisoner through the post was, at the discretion of the governor, to be, inter alia, dealt with in accordance with r 43(3). In practice, money handed by a prisoner to a prison governor under r 43(3) was paid into the prison's general bank account. Very little interest was earned on such an account. The prisoner brought proceedings against the governor of his prison and the Home Office, seeking determination of the question whether, as he contended, on the true construction of rr 43 and 44, all sums of money that he had at prison, or had been sent to him through the Post Office, or had resulted from the encashment of securities for money and sent to him since the time he had been transferred to the prison, and held by the governor or the Home Office pursuant to those rules, had been and were held upon trust for him. The judge dismissed the claim, and the prisoner appealed.

Held – There was nothing in the language of r 43(3) of the 1999 rules or, more generally, in the circumstances in which cash was taken from a prisoner under that rule or dealt with under that rule pursuant to r 44(2), which should lead to the imposition of a trust on the moneys when they came into the hands of the prison governor. It was impossible to find any clear intention to impose a trust in the language of r 43(3) itself. The requirement that the cash 'shall be paid into an account under the control of the governor' was essentially of an administrative nature. The further requirement that 'the prisoner shall be credited with the amount in the books of the prison' pointed to the relationship being that of banker/customer rather than that of trustee/beneficiary. Moreover, there was no reason to construe r 43(3) so as to imply a trust which had not been expressed. The construction for which the prisoner contended would bring him little, if any, practical benefit, while imposing a disproportionate administrative burden on prison authorities who (on that hypothesis) would be subjected to the obligations of trusteeship. Furthermore, it was accepted that r 43(3) could not be construed so as to require the payment of moneys into separate bank accounts in respect of

a Rule 43(3) is set out at [3], below

b Rule 44 is set out [5], below

- a each prisoner, and whilst it would be possible to impose a trust on prisoners' moneys generally, there was nothing in r 43(3) which suggested that the rule-maker had had that in mind. Accordingly, the appeal would be dismissed (see [33]–[40], [43], [45], [46], below).

Decision of Hart J [2003] 2 All ER 678 affirmed.

b Notes

For prisoners' property, see 36(2) *Halsbury's Laws* (4th edn reissue) para 567.

Cases referred to in judgments

- Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1, [1991] 2 WLR 372, HL.
- c *Joachimson (N) (a firm) v Swiss Bank Corp* [1921] 3 KB 110, [1921] All ER Rep 92, CA.
- R v Secretary of State for the Home Dept, ex p Simms, R v Governor of Whitemoor Prison, ex p Main* [1998] 2 All ER 491, [1999] QB 349, [1998] 3 WLR 1169, CA; *rvsd* [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
- Raymond v Honey* [1982] 1 All ER 756, [1983] 1 AC 1, [1982] 2 WLR 465, HL.
- d *Tito v Waddell (No 2), Tito v A-G* [1977] 3 All ER 129, [1977] Ch 106, [1977] 2 WLR 496.
- Westdeutsche Landesbank Girozentrale v Islington London BC, Kleinwort Benson Ltd v Sandwell BC* [1996] 2 All ER 961, [1996] AC 669, [1996] 2 WLR 802, HL.

Cases also cited or referred to in skeleton arguments

- e *Andrabell Ltd (in liq), Re, Airborne Accessories Ltd v Goodman* [1984] 3 All ER 407.
- Banque Belge pour L'Etranger v Hambrouck* [1921] 1 KB 321, CA.
- Harding v Home Office* (11 January 2000, unreported).
- Henry v Hammond* [1913] 2 KB 515, [1911–13] All ER Rep Ext 1478, DC.
- Kayford Ltd, Re* [1975] 1 All ER 604, [1975] 1 WLR 279.
- f *King v Hutton* [1900] 2 QB 504, CA.
- Stretch v UK* [2003] 29 EGCS 118, ECt HR.

Appeal

- John William Duggan, a prisoner serving a life term at HM Prison Full Sutton, appealed with permission of Carnwath LJ granted on 22 July 2003 from the order of Hart J on 28 February 2003 ([2003] EWHC 361 (Ch), [2003] 2 All ER 678) dismissing his proceedings against the respondents, the governor of the prison and the Home Office, for a determination of the question whether, upon the true construction of rr 43 and 44 of the Prison Rules 1999, and in the events which had happened, all sums of money (a) that the appellant had had at prison or (b) that had been sent to him through the Post Office or (c) that had resulted from the encashment of securities for money and sent to the appellant since about 30 April 1999, and held by the respondents pursuant to those rules, had been held on trust for him. The facts are set out in the judgment of Chadwick LJ.

- j *Stephen Smith QC and Leigh Sagar* (instructed by AS Law, Liverpool) for the appellant.
- Jonathan Crow and Steven Kovats* (instructed by the Treasury Solicitor) for the respondents.

10 February 2004. The following judgments were delivered.

CHADWICK LJ giving the first judgment at the invitation of Peter Gibson LJ).

[1] This is an appeal from an order made on 28 February 2003 by Hart J ([2003] EWHC 361 (Ch), [2003] 2 All ER 678) in proceedings brought by the appellant, a prisoner now serving a life sentence at HM Prison Full Sutton, against the governor of that prison and the Secretary of State for the Home Department, as the minister responsible for the Prison Service. The question raised by the appeal is whether the effect of r 43(3) of the Prison Rules 1999, SI 1999/728 is to impose a trust on moneys paid into an account under the control of the governor pursuant to that rule.

[2] It is accepted on behalf of the appellant that, in the present case, the moneys which would be subject to a trust (if any) imposed by that rule are not large. Nevertheless, given the size of the prison population, the aggregate amount of what may be described as 'prisoners' moneys'—including moneys within r 43(3)—is substantial. The amount of prisoners' moneys shown in the audited financial accounts of the Prison Service for the year ended 31 March 2003 is £4.7m or thereabouts (2002 – £5.1m). The proceedings have been brought on the basis that the point is of importance to prisoners generally; and it was on that basis that permission to appeal was granted by this court (Carnwath LJ) on 22 July 2003.

THE REGULATORY FRAMEWORK

[3] Section 47(1) of the Prison Act 1952 empowers the Secretary of State to make rules for the regulation and management of prisons and for the treatment and control of persons required to be detained therein. The 1999 rules are made under that power. Rule 43(3) is in these terms:

'43 ... (3) Any cash which a prisoner has at a prison shall be paid into an account under the control of the governor and the prisoner shall be credited with the amount in the books of the prison.'

[4] Rule 43(3) of the 1999 rules must be read in conjunction with r 43(2), (4) and (5), which provide for a different treatment of property other than cash:

'(2) Anything, other than cash, which a prisoner has at a prison and which he is not allowed to retain for his own use shall be taken into the governor's custody. An inventory of a prisoner's property shall be kept, and he shall be required to sign it, after having a proper opportunity to see that it is correct.

(3) ...

(4) Any article belonging to a prisoner which remains unclaimed for a period of more than 3 years after he leaves prison, or dies, may be sold or otherwise disposed of; and the net proceeds of any sale shall be paid to the National Association for the Care and Resettlement of Offenders, for its general purposes.

(5) The governor may confiscate any unauthorised article found in the possession of a prisoner after his reception into prison, or concealed or deposited anywhere within a prison.'

[5] It is pertinent, also, to have in mind the provisions of r 44, which govern the treatment of money and articles sent to a prisoner through the post:

'44.—(1) Any money or other article (other than a letter or other communication) sent to a convicted prisoner through the post office shall be

a dealt with in accordance with this rule, and the prisoner shall be informed of the manner in which it is dealt with.

(2) Any cash shall, at the discretion of the governor, be—(a) dealt with in accordance with rule 43(3); (b) returned to the sender; or (c) in a case where the sender's name and address are not known, paid to the National Association for the Care and Resettlement of Offenders, for its general purposes: Provided that in relation to a prisoner committed to prison in default of payment of any sum of money, the prisoner shall be informed of the receipt of the cash and, unless he objects to its being so applied, it shall be applied in or towards the satisfaction of the amount due from him.

b (3) Any security for money shall, at the discretion of the governor, be—(a) delivered to the prisoner or placed with his property at the prison; (b) returned to the sender; or (c) encashed and the cash dealt with in accordance with paragraph (2).

c (4) Any other article to which this rule applies shall, at the discretion of the governor, be—(a) delivered to the prisoner or placed with his property at the prison; (b) returned to the sender; or (c) in a case where the sender's name and address are not known or the article is of such a nature that it would be unreasonable to return it, sold or otherwise disposed of, and the net proceeds of any sale applied in accordance with paragraph (2).
d

[6] The Prison Rules 1999 revoked and re-enacted the Prison Rules 1964. SI 1964/388 as amended over the years from 1968 to 1998. Rules 43(3) and 44(2), (3) and (4) of the 1999 rules were formerly enacted as the corresponding paragraphs of rr 41 and 42 in the 1964 rules.
e

RESTRICTION OF ACCESS TO CASH

f [7] It is common ground that the power conferred by the 1952 Act enabled the Secretary of State to make rules in relation to the property which prisoners may have with them in prison; and, in particular, in relation to the retention of, and the restriction of access to, cash. The need for control in relation to the use of cash and the means to make payments is explained by Mrs Irena Scaife, the finance manager employed at HM Prison Full Sutton, in a witness statement dated 29 January 2003:
g

h '11. Inmates are not allowed to have cash or the means to make payments to other inmates. There is a concern that if inmates could make payments to each [other] these payments might be used for illicit purposes, bullying or other behaviour not in accord with the good order and discipline of the prison.'

[8] Subject to that restriction, however, a prisoner retains control over moneys which are not brought into the prison. In particular, a prisoner can open, maintain and operate a bank or building society account; although there are checks in place which are intended to ensure that payments are not being made from that account for purposes which, in the context of the good order and discipline of the prison, are judged unacceptable. The position is described by Mrs Scaife in the following paragraphs of her witness statement:
j

'3. There is no requirement for approval by a Governor 1 or any staff at HMP Full Sutton for an inmate to open a bank or building society account ...

7. Further, inmates who have a bank or building society account when they arrive at HMP Full Sutton, or who open one while at HMP Full Sutton, are allowed to manage their accounts ... *a*

10. An inmate is not allowed to keep a cheque book or savings account passbook in his own possession in his cell. Such documents are kept in the cashier's office ...

12. An inmate may send a cheque from the prison drawn on a bank or building society account ... *b*

[9] Although a prisoner is not allowed to have cash in his possession while in prison there are arrangements which enable him to earn money from work and to spend that money (and, within limits, other money) within the prison itself. Arrangements which enable prisoners to spend the money which they earn are required by r 8(1) of the 1999 rules: *c*

'There shall be established at every prison systems of privileges approved by the Secretary of State and appropriate to the classes of prisoners there, which shall include arrangements under which money earned by prisoners in prison may be spent by them within the prison.' *d*

The position at HM Prison Full Sutton is described by Mrs Scaife at para 8 of her witness statement:

'Limits are imposed on how much money an inmate should have at his disposal for his own private daily use and enjoyment at any one time. An inmate is allowed to have for such use only the money he receives for work carried out at the prison each week—his earnings—and also an additional sum from monies he has in his private cash account ...' *e*

THE PRIVATE CASH ACCOUNT *f*

[10] The 'private cash account' to which Mrs Scaife refers in that paragraph is an account maintained in the prisoner's name in the books of the prison. The purpose of the private cash account is to hold to his credit cash which has been brought into the prison but which is not freely available for the prisoner's own use. Again, the position is described by Mrs Scaife in her witness statement: *g*

'9. Money not available for an inmate's private use and enjoyment are held ... in his private cash account and cannot be used for his own private daily use and enjoyment. There is no limit to the amount which an inmate can have to his credit in a private cash account.' *g*

[11] Subject to checks intended to ensure that such payments are not made for purposes which, in the context of the good order and discipline of the prison, are unacceptable, a prisoner may use the amount standing to the credit of his private cash account to make payments outside the prison—including the transfer of that amount to a bank or building society account in his name. As Mrs Scaife explains: *h*

'12. ... An inmate may also ask for a cheque to be sent by the prison drawn on his credit ... exceptionally, in his private cash account. Monies paid from an inmate's private cash account should not be intended for his own daily private use and enjoyment.' *i*

[12] As I have said, the purpose of the private cash account is to hold cash which has been brought into the prison but which is not freely available for the

a prisoner's own use. Cash which is to be credited to a prisoner's private cash account will comprise (i) cash which was in his possession when he was first admitted to the prison (or which subsequently comes into his possession), (ii) cash which is brought in by his visitors, (iii) cash sent to him through the post and (iv) cash which arises from the encashment of any security for money—or which is the proceeds of sale of any other article—sent to him through the post.

b Authority to apply cash from those sources to the credit of the prisoner's private cash account in the books of the prison is provided by rr 43(3) and 44(2), (3) and (4) of the 1999 rules, to which I have already referred. Effect is given to those rules by non-statutory administrative instructions issued within the Prison Service.

c PRISON SERVICE INSTRUCTION 79/97

[13] The administrative instructions in force—at the date when the 1999 rules were made and for the purposes of this appeal—are contained in Prison Service Instruction 79/97 issued on 27 November 1997 (PSI 79/97). The purpose of the instruction was to set out 'revised arrangements for prisoners' access to private cash'. In that context 'private cash' is defined as 'money (cash cheques or postal orders) credited in the prison books and kept for prisoners while they are in custody' (see para 5). Paragraphs 6 and 7 of PSI 79/97 set out the underlying principles:

e '6. MANDATORY: Prisoners may not keep cash with them while they are in prison and accounts are to be maintained on their behalf.

7. MANDATORY: Prisoners will be allowed to spend whatever they can earn from purposeful activity but access to private cash will be capped according to the weekly limits set by the level of the incentive scheme they are on ...'

f [14] Prisoners are able to 'spend' money within the prison through a computer-based recording system—the prisoners income and expenditure system (PIES)—maintained by each establishment. The amount which a prisoner can spend at any given time is the amount standing to the credit of his 'spend account' within that system. As indicated in para 7 of PSI 79/97, earnings may be transferred to the spend account without restriction—save that the amount which can be earned is itself restricted by the privilege status which the prisoner enjoys. The cap on access to private cash is enforced by restricting transfers from the private cash account to the spend account. The details, which are set out in PSI 79/97, are not material in the present context. What is material is that, subject to the checks to which I have already referred, money can be transferred from the private cash account maintained within the prison to the prisoner's own bank or building society account. That is made clear at para 12 of Mrs Scaife's witness statement (to which I have already referred); and at para 7 of the witness statement of Mrs Elizabeth Prior, a manager in the Prison Service with responsibility for prisoners' rights, where she states:

j 'He [the prisoner] may also be allowed to transfer money standing to the credit of his account with the prison to outside sources (such as his own private bank account) ...'

BANKING PRISONERS' MONEYS

[15] At para 8 of her witness statement Mrs Prior explains that:

'In practice, what happens when a prisoner hands money to the governor pursuant to r 43(3) is that it is paid into the general bank account of the establishment at which he is held.'

The governor does not open a separate bank account in respect of each prisoner. As Mrs Prior points out: '... the administrative time and cost of doing so would be prohibitive, relative to the amounts of money involved'. The internal accounting treatment is described at para 9 of that witness statement: 'These amounts, held pursuant to r 43(3), are shown in a suspense account, separately from the establishment's general resources from public funds.'

[16] The use of a suspense account to record prisoners' private cash is authorised, within the Prison Service, by s 13.3 of Prison Service Order 7500 (PSO 7500). Mrs Prior explains, at para 9 of her witness statement, that PSO 7500 was issued in November 1998, and reissued in June 2002, 'with the intention of providing a standard authority for the Prison Service on financial management and accounting procedure'. Paragraph 13.3.1 emphasises the underlying rule that prisoners must not be allowed to hold cash while in custody. Cash brought into the prison must be taken from the prisoner and recorded on PIES. Paragraph 13.3.2 requires that all moneys taken from prisoners by the reception officer are passed to the cashier at the end of each day for banking. Similar provisions apply where money is received by post or brought in by a visitor (see para 13.3.2(g), (i) and (j)). It is plain that there is no administrative requirement to keep the moneys of one prisoner physically separate from the moneys of another; or to maintain separate bank accounts in respect of individual prisoners. What there is, of course, is a requirement to credit the moneys of each prisoner to a separate account (or accounts) in his name in the internal books of the prison (or within PIES); and a requirement to reconcile the total of all moneys standing to the credit of prisoners' accounts to the amount held in a suspense account.

[17] As I have said, it appears from Mrs Prior's witness statement that prisoners' moneys passed to the cashier for banking are banked in the general bank account of the prison. Not only are there no separate bank accounts maintained in respect of individual prisoners; there is no separate account for prisoners' moneys. In practice prisoners' moneys are mixed with public moneys in the same bank account.

[18] *Prima facie*, at least, this treatment of prisoners' moneys appears inconsistent with the guidelines issued by HM Treasury in a publication, 'Government Accounting 2000'—see, in particular, para 28.5.19:

'Only public money should be paid into a public bank account and money should not be drawn from it except to meet payments properly chargeable to the account ...'

The guidelines require that balances of cleared funds in public bank accounts should be minimised; in particular, government departments should not agree to maintain balances on public bank accounts in return for reduced bank charges. Where cleared balances are held, the department should negotiate for the payment of interest; but interest received in respect of moneys held in public bank accounts must be surrendered to the consolidated fund. Paragraph 28.5.30 of Government Accounting 2000 is in these terms:

'Any non-public monies managed by departments (for example where they hold private sector monies in trust while ownership is being resolved) should not be held in public bank accounts and a standing balance may be

a appropriate. This may be particularly so where the private sector monies cannot be debited to cover associated banking costs.'

b [19] Mrs Prior acknowledges, at para 18 of her witness statement, that 'the Prison Service's practice of paying prisoners' moneys into its own group account may be in breach of the requirements of Government Accounting'. The same acknowledgment can be found at para 18 of a witness statement made some three years earlier by one of her predecessors in post, Mr Richard Pickering, in proceedings brought by another prisoner, Mr Kenneth Harding, against the Home Office. Mr Pickering stated then that the Home Office was reviewing its practice in this respect. Mrs Prior goes further. She explains that the Prison Service has consulted with HM Treasury 'to secure dispensation allowing it to continue with its current practice for the handling of non-exchequer moneys on the grounds of efficiency, economy and effectiveness.' A year has passed since that witness statement was made. Counsel for the Home Office was unable to tell us the outcome of such consultation as has taken place.

d [20] The effect of the practice which Mrs Prior describes is that there is no separate interest-bearing bank account in which the governor of an individual prison, or the Prison Service generally, holds prisoners' moneys. Further, very little interest (relative to the amounts involved) is earned on moneys (including prisoners' moneys) in the bank accounts which are maintained by individual prisons or by the Prison Service generally. By way of illustration, Mrs Prior points out that for the period April to December 2002 the Prison Service earned e bank interest of £992.70 on a turnover of £1,548m. The amount of that interest which could be attributed to prisoners' moneys would be negligible. And, as she also points out, 'the Home Office does not even keep that interest, as it is paid into the consolidated fund.' Nevertheless, as she acknowledges, the practice needs to be addressed internally: it has the effect, as she puts it, that—

f 'the money received from prisoners and paid into the Prison Service's group account with [Royal Bank of Scotland] indirectly reduces, to a modest extent, the amount that needs to be drawn from the Prison Service's [own account at the office of the Paymaster General] each day in order to maintain that [RBS] account at nil.'

g But, if that practice is objectionable, it can be the subject of a public law challenge. It is not open to challenge in these proceedings.

THESE PROCEEDINGS

h [21] These proceedings were commenced by the issue of a claim form (under CPR Pt 8) in the Liverpool County Court on 23 November 2001 seeking determination of the question—

j 'whether, upon the true construction of rr 43 and 44 [of the 1999 rules] and in the events which have happened all sums of money (a) that the claimant has had at prison or (b) that have been sent to the claimant through the Post Office or (c) that result from the encashment of securities for money and sent to the claimant since about 30 April 1999 and held by [the Home Office or the governor] pursuant to the said rules ...'

have been and are held upon trust for the claimant. The significance of the date, 30 April 1999, is that it was on that date that the claimant was transferred to HM Prison Full Sutton.

[22] The obligation imposed by the trust—as asserted in the claim form—was to pay those moneys, or assets representing those moneys, to the claimant upon his release from prison; and, in the meantime, ‘to invest the same under the provisions of the Trustee Investments Act 1961 alternatively the Trustee Act 2000’; but with power to pay sums out of those moneys to the claimant ‘in accordance with the privilege systems established under r 8 of the 1999 Rules’. On the basis that a trust could be established, the claim sought an inquiry as to the interest or income which could have been earned by investment of the moneys subject to the trust ‘but for the wilful default of the defendants or either of them in not investing the same in an interest-bearing bank or building society account ...’; alternatively, an account of profits made by the employment of the moneys ‘in the course of the business of the defendants or either of them as trustees’. On 28 February 2002 the proceedings were transferred to the High Court.

THE JUDGE’S REASONS

[23] The proceedings came before Hart J on 30 January 2003. By an order made on 28 February 2003 he dismissed the claim. He did so for the reasons set out in a written judgment ([2003] EWHC 361(Ch)) handed down on that day and now reported at [2003] 2 All ER 678. After identifying the central question in issue—‘does r 43(3) impose a trust on the governor’—he went on to say this (at [18]–[22]):

[18] ... Assuming for the sake of argument that the relationship envisaged by r 43(3) must be regarded as either a debtor/creditor or a trustee/beneficiary relationship, the argument for the former relies on the words “the prisoner shall be credited with the amount in the books of the prison”, and the argument for the latter relies on the words “... shall be paid into an account under the control of the governor”.

[19] [Counsel for the claimant] submitted that it was a necessary implication of the requirement that the cash be paid into such an account that a trust was created in relation to the cash. He shrank from saying that the governor was obliged to open (or control) a separate account for each prisoner. Rather he suggested, the governor’s obligation was to have, or control, an account in which the cash of his prisoners would be mixed and to which resort might be had whenever a prisoner “spent” money within the prison, or asked for reimbursement when leaving prison. The critical feature of the account was, he submitted, that it was intended to be separate from any account used by the prison for its own expenditure.

[20] That seems to me to involve getting far more out of a few words than can sensibly be done. Furthermore, even if the subrule does posit such a collective account as the nature of the account in contemplation, it is not clear to me why such an account should be assumed to be an interest-bearing account. The assumption that it is an interest bearing account can only be derived from the proposition that a trust to “invest” is implied.

[21] If the draftsman of the rules had intended to create a trust, with a concomitant obligation to “invest”, it would have been relatively easy to say so. The language is, however, otherwise. The cash has simply to be “paid” into the account, and then “the prisoner shall be credited with the amount in the books of the prison”. To the extent to which these words seek to create a relationship in private law it is clearly the relationship of debtor and creditor.

[22] The requirement that the cash be paid into an account is simply there, in my judgment, because completeness and good order requires that something be said about what is to happen to the cash. Rather than direct, as in the case of the prisoner's other property—see r 43(2)—that it simply be taken into the governor's custody, the provision is that it be paid into an account under his control. The prisoner loses his rights to the notes or coins thus taken from him in a way in which he does not lose his rights to his other property. For his right to "own" that cash, there is substituted a monetary credit. It may incidentally be noted that in relation to "securities for money" (see r 44(3)) amongst the options given to the governor are either to place them with the prisoner's property at the prison, or to encash them and deal with the cash under r 44(2), and thence under r 43(3). These are set out as apparently equivalent modes of treatment. This seems to me to emphasise how very far from the draftsman's mind was any thought that the purpose of r 43(3) was to impose a trust to invest cash on the prisoner's behalf in an interest-bearing account.'

[24] The judge addressed r 43(3) of the 1999 rules on the assumption, as he makes clear at [18], that its effect could be analysed by reference to the familiar private law relationships of debtor/creditor or trustee/beneficiary. It had been submitted to him, on behalf of the defendants, that the relationship between the Prison Service (and the governor) and the prisoners in respect of prisoners' money is not amenable to analysis in terms of private law concepts. The judge recognised that the obligations of the Prison Service (and of the governor) in respect of prisoners' money might exist only in public law; but he found it unnecessary to decide the point. It was enough, as he observed, that the claimant had failed to make good his contention that r 43(3) imposed a trust in the private law sense.

DID THE JUDGE ADOPT THE CORRECT APPROACH?

[25] It is common ground that, under English law, a convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication. If authority be needed, it is found in the speech of Lord Wilberforce (with whom the other members of the House of Lords agreed) in *Raymond v Honey* [1982] 1 All ER 756 at 759, [1983] 1 AC 1 at 10. In his judgment in *R v Secretary of State for the Home Dept, ex p Simms*, *R v Governor of Whitemoor Prison, ex p Main* [1998] 2 All ER 491 at 506, [1999] QB 349 at 367, Judge LJ observed that—

'the starting point is to assume that a civil right is preserved unless it has been expressly removed or its loss is an inevitable consequence of lawful detention in custody.'

That that is the correct approach was recognised by Lord Steyn on the appeal in that case ([1999] 3 All ER 400 at 403, [2000] 2 AC 115 at 120).

[26] It is said on behalf of the appellant that, on reception into prison and subject to the implementation of r 43(3) of the 1999 rules, a prisoner has legal and beneficial ownership of the cash—that is to say, the currency notes or coins—then in his possession. Prima facie, at least, that is correct. It is said that the effect of r 43(3) is to deprive the prisoner of his legal ownership of the cash. But it is submitted that there is nothing in r 43(3)—either expressly or by necessary implication—which deprives the prisoner of his beneficial ownership of the cash. So, it is submitted, his beneficial ownership must persist in equity,

notwithstanding the implementation of r 43(3), and can be followed into the chose in action which arises when the cash is banked in an account under the control of the governor. Effect is given in equity to the prisoner's continuing beneficial ownership in the cash by treating the governor as trustee of the debt owed to him by the bank—or, to put the point another way, as trustee of the balance on the account. It was submitted that the judge had—

‘approached the question from the wrong direction. What he should have asked himself is whether there is anything in sub-r 43(3) which (in contrast to eg sub-r 43(2)) requires the prisoner to be deprived of the beneficial ownership of his property.’

[27] The fallacy upon which that submission is based was exposed by Lord Browne-Wilkinson (with whom Lord Slynn of Hadley and Lord Lloyd of Berwick agreed) in *Westdeutsche Landesbank Girozentrale v Islington London BC*, *Kleinwort Benson Ltd v Sandwell BC* [1996] 2 All ER 961, [1996] AC 669. The bank's claim was for repayment of moneys paid to the local authority in 1987 pursuant to an interest swap agreement which—following the decision in *Hazell v Hammersmith and Fulham London BC* [1991] 1 All ER 545, [1992] 2 AC 1—was accepted to have been ultra vires the local authority. It was submitted on behalf of the bank that, since the bank only intended to part with its beneficial ownership of the moneys in performance of a valid contract, neither the legal nor the equitable title passed to the local authority at the date of payment. It was accepted that the legal title to the moneys vested in the local authority by operation of law when the moneys were mixed in its bank account; but it was said that, nevertheless, the bank had retained its equitable title. Lord Browne-Wilkinson rejected that submission. He said ([1996] 2 All ER 961 at 989, [1996] AC 669 at 706):

‘I think this argument is fallacious. A person solely entitled to the full beneficial ownership of money or property, both at law and in equity, does not enjoy an equitable interest in that property. The legal title carries with it all rights. Unless and until there is a separation of the legal and equitable estates, there is no separate equitable title. Therefore to talk of the bank “retaining” its equitable interest is meaningless. The only question is whether the circumstances under which the money was paid were such as, in equity, to impose a trust on the local authority. If so, an equitable interest arose for the first time under that trust.’

[28] The relevant question, therefore, is not whether r 43(3) of the 1999 rules is intended to deprive the prisoner of an existing equitable interest in the notes and coins which are taken from him on reception into prison. There was no existing equitable interest. The legal title carried with it all rights of ownership, both legal and beneficial. The relevant question is whether the circumstances under which the notes and coins were taken from the prisoner pursuant to r 43(3) were such as, in equity, to impose a trust on the governor, or on the Prison Service. The approach of the judge to the issue which he had to decide was correct; he was right to identify the central question in the terms which he did.

POSSESSION AND OWNERSHIP

[29] In order to address that question it is, I think, pertinent to have in mind that r 43 of the 1999 rules is as much about possession as it is about ownership. In particular—contrary to the submission made on behalf of the appellant—r 43(2) is

a all about possession and not at all about ownership. The effect of that rule is to
require that a prisoner is deprived of possession of chattels without being deprived
of ownership. If that rule is to be analysed by reference to private law concepts, the
chattels are transferred into the custody of the governor by way of bailment. The
treatment of unauthorised articles found in the possession of a prisoner after
reception into prison reflects the same approach. The articles may be confiscated
b by the governor under r 43(5)—so that the prisoner is deprived of possession—but
there is nothing to suggest that the prisoner is thereby deprived of ownership.
Deprivation of ownership is authorised only by r 43(4)—which provides that any
article ‘belonging to a prisoner which remains unclaimed for a period of more than
3 years after he leaves prison, or dies’ may be sold and the proceeds of sale paid to
the National Association for the Care and Resettlement of Offenders for its general
c purposes.

[30] Rule 43(3) of the 1999 rules requires that the prisoner is deprived of the
possession of the notes and coins which he has on reception into the prison. And,
as the evidence shows, that is what happens (see para 6 of PSI 79/97 and
para 13.3.3(a) of PSO 7500). Plainly, r 43(3) is intended to—and, as implemented,
d does—deprive the prisoner of a civil right which he would otherwise have;
namely, the right to possess notes and coins. No complaint is made about that.
As I have said, it is accepted that it was a proper exercise of the power conferred
by s 47(1) of the 1952 Act to regulate prisoners in relation to the retention of, and
the restriction of access to, cash in prison. But notes and coins, although property
e in the nature of a chattel and capable of being owned, are fungibles; and have the
particular feature that, in a case where the transferor was himself the full legal and
beneficial owner, ownership (or title) to the notes or coins passes with
possession—save, perhaps, where there is some clear intention to treat the notes
and coins as non-fungible. And, in that context, there is no distinction between
legal and beneficial ownership of the notes or coins. Cash deposited with another
f as banker is neither the subject of a bailment at law nor of a trust in equity.

[31] It is, to my mind, reasonably clear that it is those particular features of
cash—fungibility and the identity of possession and ownership—that has led to
the difference in treatment under r 43(2) and (3). It would have been possible to
provide that the notes and coins taken from a prisoner on reception into prison
be kept in an individual sealed bag, to be returned to the prisoner on discharge.
g In such a case there would be a bailment; ownership of the notes and coins would
not pass to the prison authorities. But, plainly, that was not the intention of the
rule-maker. The purpose of r 43(3) is to transfer possession and ownership of the
cash together, in the ordinary way. This is, in effect, acknowledged by the
appellant who accepts that legal ownership of the notes and coins does pass to the
h prison authorities when the cash is taken from the prisoner on reception. But, as
I have said, the passing of ownership carries with it both legal and beneficial rights
unless there is something in the circumstances which should lead equity to
impose a trust.

[32] Cash credited to a prisoner’s private cash account is not confined to cash
j which was in his possession when he was first admitted to prison (or which
subsequently comes into his possession); it will include, also, cash which is
brought into the prison by his visitors, cash sent to him through the post and cash
which arises from the encashment of any security for money—or which is the
proceeds of sale of any other article—sent to him through the post. The effect of
r 44(2) of the 1999 rules, is to require that cash sent to a prisoner through the post
does not come into his possession; and that requirement is implemented by the

procedure described at para 13.3.3(d) and (g) of PSO 7500. Similarly, cash brought into the prison by a visitor is taken by the prison authorities before it comes into the possession of the prisoner (para 13.3.3(f) of PSO 7500). But cash from those sources does come into the possession of the governor; and, at the discretion of the governor, may be dealt with under r 43(3) as if it were cash which had been in the possession of the prisoner. If the governor does decide to deal with cash from those sources in accordance with r 43(3), ownership passes with possession. And, in these cases, also, the passing of ownership carries with it both legal and beneficial rights unless there is something in the circumstances which should lead equity to impose a trust.

WHETHER THERE IS ANYTHING IN THE CIRCUMSTANCES WHICH SHOULD LEAD EQUITY TO IMPOSE A TRUST?

[33] In my view there is nothing in the language of r 43(3) of the 1999 rules—or, more generally, in the circumstances in which cash is taken from a prisoner under that rule or dealt with under that rule pursuant to r 44(2)—which should lead to the imposition of a trust on the moneys when they come into the hands of the governor. There is no distinction, in this respect, between the period while the moneys remain cash (whether or not mixed with cash taken from other prisoners on the same day) and the period after the moneys have been paid into a bank account (when the relevant asset is the credit balance, if any, on that account).

[34] I reach that conclusion for reasons which differ little (if at all) from those which attracted the judge. First, it seems to me impossible to find any clear intention to impose a trust in the language of r 43(3) itself. The requirement that the cash 'shall be paid into an account under the control of the governor' is, I think, essentially of an administrative nature. Given the object which underlies the rule—that is to say, the need to control a prisoner's access to cash within the prison—the choice is to require all prisoners' moneys to be kept in a safe or strong room, or to require the moneys to be paid into a bank account. There are obvious reasons for choosing the latter. Given the relatively small amounts of cash which are likely to be in the possession of each prisoner on reception into prison, the administrative costs of opening separate accounts in the name, and under the control, of each prisoner would be disproportionate. It would, perhaps, have been open to the rule-maker to provide that cash taken from a prisoner be paid into an existing bank account in his name, if there were such an account. But not every prisoner will have an existing bank account in his name; and, as the evidence shows, a prisoner can transfer moneys taken from him on reception—or received through the post or brought into the prison by his visitors—and credited to his private cash account within PIES to an existing (or newly opened) external account in his own name. There are, as it seems to me, obvious administrative reasons for providing, by r 43(3), that the moneys be paid into an account under the control of the governor. The rule itself, to my mind, sheds no light on the question whether the moneys standing to the credit of that account are to be held upon a trust.

[35] Second, the requirement in r 43(3) that 'the prisoner shall be credited with the amount in the books of the prison'—read with knowledge of the provisions in PSI 79/97 and PSO 7500 (which must have been in the mind of the rule-maker when the 1999 rules were made)—points to the relationship being that of banker/customer rather than that of trustee/beneficiary. The problem, as explained in the evidence, is how to give prisoners spending power within the

a prison—having regard, in particular, to the need to implement a system of privileges imposed by r 8—without allowing access to cash. That problem is met, under the provisions in PSI 79/97 and through PIES, by an internal prison credit system which may fairly be regarded as analogous to the provision of limited banking services. In that limited context the prison does have a role as banker to the prisoners detained within it. And it is trite law that the relationship between banker and customer is that of debtor/creditor, not that of trustee/beneficiary (see *N Joachimson (a firm) v Swiss Bank Corp* [1921] 3 KB 110 at 127, [1921] All ER Rep 92 at 100).

[36] Third, there is no reason to construe r 43(3) of the 1999 rules so as to imply a trust which has not been expressed. The construction for which the appellant contends would bring him little, if any, practical benefit, while imposing a disproportionate administrative burden on prison authorities who (on this hypothesis) would be subjected to the obligations of trusteeship. Notwithstanding the terms in which relief was sought in the claim form, the appellant accepted before the judge and in this court that the obligation to invest, if moneys were held for him in trust, did not extend beyond the placing of those moneys in an interest-bearing account. But the right to repayment (on discharge) from an interest-bearing account with a commercial banker, which the governor holds on trust, is not said to be of more value to the prisoner than the right to be paid by the Prison Service the amount standing to the credit of his private cash account. It is not suggested that there is any credit risk if the Prison Service, rather than a commercial banker, is the debtor. Nor is it suggested that the prisoner does not need frequent access, on demand, to funds within PIES so that he can make purchases in prison; nor that that need could be met more conveniently through the medium of a trust than by the internal banking services provided under PSI 79/97. And any balance on his private cash account which is in excess of that need can be transferred to his own bank or building society account. So the prisoner is not denied the opportunity to earn interest on surplus funds. It is, as I have said, difficult to see any need, in practice, for a trustee/beneficiary relationship; or any reason to imply into r 43(3) of the 1999 rules words which the rule-maker has not used.

[37] Fourth, it is now accepted that r 43(3) should not be construed so as to require the payment of moneys into separate bank accounts in respect of each prisoner. It is said that the trust obligation imposed by the rule would be met if the moneys taken from each prisoner were paid into a single account for each prison in which all prisoners' moneys were mixed. And, of course, it is said that that is what the guidance in Government Accounting 2000 requires. But the guidance in Government Accounting 2000 requires separation of public moneys from non-public moneys—for reasons relating to bank charges which are explained—and is equally applicable whether or not the non-public moneys are held on trust, as para 28.5.30 makes clear. The difficulty which the appellant's submissions do not address is that if the rule-maker had intended to impose a trust obligation in respect of prisoners' funds generally—an obligation to be met by keeping those funds in a single mixed account—it would have been easy for him to say so. And, because that would be a departure from the more usual obligation imposed on a trustee—to keep the trust moneys separate not only from his own moneys but also from the moneys of others for whom he is trustee—the rule-maker might have been expected to say so. It would, of course, be possible to impose a trust on prisoners' moneys generally; with powers and obligations as to investment and liquidity which were to be exercised in the

interests of prisoner beneficiaries generally rather than in the interests of any individual beneficiary—compare the Solicitors' Accounts Rules 1998, Pt C—but there is nothing in r 43(3), or elsewhere, which suggests that the rule-maker had that in mind. a

CONCLUSION

[38] I would dismiss this appeal. b

KEENE LJ.

[39] I agree. I also agree with the judgment of Peter Gibson LJ, which I have read in draft.

PETER GIBSON LJ. c

[40] I also agree that this appeal must be dismissed. I add a few words of my own in deference to the careful arguments of Mr Smith QC for the appellant and Mr Crow for the respondents.

[41] Mr Smith's primary argument was that on the natural interpretation of r 43(3) of the Prison Rules 1999, SI 1999 728 the required payment of cash, which a prisoner has at a prison, into an account under the control of the governor creates a trust of that money of which the governor is a trustee. He sought to derive assistance from *Lewin on Trusts* (17th edn, 2000) para 1-01 where the editors cite with approval art 2 of the Convention on the Law Applicable to Trusts and on their Recognition (Hague, 1 July 1985; TS 14 (1992); Cm 1823): d

'For the purposes of this Convention, the term "trust" refers to the legal relationship created—*inter vivos* or on death—by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. e

A trust has the following characteristics—(a) the assets constitute a separate fund and are not a part of the trustee's own estate; (b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee; (c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law.' f

[42] But that begs the question whether the prisoner has placed the cash under the control of a trustee for the prisoner's benefit when the cash is paid into an account under the control of the governor. Mr Crow rightly drew attention to the absence from r 43(3) of any words of trust. Mr Smith said that there was a duty on the governor to put the cash into a separate account, but no duty to put it into an account separate from the account into which another prisoner's cash is put. Rule 43(3) is silent on that point, and in the absence of express authorisation to the contrary a trustee would normally have to keep trust moneys separate not only from his own moneys but also from other moneys which the trustee holds for other beneficiaries. Mr Smith further submitted that the governor as trustee had a duty to invest the cash paid into the account under his control. Again there is no indication in r 43(3) of such a duty. g

[43] On the other hand, r 43(3) refers to the prisoner being credited in the books of the prison with the amount of cash paid into the account. That suggests a creditor/debtor relationship between the prisoner and the governor. That also accords with the legal analysis that the payment of cash into an account with h
j

a another does not reserve to the payer the beneficial interest in the money: it transfers the legal and beneficial ownership of the money but gives the payer the right to a corresponding credit. It also accords with the common sense of the factual situation. I find it impossible to believe that the legislature intended that the governor should owe fiduciary duties as trustee to each prisoner whose cash is paid into an account under his control, such duties including a duty to invest the trust moneys and to give separate consideration to the needs and
b circumstances of each prisoner in respect of small amounts of cash.

[44] Mr Smith further argued that to treat the prisoner as losing the beneficial interest in his cash amounted to a disproportionate interference with the prisoner's human rights under art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms
c 1950 (as set out in Sch 1 to the Human Rights Act 1998). I am not able to agree. I am prepared to accept that r 43(3) is an interference with the prisoner's rights to his possessions, but it is to my mind a justified and proportionate interference, given (i) the obvious undesirability of prisoners holding cash while in prison, (ii) the fact that the prisoner is entitled a credit corresponding to the cash paid into
d the account under the governor's control, and (iii) the ability of the prisoner to cause the transfer of credit to his own bank or building society account.

[45] In my judgment the judge reached the right decision for the reasons which he gave. He did not find it necessary to deal with the argument of the respondents that r 43(3) only gave rise to a public law relationship, namely a 'trust in the higher sense', to use the language of Megarry V-C in *Tito v Waddell (No 2)*,
e *Tito v A-G* [1977] 3 All ER 129 at 216–223, [1977] Ch 106 at 211–219. Although by a respondent's notice the respondents take that point again, we also have not found it necessary to consider that argument for the purpose of deciding this appeal.

[46] For these reasons as well as the reasons given by Chadwick LJ I would
f dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

Harvey Shopfitters Ltd v ADI Ltd

[2003] EWCA Civ 1757

COURT OF APPEAL, CIVIL DIVISION

DAME ELIZABETH BUTLER-SLOSS P, BROOKE AND LATHAM LJ

13 NOVEMBER 2003

Building contract – Formation – Parties agreeing on standard terms – Proviso that should contract fail to proceed and be formalised quantum meruit basis applying – Work proceeding on agreed basis – Whether contract existing.

Practice – Appeals – Filing of skeleton arguments, core bundles and bundle of authorities – Guidance – CPR PD 52, paras 5.6, 5.7, 5.8, 7.6, 7.7, 15.11A.

The claimants were invited in May 1998 to tender for building work at the defendants' premises. The defendants had employed architects who had produced tender documents based on the JCT Intermediate Form of Building Contract 1984 (the IFC 84). The claimants returned the form of tender offering to carry out the works 'in accordance with the conditions of contract' for the lump sum of £339,895.34. The defendants informally indicated that the tender was acceptable and the claimants commenced work on site on 6 July 1998. On 7 July 1998 the architects wrote a letter on behalf of the defendants to the claimants. This letter authorised the claimants to proceed and said, 'If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis.' Work proceeded. No formal IFC 84 contract was ever prepared, although there was nothing left to agree. Interim payments were made following the IFC conditions: architects' instructions were issued on IFC 84 forms; the final account was based on the lump sum figure and formed the basis of an adjudication in December 2000 which resulted in the claimants being awarded the full sum claimed. The claimants brought proceedings to enforce the award and in May 2001, they amended their claim to allege that they were entitled to be paid on a quantum meruit basis. The judge decided that it would be sensible to decide as a preliminary point what the terms of the contract were and held that the parties had agreed by the letter of 7 July to carry out the work in accordance with IFC 84 conditions. The claimants appealed.

Held – The judge had been entitled to conclude that the mere fact that the letter giving instructions to proceed envisaged the execution of a further document did not preclude him from concluding that a binding contract had nevertheless been entered into, provided all the necessary ingredients of a valid contract were present, and entitled to conclude that the contract was one for a lump sum under IFC 84 conditions. The contract had proceeded and the proviso as to quantum meruit did not apply. Accordingly, the appeal would be dismissed (see [9], [10], [25], [26], below).

Per Dame Elizabeth Butler-Sloss P and Brooke LJ. There is an evident need to draw attention to four aspects of CPR PD 52 where ignorance or deliberate disobedience are making things unnecessarily difficult for the court and unnecessarily expensive for lay parties. (1) The bundle of documents in support

- a of an appeal originally lodged with an appellant's notice must comply with CPR PD 52, paras 5.6, 5.7, and 5.8. Those who are responsible in solicitor's firms for litigation in the Court of Appeal must make it their business to ensure that members of staff who are concerned with the preparation of papers for the Court of Appeal are familiar with the requirements of those paragraphs, especially para 5.8, which is widely ignored. (2) In respect of core bundles to be prepared for the substantive appeal, CPR PD 52, para 15.11A is required reading for all who practise in the Court of Appeal. Paragraph 15.11A is so critically important to the work of the court that it must be scrupulously observed. CPR PD 52 does not specify the time by which the parties must file and serve the core bundle but in order to achieve its purpose it must be at the very latest filed seven days before the hearing starts. (3) By seven days before the hearing the Court of Appeal must have an agreed bundle of authorities, prepared in full compliance with the Practice Note [2001] 2 All ER 510 so that when the judges do their pre-reading they have the authorities to which they can refer. (4) It is essential that every advocate who drafts any skeleton argument for the Court of Appeal observes the mandatory requirements of paras 8.1 and 8.2 of Practice Note [2001] 2 All ER 510 and has the provision of para 8.4 well in mind. Nothing is said in CPR PD 52, paras 5.9, 7.6, 7.7 about late skeletons. If the seven-day rule is now widely recognised as the time at which papers must be available for judges for pre-reading in the week before the hearing, it is less likely that the judges of the Court of Appeal will be relaxed or even ready to read skeleton arguments which are lodged less than seven days before the hearing (see [13]–[24], [26], below).

e

Notes

For construction contracts generally and for acceptance of tender and rights and obligations created by tendering see 4(3) *Halsbury's Laws* (4th edn reissue) paras 11, 17, 18.

f

Cases referred to in judgments

Haggis v DPP [2003] EWHC 2481 (Admin), [2004] 2 All ER 382n.

Stent Foundations Ltd v Carillion Construction (Contracts) Ltd (formerly *Tarmac Construction (Contracts) Ltd*) (2000) 78 ConLR 188, QBD and CA.

g Appeal

The claimants, Harvey Shopfitters Ltd appealed from the decision of Recorder John Uff QC in the Technology and Construction Court on 6 March 2003, ([2003] All ER (D) 129 (Mar)) determining a preliminary issue, set out at [6], below in its claim for endorsement of a sum awarded against the defendants, ADI Ltd, in an adjudication on a construction contract. The facts are set out in the judgment of Latham LJ.

h

Richard Wilmot-Smith QC and *Nicola Greaney* (instructed by *Collyer-Bristow*) for the appellants.

j *Peter Coulson QC* and *Gaynor Chambers* (instructed by *Colman Coyle*) for the respondents.

LATHAM LJ (giving the first judgment at the invitation of Dame Elizabeth Butler-Sloss P).

[1] This is an appeal from Mr Recorder John Uff sitting in the Technology and Construction Court ([2003] All ER (D) 129 (Mar)) in a claim by the appellants

against the respondents for work carried out by them as building contractors. The work was to the respondents' property, 22 Cornwall Gardens, in London, which is a property consisting of six flats. The essence of the dispute is that the appellants now claim that work they carried out was pursuant to a quantum meruit, whereas the respondents say that it was pursuant to a lump sum contract. The recorder held in a preliminary ruling that, on the true construction of the document on which both appellants and respondents relied, it was a lump sum contract.

[2] In his final judgment dealing with issues consequential to this ruling, which are not material to our decision, he further concluded that he would in any event have decided that the appellants were estopped by convention from asserting that it was not a lump sum contract. The appellants in their grounds of appeal say that the recorder was wrong in both respects.

[3] The relevant facts were never in dispute. The appellants were asked to carry out alterations and refurbishments to the appellants' properties. They had employed architects, Salt Evans, who had produced tender documents based on the JCT Intermediate Form of Building Contract (1984 edn) (the IFC 84), and set out the proposed amendments to that form and the manner in which the conditions were to apply. The appellants were invited to tender in relation to those works on 6 May 1998. The final documentation provided by Salt Evans was provided to them on 26 May 1998. In a series of documents in June 1998 the appellants offered to carry out the works 'in accordance with the conditions of contract' by returning the form of tender, which constituted an offer to carry out the works for the lump sum of £339,895.34. The respondents informally indicated through the architects that that tender was acceptable, and the appellants commenced work on site in accordance with the tender on 6 July 1998. On 7 July 1998 the architects wrote the letter upon which both parties now rely. It reads as follows, leaving aside immaterial matters:

'Further to your tender dated 23 June 1998 and fax dated 24 June 1998, I write to confirm that it is the intention of our client, A.D.I Limited, to enter into a contract with you on the basis of the tender sum of £339,895.34 exclusive of VAT, for the above project. The main contract documents are currently being prepared for signature. I confirm that the conditions of contract will be those of the JCT Intermediate Form of Building Contract 1994 [sic] Edition amended as stated in the tender documents and this contract is to be executed under hand. The date for commencement is to be 06 June [sic] 1998 and the contract period is to be 12 weeks with completion on 25 September 1998. I have been instructed by our client to request that you accept this letter as authority to proceed. If, for any unforeseen reason, the contract should fail to proceed and be formalised, then any reasonable expenditure incurred by you in connection with the above will be reimbursed on a quantum meruit basis. Any such payment would strictly form the limit of our client's commitment and our client would not be subject to any further payment of compensation for damages for breach of contract. If you are agreeable to the foregoing please: (i) Sign the enclosed copy of this letter and return it to me at the above address. (ii) Provide me with a statement from your insurance broker showing the details of Employer's Liability and Public Liability Insurance along with a copy of your valid 714 Tax Certificate. (iii) Provide a programme of works for the project. I look forward to receiving this information by return.'

a The appellants were not in a position to sign a copy of that letter until the relevant director, Mr Nolan, had returned from holiday on 28 July 1998, when he duly signed the document and returned it to the architects.

[4] Thereafter, work continued; but no formal IFC 84 contract was prepared, although it was common ground at the trial that there was nothing left for the parties to agree. The form simply had to be prepared in accordance with the particulars of contract fully set out in the tender documents.

b [5] As a matter of history, thereafter the position was this. (1) From 28 July 1998 interim payments were made pursuant to certificates from the architects based on a percentage of the lump sum amount from which a retention of 5% was deducted in accordance with IFC 84 conditions; (2) architects' instructions were issued on IFC 84 forms; (3) all negotiations in relation to the applicants' final account were carried out on the basis of the tender sum, replacing provisional cost items with those required by architects' instructions, again in accordance with IFC 84; (4) the final account was accordingly based on the lump sum tender figure and formed the basis of an adjudication in December 2000 which resulted in the appellants being awarded the full sum claimed in the absence of any formal objection by the respondents; (5) the original claim in the present action, which was commenced on 19 January 2001, was based on that same calculation. It might be thought therefore somewhat surprising to find that the appellants in May 2001 amended their claim to allege that they were entitled to a quantum meruit which had never been suggested at any time until then.

c [6] The recorder, who is a highly experienced practitioner and arbitrator in this field, considered that it would be sensible, when the matter first came before him, to determine the contractual issue as a preliminary point. It is perhaps unfortunate that he and counsel did not formulate the issue in writing; but it is clear that both parties and the recorder were satisfied that the critical issue to be determined was whether or not the words 'the contract should fail to proceed and be formalised' applied so as to entitle the appellants to the quantum meruit they claimed.

d [7] The recorder, having referred to the concessions necessarily made by the then counsel for the appellants on the basis of the evidence, that there was by 7 July 1998 nothing left to discuss or formalise, and that 'the parties did not necessarily intend the letter of 7th July to be displaced at a later date by a formal contract', concluded that the parties had clearly by that letter entered into a contract to carry out the work in accordance with the IFC 84 conditions. He considered that the mere fact that, as in *Stent Foundations Ltd v Carillion Construction (Contracts) Ltd* (formerly *Tarmac Construction (Contracts) Ltd*) (2000) 78 ConLR 188 the parties had contemplated executing formal documents, did not detract from the clear intention of the parties to be contractually bound. He held that the words 'failed to proceed and be formalised' were to be read conjunctively so that the appellants' entitlement to a quantum meruit would only arise where both conditions were fulfilled. Accordingly, he decided that the appellants' claim for a quantum meruit failed. We decided to hear the argument on this issue first because if we concluded that the recorder was correct the second issue as to estoppel would not arise.

e [8] Mr Wilmot-Smith QC on behalf of the appellants has argued, with effective brevity, that the letter has to be construed on its own. He submits that the words are clear and require no elucidation from their context. The phrase 'the contract should fail to proceed and be formalised' is, he agrees, to be read conjunctively, but so read, he submits, clearly indicates that the parties intended that the

contract be 'formalised'; that is, that a formal contractual document or documents should be signed as being a necessary part of the procedure if the work was to be carried out under the IFC 84 conditions. The fact that they were not formalised triggered, he submits, the entitlement to a quantum meruit pursuant to the terms of the letter, whatever may have been the behaviour of the parties thereafter.

[9] It seems to me that, whilst I entirely accept that the behaviour of the parties thereafter was not, for the purposes of this case at any rate, necessary for the purposes of identifying the true meaning of the agreement, this argument fails to recognise that the letter cannot be read in isolation. It formed the culmination of a process, which was accepted by the appellants' own witness below to have resulted in an agreement as to price and to all material terms necessary for the commercial efficacy of the contract under IFC 84 conditions. The recorder was entitled to conclude, as Dyson J had done in the *Stent Foundations* case, that the mere fact that the letter giving instructions to proceed envisages the execution of further documentation, does not preclude the court from concluding that a binding contract was none the less entered into, provided that all the necessary ingredients of a valid contract are present. In that case the relevant letter read ((2000) 78 ConLR 188 at 191–192):

'Until formal documents are available for signature please accept this letter as our instruction to proceed. In the event of the parties failing to enter into a contract, we confirm that you will be reimbursed with all reasonable costs incurred including overheads and profit thereon, but no allowance will be accepted for loss of profit.'

Dyson J held on the facts that both parties had none the less agreed to proceed with the works on a contractual basis. The Court of Appeal held that he was entitled to do so on the evidence. Mr Wilmot-Smith sought to argue that that was a decision on its own facts. That is so; but it demonstrates that the judge is entitled to look behind the apparent or literal meaning of the words of a letter, such as the one in question, to determine the true intent of the parties. Having concluded that the parties had agreed to a fixed-sum contract under IFC 84 conditions, it is not surprising that the recorder held that the words in question, construed conjunctively, mean what they say. In other words, the only circumstance in which the appellants were to be entitled to a quantum meruit was if the contract did not proceed and was not finalised. The contract did proceed. In my judgment, the recorder was not only entitled to conclude as he did, that the contract was one for a lump sum under IFC 84 conditions, but was also correct to reject the argument of the appellants that the proviso, if I can put it that way, as to quantum meruit applied so as to entitle them to a quantum meruit under the terms of the letter of 7 July 1998. Accordingly, I would dismiss the appeal.

BROOKE LJ.

[10] I agree, and wish to add a few words about certain matters of procedure. The court experienced great difficulties in the conduct of this appeal. On the one hand, we received far more documents than we needed for the disposition of the comparatively simple issues raised on the appeal. On the other hand, we did not receive most of the documents that we really needed until last night or this morning. We made clear to the parties our displeasure at what happened and I do not wish to revisit those matters now.

a [11] They are, however, symptomatic of a more general malaise. An increasing number of those who practise in this court appear to be unfamiliar with the requirements of the practice direction to CPR Pt 52 and to be unaware of the reasons for those requirements. In addition, the Practice Direction sometimes imposes unreasonable requirements as to the time for lodging documents, or is silent as to time. This seems to contribute to a prevailing culture b which regards certain aspects of the practice direction as a dead letter.

[12] The Court of Appeal has often been described as the engine room of the judicial system of England and Wales. I believe that the massive volume of business which the judges of the court have to undertake against pressures of time is fairly well known. The present situation in which aspects of the practice direction are regarded as a dead letter is adding significantly to the burden on the c members of the court.

[13] It is likely in due course that the Master of the Rolls will re-state the position more formally in a practice direction. For the time being, there is an evident need to draw attention to four aspects of the practice direction where d ignorance or deliberate disobedience are making things unnecessarily difficult for the court and unnecessarily expensive for the lay parties who have to pay their lawyers' bills. I have the authority of Lord Phillips of Worth Matravers MR to say what follows, and I hope that it will be given widespread publicity among practitioners, so serious is the present position.

(I) THE BUNDLE OF DOCUMENTS IN SUPPORT OF THE APPEAL (PARAS 5.6-5.8)

e [14] First, the bundle that is originally lodged with an appellant's notice must comply with paras 5.6, 5.7 and 5.8 of the practice direction. Those who are responsible in solicitors' firms for litigation in the Court of Appeal must make it their business to ensure that those members of their staff who are concerned with the preparation of papers for the Court of Appeal are familiar with the f requirements of all three of these paragraphs. The practice direction has been drafted so as to be appropriate for appeals at all levels of the judicial system. It is designed for simple appeals from a district judge in the county court to a circuit judge in the county court, as well as heavy appeals, such as the one we are at present entertaining from a judge of the Technology and Construction Court to the Court of Appeal.

g [15] Paragraph 5.6 sets out a checklist of the documents that need to be filed with the appellant's notice which will in due course go before the judge who considers whether or not to grant permission to appeal. There is a list of the documents required for the bundle at 5.6(7), and para 5.7 makes it clear that if documents are not yet ready, the court should be told why they are not ready. It h is para 5.8 which is so widely ignored. It reads:

'Where bundles comprise more than 150 pages excluding transcripts of judgment and other transcripts of the proceedings in the lower court only those documents which the court may reasonably be expected to pre-read should be included. A full set of documents should then be brought to the j hearing for reference.'

In other words, it was quite unnecessary, and also wrong, for the appellants' then solicitors to file bundles containing 1,130 pages for the permission application. They should have had a single set of relevant papers in court when the matter came before Peter Gibson LJ on the permission application in case there was a need to have reference to any of them, but all that those solicitors were required

to lodge, and all that they were permitted to lodge, was a bundle of the documents which the court might reasonably be expected to pre-read. This will provide the judge who is hearing and considering an application the opportunity to study the most important documents before the application is heard or considered. If he needs more, he can always ask for them. I mention this because it was said that it was necessary to have the 1,130 documents copied to all three members of the Court of Appeal at the hearing of the full appeal for this hearing because there were issues at the permission stage which were not then allowed to be argued at the substantive appeal. As I have said, if those who were responsible for the preparation of documents originally had studied para 5.8, they would have realised that all this copying of documents was wholly unnecessary, in addition to not being permitted by the practice direction.

(II) CORE BUNDLES (PARA 15.11A)

[16] I now move to the bundles to be prepared for the substantive appeal. In this respect para 15.11A is required reading for all who practise in this court. It reads:

‘Where the total number of pages to be put before the court in a full appeal exceeds 750 pages, excluding transcripts and copied authorities, the parties must file and serve a core bundle of essential documents not exceeding 150 pages.’

This provision was added by amendment to the practice direction, but it is so critically important to the work of the court that it must be scrupulously observed. When judges are pre-reading, they do not wish or need to have 2,000 pieces of paper by their side. They need to have the central documents which they must be familiar with by the time the appeal starts. This is the purpose of the requirement for an agreed core bundle.

[17] Unhappily, the practice direction does not specify the time by which the parties must file and serve the core bundle. In order to achieve its purpose the core bundle must at the very latest be filed seven days before the hearing starts. Ideally, it should be prepared when the bundle of authorities are prepared for the court.

[18] It may be that this time limit will be reconsidered when the practice direction is reconsidered. For the time being, it should be regarded as an absolutely mandatory obligation that the core bundle is served, following co-operation between the parties, a week before the hearing starts. In the present case all that the members of the court received were 1,128 pages from one side and 310 from the other. When we did our pre-reading last weekend we had to delve into those pages to try and identify what was relevant to the narrow issue to be heard on this appeal. This simply will not do.

(III) BUNDLES OF AUTHORITIES (PARA 15.11)

[19] Thirdly, bundles of authorities. Paragraph 15.11 reads:

‘Once the parties have been notified of the date fixed for hearing the appellant’s advocate shall file, after consulting his opponent, for the purpose of pre-reading by the court, one bundle containing photocopies of the principal authorities upon which each side will rely at the hearing, with the relevant passages marked. There will in general be no need to include authorities for propositions not in dispute. This bundle should be made available 28 days before the hearing, unless the period of notice of the

a hearing is less than 28 days in which case the bundle should be filed immediately. Such bundles should not normally contain more than 10 authorities. If any party intends, during the hearing to refer to other authorities these may be included in a second agreed bundle to be filed by the parties at the hearing. Alternatively, and in place of the second bundle only, b a list of authorities and text may be delivered to the office of the Head Usher of the Court of Appeal no later than 5.30 pm on the last working day before the hearing is to commence.'

[20] On 7 October 2003, in *Haggis v DPP* [2003] EWHC 2481 (Admin), [2004] 2 All ER 382n, after quoting the provisions of the practice direction, which apply equally to appeals to the Divisional Court, I said:

c '[32] The judges of the Court of Appeal and the Heads of Division have recently considered the language of this practice direction. They take the view that what is really important is that this agreed bundle should be filed not less than seven days before the hearing. This appears to be a more reasonable time. If an agreed bundle with each side's authorities is not filed d at least seven days before the hearing, again the judges of this court and in the Court of Appeal are likely to show very much less forbearance than they have in the past.

e [33] I draw particular attention to the need to mark in the authorities the passages on which the advocates wish to rely. It is also very helpful if the page number can be mentioned in the skeleton argument, although that is not specified in the practice direction. The reason for this is that the judges wish to be able to pre-read whenever they reasonably can. If they are simply referred to a case which may have 20 or 25 pages in it, it is unlikely that they are going to be enthusiastic about reading all 25 pages in order to run to earth, if they spot it, the principle on which the advocate seeks to rely.'

f [21] This judgment has received no publicity whatsoever. What has happened in connection with this appeal is exactly what I was talking about in the Divisional Court a month ago. I now have the authority of Lord Phillips of Worth Matravers MR to make it clear that this new practice will apply in the Court of Appeal as well, subject to the proviso that very strict attention need not be paid g to the duty to mark the authorities in the margin provided, and provided only, that the agreed bundle of authorities is filed before the seven-day deadline and each party has by that time identified in the skeleton arguments they have filed the precise passages in the judgments the court should read.

h [22] We are happy to substitute seven days for the 28 days in the practice direction, but by seven days before the hearing we must have an agreed bundle of authorities, prepared in full compliance with the *Practice Note* (citation of cases: restrictions and rules) [2001] 2 All ER 510, [2001] 1 WLR 1001, so that when judges of the court do their pre-reading they have the authorities to which they can refer. If the time is brought down to seven days—in an appropriate case the upper limit of ten authorities may be disregarded—there should be no need for the straggling j in of authorities over the course of the week before the hearing, or the night before the hearing, that is so familiar a feature of practice today.

(IV) SKELETON ARGUMENTS (PARAS 5.9 AND 7.6–7.7)

[23] Point 4 relates to skeleton arguments. The practice direction provides (in para 5.9) for a skeleton argument to be lodged with the appellant's notice or shortly thereafter, and (in paras 7.6–7.7) for the respondent's skeleton argument

to be lodged at an appropriate time after the appellant's skeleton has been served. It is essential that every advocate who drafts any skeleton argument for the Court of Appeal observes the mandatory requirements of paras 8.1 and 8.2 of the *Practice Note (citation of cases: restrictions and rules)* [2001] 2 All ER 510, [2001] 1 WLR 1001, and has the provision of para 8.4 of that Practice Note well in mind. The purpose of these requirements is to focus attention on points actually in issue in the appeal at an early stage, and to facilitate the subsequent preparation of bundles of authorities. a
b

[24] Nothing is said in the practice direction about late skeletons. We are familiar with the need for advocates, close to the hearing, particularly if there has been a change in representation, or if there have been recent decisions in the House of Lords or the Court of Appeal that are relevant, to file a supplemental skeleton. Until now the judges of the court have been fairly relaxed about the time at which they are filed. If the seven-day rule is now widely recognised as the time at which papers must be available for the judges of this court will be relaxed or even ready to read skeleton arguments which are lodged less than seven days before the hearing. In other words, if a case is listed for the Court of Appeal on a Wednesday of one week, it is on the Wednesday of the previous week (at the very latest) that the parties should file the necessary documents, and all of them, with the court. If this is done, then a great many of the present difficulties which are making the conduct of litigation in this court quite unnecessarily burdensome for the court and expensive for the litigants will be at an end. c
d

[25] So far as the substantive appeal is concerned, I agree with the judgment given by Latham LJ. e

DAME ELIZABETH BUTLER-SLOSS P.

[26] I agree with both judgments. Consequently the appeal is dismissed.

Appeal dismissed with costs; payment of £10,000 to be paid on account within 14 days; costs to be subject to detailed assessment.

James Wilson Barrister (NZ).

Note

Crest Nicholson Residential (South) Ltd v
McAllister

[2004] EWCA Civ 410

COURT OF APPEAL, CIVIL DIVISION

AULD, CHADWICK AND ARDEN LJJ

27, 28 OCTOBER 2003, 1 APRIL 2004

Restrictive covenant affecting land – Construction of covenant – Use as a dwelling house – Covenant not to use burdened property ‘for any purpose other than those of or in connection with a private dwellinghouse’ (first covenant) – Covenant not to erect dwelling house or other building on land conveyed unless plans and drawings approved by vendor company (second covenant) – Whether first covenant preventing erection of more than one dwelling house on plot – Whether dissolution of vendor company discharging second covenant or rendering it absolute in effect.

The Court of Appeal allowed the appeal of the claimant and made no order on the cross-appeal of the defendant from the order of Neuberger J on 17 December 2002 ([2002] EWHC 2443 (Ch), [2003] 1 All ER 46) in proceedings in which the court was asked to determine the effect of certain restrictive covenants imposed on parcels of land acquired, or to be acquired by the claimant. At the hearing the claimant had applied to withdraw the concession made in the High Court that the covenants had become, or remained, annexed to land conveyed to the defendant’s predecessor in title and owned by her. The court concluded that the benefit of the covenants was not annexed to the land owned by the defendant and found it unnecessary to decide either of the questions which the judge had considered. In the course of giving judgment, Chadwick LJ (with whom Arden and Auld LJJ agreed) said, after referring to *Roake v Chadha* [1983] 3 All ER 503 at 508, [1984] 1 WLR 40 at 46 per Judge Paul Baker QC:

[41] I respectfully agree, first, that it is impossible to identify any reason of policy why a covenantor should not, by express words, be entitled to limit the scope of the obligation which he is undertaking; nor why a covenantee should not be able to accept a covenant for his own benefit on terms that the benefit does not pass automatically to all those to whom he sells on parts of his retained land. As Brightman LJ pointed out [in *Federated Homes Ltd v Mill Lodge Properties* [1980] 1 All ER 371 at 381, [1980] 1 WLR 594 at 606] in the passage cited by Judge Paul Baker QC, a developer who is selling off land in lots might well want to retain the benefit of a building restriction under his own control. Where, as in *Roake v Chadha* [1983] 3 All ER 503, [1984] 1 WLR 40 and the present case, development land is sold off in plots without imposing a building scheme, it seems to me very likely that the developer will wish to retain exclusive power to give or withhold consent to a modification or relaxation of a restriction on building which he imposes on each purchaser; unfettered by the need to obtain the consent of every subsequent purchaser to whom (after imposing the covenant) he has sold off other plots on the development land. I can see no reason why, if original

covenantor and covenantee make clear their mutual intention in that respect, the legislature should wish to prevent effect being given to that intention. a

[42] Second, it is important to keep in mind that, for the purposes of its application to restrictive covenants—which is the context in which this question arises where neither of the parties to the dispute were, themselves, party to the instrument imposing the covenant or express assignees of the benefit of the covenant—s 78 of the Law of Property Act 1925 defines ‘successors in title’ as the owners and occupiers for the time being of the land of the covenantee intended to be benefited. In a case where the parties to the instrument make clear their intention that land retained by the covenantee at the time of the conveyance effected by the transfer is to have the benefit of the covenant only for so long as it continues to be in the ownership of the original covenantee, and not after it has been sold on by the original covenantee—unless the benefit of the covenant is expressly assigned to the new owner—the land of the covenantee intended to be benefited is identified by the instrument as (i) so much of the retained land as from time to time has not been sold off by the original covenantee and (ii) so much of the retained land as has been sold off with the benefit of an express assignment, but not as including (iii) so much of the land as has been sold off without the benefit of an express assignment. I agree with the judge in *Roake v Chadha* that, in such a case, it is possible to give full effect to the statute and to the terms of the covenant. b c d

[43] This approach to s 78 of the 1925 Act provides, as it seems to me, the answer to the question why, if the legislature did not intend to distinguish between the effect of s 78 (mandatory) and the effect of s 79 (subject to contrary intention), it did not include the words ‘unless a contrary intention is expressed’ in the first of those sections. The answer is that it did not need to. The qualification ‘subject to contrary intention’ is implicit in the definition of ‘successors in title’ which appears in s 78(1); that is the effect of the words ‘the land of the covenantee intended to be benefited’. If the terms in which the covenant is imposed show—as they did in *Marquess of Zetland v Driver* [1938] 2 All ER 158, [1939] Ch 1 and in *Roake v Chadha*—that the land of the covenantee intended to be benefited does not include land which may subsequently be sold off by the original covenantee in circumstances where (at the time of that subsequent sale) there is no express assignment of the benefit of the covenant, then the owners and occupiers of the land sold off in those circumstances are not ‘owners and occupiers for the time being of the land ... intended to be benefited’; and so are not ‘successors in title’ of the original covenantee for the purposes of s 78(1) in its application to covenants restrictive of the use of land. e f g h

[44] By contrast, the definition of ‘successors in title’ for the purposes of s 79(1) appears in sub-s (2) of that section: ‘the owners and occupiers for the time being of such land.’ In that context ‘such land’ means ‘any land of the covenantor or capable of being bound by him [to which the covenant relates].’ The counterpart in s 79 of ‘land of the covenantee intended to be benefited’ (in s 78(1)) is ‘such land’. ‘Such land’ in that context means the land referred to in s 79(1); that is to say ‘any land of a covenantor or capable of being bound by him’. But s 79(1) imposes two qualifications; (i) the land must be land to which the covenant relates and (ii) there must be no expression of contrary intention. The section could, perhaps, have described j

a the land as 'land of the covenantor (or capable of being bound by him) intended to be burdened'. The effect would have been the same. If the parties did not intend that land, burdened while in the ownership of the covenantor, should continue to be subject to the burden in the hands of his successors (or some of his successors), they could say so. On a true analysis there is no difference in treatment in the two sections. There is a difference in the drafting technique used to achieve the same substantive result.

b Section 78(1) of the 1925 Act re-enacted s 58 of the Conveyancing and Law of Property Act 1881 as applied by s 96(3) of the Law of Property Act 1922 and amended by s 3 of, and para 11 in Sch 3 to, the Law of Property (Amendment) Act 1924. Section 79 was a new provision first introduced in the 1925 Act.'

Kate O'Hanlon Barrister.

Practice Note (Administrative Court)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

COLLINS J

17 MAY 2004

Practice – Administrative Court – Application for permission for judicial review – Costs – CPR 44.13.

COLLINS J gave the following direction at the sitting of the court.

CPR 44.13 provides that where the court makes an order which does not mention costs the general rule is that no party is entitled to costs in relation to that order.

It is necessary in judicial review claims to obtain permission and it has sometimes been suggested that a successful claimant cannot recover the costs of obtaining permission unless the court has made a specific order. It has never been the practice in the Administrative Court or its predecessor, the Crown Office, to make any costs order in granting permission because it was assumed that costs would be costs in the case.

To avoid any arguments, a grant of permission to pursue a claim for judicial review, whether made on papers or after oral argument, will be deemed to contain an order that costs be costs in the case.

Any different order made by a judge must be reflected in the court order granting permission.

Dilys Tausz Barrister.

Campbell v MGN Ltd

[2004] UKHL 22

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD,
BARONESS HALE OF RICHMOND AND LORD CARSWELL

18, 19 FEBRUARY, 6 MAY 2004

Confidential information – Breach of confidence – Disclosure by media – Public interest in publication – Right to freedom of expression – Right to respect for private and family life – Newspaper publishing fact and details of celebrity’s treatment for drug addiction – Whether newspaper entitled to publish details of treatment – Whether information private – Whether disclosure of information in public interest – Human Rights Act 1998, Sch 1, Pt I, arts 8, 10.

The defendant newspaper published a number of articles about the claimant, a celebrated fashion model. The articles revealed the following matters: (1) that the claimant was a drug addict; (2) that she was receiving treatment for her addiction; (3) that she was attending Narcotics Anonymous (NA); (4) details of that treatment; and (5) a visual portrayal by means of photographs, covertly taken, of the claimant when leaving the meetings. The claimant accepted that the newspaper had been entitled, in the public interest, to disclose the information that she was a drug addict and was receiving treatment for her addiction, as she had previously falsely and publicly stated that unlike many others in the fashion business she was not a drug addict. However, she brought proceedings against the publishers for breach of confidence and compensation under the Data Protection Act 1998 with respect to the additional information and photographs published relating to her attendance at NA. The judge upheld the claim. The Court of Appeal allowed the newspaper’s appeal and discharged the judge’s order. The claimant appealed to the House of Lords. The primary issue on the appeal was the way in which a balance was to be struck between the right to respect for private and family life and the right to freedom of expression, in accordance with arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Held – (Lord Nicholls and Lord Hoffmann dissenting) The appeal would be allowed for the following reasons: (1) The underlying question in all cases where it was alleged there had been a breach of the duty of confidence was whether the information that was disclosed was private and not public. In the instant case, no distinction was to be drawn between the details of the claimant’s therapy from NA and details of a medical condition or its treatment. Those details were private information which imported a duty of confidence. It was well known that persons who were addicted to the taking of illegal drugs or to alcohol could benefit from meetings at which they discussed and faced up to their addiction. The private nature of those meetings encouraged addicts to attend them in the belief that they could do so anonymously. The assurance of privacy was an essential part of the exercise. The therapy was at risk of being damaged if the duty of confidence which the participants owed to each other was breached by making

details of the therapy, such as where, when and how often it was being undertaken, public. Those details were obviously private. Further, in order to assess whether disclosure would be objectionable, one had to put oneself into the shoes of a reasonable person who was in need of that treatment. The fact in the present case that no objection could be taken to disclosure of the first two elements in the article did not mean that they had to be left out of account in a consideration as to whether disclosure of the other elements was objectionable. The article had to be read as a whole along with the photographs to give a proper perspective to each element. The context was that of a drug addict who was receiving treatment. It was her sensibilities that needed to be taken into account. Critical to that exercise was an assessment of whether disclosure of the details would have been liable to disrupt her treatment. A drug addict who was trying to benefit from meetings to discuss her problem anonymously with other addicts would be expected to find the disclosure of those details distressing and highly offensive (see [92], [95], [97], [98], [144]–[147], [165], below); *A v B (a company)* [2002] 2 All ER 545 applied.

(2) The effect of arts 8 and 10 of the convention was that the right to privacy which lay at the heart of an action for breach of confidence had to be balanced against the right of the media to impart information to the public, and the right of the media to impart information to the public had to be balanced in its turn against the respect that had to be given to private life. Neither art 8 nor art 10 had any pre-eminence over the other in the conduct of that exercise. They were neither absolute nor in any hierarchical order, since they were of equal value in a democratic society. The tests which the court had to apply were whether publication of the material pursued a legitimate aim and whether the benefits that would be achieved by its publication were proportionate to the harm that might be done by the interference with the right to privacy. The restrictions imposed on an art 10 right had to be rational, fair and not arbitrary, and they had to impair the right no more than was necessary. In the instant case, there were no political or democratic values at stake, nor was any pressing social need identified. Further, the potential for disclosure of the information to cause harm was an important factor to be taken into account. In all the circumstances, there had been an infringement of the claimant's right to privacy that could not be justified and publication of the third, fourth and fifth elements of the articles was an invasion of that right for which she was entitled to damages. Accordingly, the orders of the trial judge would be restored (see [105], [113], [115], [117]–[119], [124], [125], [138], [167], [170], [171], below).

Decision of the Court of Appeal [2003] 1 All ER 224 reversed.

Notes

For the equitable jurisdiction in breach of confidence, the essential features of confidentiality, and the relation to freedom of expression, see 8(1) *Halsbury's Laws* (4th edn) (2003 reissue) paras 406, 410 and 408.

For the right to respect for private and family life, for what constitutes respect, for the right to freedom of expression and for what constitutes freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 150, 154, 158, 159.

For the Human Rights Act 1998, Sch 1, Pt I, arts 8, 10, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

Cases referred to in opinions

- a** *A v B (a company)* [2002] EWCA Civ 337, [2002] 2 All ER 545, [2003] QB 195, [2002] 3 WLR 542.
A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.
Albert (Prince) v Strange (1849) 2 De G & Sm 652, LC.
- b** *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591, Can SC.
Australian Broadcasting Corp v Lenah Game Meats Pty Ltd (2001) 185 ALR 1, Aust HC.
Bladet Tromsø v Norway (1999) 6 BHRC 599, ECt HR.
Coco v AN Clark (Engineers) Ltd [1969] RPC 41.
Douglas v Hello! Ltd [2001] 2 All ER 289, [2001] QB 967, [2001] 2 WLR 992, CA.
- c** *Dudgeon v UK (No 2)* (1981) 4 EHRR 149, [1981] ECHR 7525/76, ECt HR.
Fressoz and Roire v France (1999) 5 BHRC 654, ECt HR.
Goodwin v UK (1996) 1 BHRC 81, ECt HR.
Hellewell v Chief Constable of Derbyshire [1995] 4 All ER 473, [1995] 1 WLR 804.
Hosking v Runting [2003] 3 NZLR 385, NZ HC; *affd* (25 March 2004, unreported), NZ CA.
- d** *Jersild v Denmark* (1995) 19 EHRR 1, [1994] ECHR 15890/89, ECt HR.
Observer v UK (1992) 14 EHRR 153, [1991] ECHR 13585/88, ECt HR.
P v D [2000] 2 NZLR 591, NZ HC.
Peck v UK (2003) 13 BHRC 669, ECt HR.
- e** *PG v UK* [2001] ECHR 44787/98, ECt HR.
R v Broadcasting Standards Commission, ex p BBC (Liberty intervening) [2000] 3 All ER 989, [2001] QB 885, [2000] 3 WLR 1327, CA.
R v Dyment [1988] 2 SCR 417, Can SC.
Reynolds v Times Newspapers Ltd [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, HL.
- f** *S (a child) (identification: restriction on publication), Re* [2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43, [2003] 3 WLR 1425.
Spencer (Earl) v UK (1998) 25 EHRR CD 105, E Com HR.
Tammer v Estonia (2001) 10 BHRC 543, ECt HR.
Venables v News Group Newspapers Ltd [2001] 1 All ER 908, [2001] Fam 430, [2001] 2 WLR 1038.
- g** *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137.
Z v Finland (1999) 45 BMLR 107, ECt HR.
- h** **Cases referred to in list of authorities**
Adam v Ward [1917] AC 309, [1916–17] All ER Rep 157, HL.
Argyll (Duchess) v Duke of Argyll [1965] 1 All ER 611, [1967] Ch 302, [1965] 2 WLR 790.
Ashburton (Lord) v Pape [1913] 2 Ch 469, [1911–13] All ER Rep 708, CA.
- j** *Ashdown v Telegraph Group Ltd* [2001] EWCA Civ 1142, [2001] 4 All ER 666, [2002] Ch 149, [2001] 3 WLR 1368.
Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577.
Barrymore v News Group Newspapers Ltd [1997] FSR 600.
Bensaid v UK (2001) 11 BHRC 297, ECt HR.

- Bichler v Union Bank and Trust Co of Grand Rapids* (1984) 745 F 2d 1006, US Ct of Apps. **a**
- Boardman v Phipps* [1966] 3 All ER 721, [1967] 2 AC 46, [1966] 3 WLR 1009, HL.
- Botta v Italy* (1998) 4 BHRC 81, ECt HR.
- Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415, NZ HC.
- Cassell & Co Ltd v Broome* [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL. **b**
- Craxi (No 2) v Italy* [2003] ECHR 25337/94, ECt HR.
- Cream Holdings Ltd v Banerjee* [2003] EWCA Civ 103, [2003] 2 All ER 318, [2003] Ch 650, [2003] 3 WLR 999.
- Creation Records Ltd v News Group Newspapers Ltd* [1997] EMLR 444.
- Derbyshire CC v Times Newspapers Ltd* [1993] 1 All ER 1011, [1993] AC 534, [1993] 2 WLR 449, HL. **c**
- Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700, [2000] 1 WLR 2416, HL.
- Dietrich v R* (1992) 177 CLR 292, Aust HC.
- Douglas v Hello! Ltd (No 3)* [2003] EWHC 786 (Ch), [2003] 3 All ER 996.
- English & American Insurance Co Ltd v Herbert Smith & Co* [1988] FSR 232. **d**
- Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408, [1984] 1 WLR 892, CA.
- Grobbelaar v News Group Newspapers Ltd* [2002] UKHL 40, [2002] 4 All ER 732, [2002] 1 WLR 3024.
- Hyde Park Residence Ltd v Yelland* [2001] Ch 143, [2000] 3 WLR 215, CA.
- Initial Services Ltd v Putterill* [1967] 3 All ER 145, [1968] 1 QB 396, [1967] 3 WLR 1032, CA. **e**
- Interbrew Ltd v Financial Times Ltd* [2002] EMLR 446.
- Jansen van Vuuren v Kruger* [1993] (4) SA 842, SA SC.
- Kaye v Robertson* [1991] FSR 62, CA.
- Khashoggi v Smith* [1980] CA Transcript 58. **f**
- L v D* [2003] EWCA Civ 1169, [2003] All ER (D) 558 (Jul).
- Lion Laboratories Ltd v Evans* [1984] 2 All ER 417, [1985] QB 526, [1984] 3 WLR 539, CA.
- London Regional Transport v Mayor of London* [2001] EWCA Civ 1491, [2003] EMLR 4. **g**
- Malone v Comr of Police of the Metropolis (No 2)* [1979] 2 All ER 620, [1979] Ch 344, [1979] 2 WLR 700.
- Martin v UK* (2003) 37 EHRR CD 91, E Com HR.
- Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1984) 56 ALR 193, Aust HC.
- Morris v Beardmore* [1980] 2 All ER 753, [1981] AC 446, [1980] 3 WLR 283, HL. **h**
- Murray v Batey* [1992] CA Transcript 819.
- Pollard v Photographic Co* [1888] 40 Ch D 345.
- R (on the application of Robertson) v Wakefield Metropolitan DC* [2001] EWHC 915 (Admin), [2002] LGR 286, [2002] QB 1052, [2002] 2 WLR 889.
- R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA. **j**
- R v Chief Constable of the North Wales Police, ex p AB* [1997] 4 All ER 691, [1999] QB 396, [1997] 3 WLR 724, DC; *aff'd* [1998] 3 All ER 310, sub nom *R v Chief Constable of the North Wales Police, ex p Thorpe* [1999] QB 396, [1998] 3 WLR 57, CA.
- R v Dept of Health, ex p Source Informatics Ltd* [2000] 1 All ER 786, [2001] QB 424, [2000] 2 WLR 940, CA.

- a** *R v DPP, ex p Kebilene, R v DPP, ex p Rechachi* [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.
- R v Hines* [1997] 3 NZLR 529, NZ CA.
- R v Loveridge* [2001] EWCA Crim 973, [2001] 2 Cr App R 591.
- Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) [1963] 3 All ER 413n, CA.
- b** *Schering Chemicals Ltd v Falkman Ltd* [1981] 2 All ER 321, [1982] QB 1, [1981] 2 WLR 848, CA.
- Science Research Council v Nassé, BL Cars Ltd (formerly Leyland Cars) v Vyas* [1979] 3 All ER 673, [1980] AC 1028, [1979] 3 WLR 762, HL.
- c** *Shelley Films Ltd v Rex Features Ltd* [1994] EMLR 134.
- Shulman v Group W Productions Inc* (1998) 18 Cal 4th 200, Cal SC.
- Stephens v Avery* [1988] 2 All ER 477, [1988] Ch 449, [1988] 2 WLR 1280.
- Sunday Times v UK* (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.
- Theakston v MGN Ltd* [2002] EWHC 137 (QB), [2002] EMLR 398.
- d** *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 All ER 377, [2002] 2 AC 164, [2002] 2 WLR 802.
- Union Pacific Rly Co v Botsford* (1891) 141 US 250, US SC.
- Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479, Aust HC.
- e** *W v Egdel* [1990] 1 All ER 835, [1990] 1 Ch 359, [1990] 2 WLR 471, CA.
- Watts v Times Newspapers Ltd (Schilling & Lom (a firm), third party)* [1996] 1 All ER 152, [1997] QB 650, [1996] 2 WLR 427, CA.
- Winer v UK* (1986) 48 DR 154, E Com HR.
- Woodward v Hutchins* [1977] 2 All ER 751, [1977] 1 WLR 760, CA.
- f** *X (a woman formerly known as Mary Bell) v O'Brien* [2003] EWHC 1101 (QB), [2003] 2 FCR 686.
- X v Netherlands* (1985) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.
- X v Y* [1988] 2 All ER 648.

g Appeal

- The claimant, Naomi Campbell appealed, with permission of the Appeal Committee of the House of Lords given on 25 February 2003, from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR, Chadwick and Keene LJ) on 14 October 2002 ([2002] EWCA Civ 1373, [2003] 1 All ER 224) whereby it allowed an appeal by the defendant, MGN Ltd, from the judgment on 27 March 2002 ([2002] EWHC 499 (QB), [2002] IP & T 612) and subsequent order of Morland J, upholding her claim for breach of confidence and breach of the Data Protection Act 1998. The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Andrew Caldecott QC, Antony White QC and Catrin Evans (instructed by *Schillings*) for Miss Campbell.

Desmond Browne QC and Richard Spearman QC (instructed by *Davenport Lyons*) for the newspaper.

Their Lordships took time for consideration.

6 May 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, Naomi Campbell is a celebrated fashion model. Hers is a household name, nationally and internationally. Her face is instantly recognisable. Whatever she does and wherever she goes is news.

[2] On 1 February 2001 the Daily Mirror (the Mirror) newspaper carried as its first story on its front page a prominent article headed: 'Naomi: I am a drug addict.' The article was supported on one side by a picture of Miss Campbell as a glamorous model, on the other side by a slightly indistinct picture of a smiling, relaxed Miss Campbell, dressed in baseball cap and jeans, over the caption: 'THERAPY: Naomi outside meeting.' The article read:

'SUPERMODEL Naomi Campbell is attending Narcotics Anonymous meetings in a courageous bid to beat her addiction to drink and drugs. The 30-year-old has been a regular at counselling sessions for three months, often attending twice a day. Dressed in jeans and baseball cap, she arrived at one of NA's lunchtime meetings this week. Hours later at a different venue she made a low-key entrance to a women-only gathering of recovered addicts. Despite her £14million fortune Naomi is treated as just another addict trying to put her life back together. A source close to her said last night: "She wants to clean up her life for good. She went into modelling when she was very young and it is easy to be led astray. Drink and drugs are unfortunately widely available in the fashion world. But Naomi has realised she has a problem and has bravely vowed to do something about it. Everyone wishes her well." Her spokeswoman at Elite Models declined to comment.'

[3] The story continued inside, with a longer article spread across two pages. The inside article was headed: 'Naomi's finally trying to beat the demons that have been haunting her.' The opening paragraphs read:

'She's just another face in the crowd, but the gleaming smile is unmistakably Naomi Campbell's.

In our picture, the catwalk queen emerges from a gruelling two-hour session at Narcotics Anonymous and gives a friend a loving hug.

This is one of the world's most beautiful women facing up to her drink and drugs addiction—and clearly winning.

The London-born supermodel has been going to NA meetings for the past three months as she tries to change her wild lifestyle.

Such is her commitment to conquering her problem that she regularly goes twice a day to group counselling ...

To the rest of the group she is simply Naomi, the addict. Not the supermodel. Not the style icon.'

[4] The article made mention of Miss Campbell's efforts to rehabilitate herself, and that one of her friends said she was still fragile but 'getting healthy'. The article gave a general description of Narcotics Anonymous (NA) therapy, and referred to some of Miss Campbell's recent publicised activities. These included an occasion when Miss Campbell was rushed to hospital and had her stomach

a pumped. She claimed it was an allergic reaction to antibiotics and that she had never had a drug problem: but 'those closest to her knew the truth'.

[5] In the middle of the double-page spread, between several innocuous pictures of Miss Campbell, was a dominating picture over the caption: 'HUGS: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week.' The picture showed her in the street on the doorstep of a building as
b the central figure in a small group. She was being embraced by two people whose faces had been pixelated. Standing on the pavement was a board advertising a named café. The article did not name the venue of the meeting, but anyone who knew the district well would be able to identify the place shown in the photograph.

[6] The general tone of the articles was sympathetic and supportive with, perhaps, the barest undertone of smugness that Miss Campbell had been caught
c out by the Mirror. The source of the newspaper's information was either an associate of Miss Campbell or a fellow addict attending meetings of NA. The photographs of her attending a meeting were taken by a freelance photographer specifically employed by the newspaper to do the job. He took the photographs
d covertly, while concealed some distance away inside a parked car.

[7] In certain respects the articles were inaccurate. Miss Campbell had been attending NA meetings, in this country and abroad, for two years, not three months. The frequency of her attendance at meetings was greatly exaggerated. She did not regularly attend meetings twice a day. The street photographs
e showed her leaving a meeting, not arriving, contrary to the caption in the newspaper article.

THE PROCEEDINGS AND THE FURTHER ARTICLES

[8] On the same day as the articles were published Miss Campbell commenced proceedings against MGN Ltd, the publisher of the Mirror. The
f newspaper's response was to publish further articles, this time highly critical of Miss Campbell. On 5 February 2001 the newspaper published an article headed, in large letters, 'PATHETIC'. Below was a photograph of Miss Campbell over the caption: 'HELP: Naomi leaves Narcotics Anonymous meeting last week after receiving therapy in her battle against illegal drugs.' This photograph was similar
g to the street scene picture published on 1 February. The text of the article was headed: 'After years of self-publicity and illegal drug abuse, Naomi Campbell whinges about privacy.' The article mentioned that 'the Mirror revealed last week how she is attending daily meetings of Narcotics Anonymous'. Elsewhere in the same edition an editorial article, with the heading 'No hiding Naomi', concluded with the words:

h 'If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a showbusiness life, she must accept what comes with it.'

[9] Two days later, on 7 February, the Mirror returned to the attack with an
j offensive and disparaging article. Under the heading 'Fame on you, Ms Campbell', an article referred to her plans 'to launch a campaign for better rights for celebrities or "artists" as she calls them'. The article included the sentence: 'As a campaigner, Naomi's about as effective as a chocolate soldier.'

[10] In the proceedings Miss Campbell claimed damages for breach of confidence and compensation under the Data Protection Act 1998. The article of

7 February formed the main basis of a claim for aggravated damages. Morland J upheld Miss Campbell's claim ([2002] EWHC 499 (QB), [2002] IP & T 612). He made her a modest award of £2,500 plus £1,000 aggravated damages in respect of both claims. The newspaper appealed. The Court of Appeal, comprising Lord Phillips of Worth Matravers MR, Chadwick and Keene LJ, allowed the appeal and discharged the judge's order ([2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633). Miss Campbell has now appealed to your Lordships' House.

BREACH OF CONFIDENCE: MISUSE OF PRIVATE INFORMATION

[11] In this country, unlike the United States of America, there is no overarching, all-embracing cause of action for 'invasion of privacy': see *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137. But protection of various aspects of privacy is a fast developing area of the law, here and in some other common law jurisdictions. The recent decision of the Court of Appeal of New Zealand in *Hosking v Runting* (25 March 2004, unreported) is an example of this. In this country development of the law has been spurred by enactment of the Human Rights Act 1998.

[12] The present case concerns one aspect of invasion of privacy: wrongful disclosure of private information. The case involves the familiar competition between freedom of expression and respect for an individual's privacy. Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well-being and development of an individual. And restraints imposed on government to pry into the lives of the citizen go to the essence of a democratic state: see *La Forest J in R v Dyment* [1988] 2 SCR 417 at 427–428.

[13] The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to a breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances 'importing an obligation of confidence' even though no contract of non-disclosure existed: see the classic exposition by Megarry J in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 at 47–48. The confidence referred to in the phrase 'breach of confidence' was the confidence arising out of a confidential relationship.

[14] This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281. Now the law imposes a 'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase 'duty of confidence' and the description of the information as 'confidential' is not altogether comfortable.

a Information about an individual's private life would not, in ordinary usage, be called 'confidential'. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as misuse of private information.

b [15] In the case of individuals this tort, however labelled, affords respect for one aspect of an individual's privacy. That is the value underlying this cause of action. An individual's privacy can be invaded in ways not involving publication of information. Strip searches are an example. The extent to which the common law as developed thus far in this country protects other forms of invasion of privacy is not a matter arising in the present case. It does not arise because, although pleaded more widely, Miss Campbell's common law claim was throughout presented in court exclusively on the basis of breach of confidence, c that is, the wrongful *publication* by the Mirror of private information.

d [16] The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), and the Strasbourg jurisprudence, have undoubtedly had a significant influence in this area of the common law for some years. The provisions of art 8, e concerning respect for private and family life, and art 10, concerning freedom of expression, and the interaction of these two articles, have prompted the courts of this country to identify more clearly the different factors involved in cases where one or other of these two interests is present. Where both are present the courts are increasingly explicit in evaluating the competing considerations involved. When identifying and evaluating these factors the courts, including your Lordships' House, have tested the common law against the values encapsulated in these two articles. The development of the common law has been in harmony with these articles of the convention: see, for instance, *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 625, [2001] 2 AC 127 at 203–204.

f [17] The time has come to recognise that the values enshrined in arts 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by arts 8 and 10 into this cause of action: see *A v B (a company)* [2002] EWCA Civ 337 at [4], [2002] 2 All ER 545 at [4], [2003] QB 195. Further, it should now be recognised that for this purpose these values are of general application. g The values embodied in arts 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.

h [18] In reaching this conclusion it is not necessary to pursue the controversial question whether the convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by s 6 of the 1998 Act extends to questions of substantive law as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying arts 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion. A convenient j summary of these cases is to be found in Gavin Phillipson's valuable article 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 MLR 726 (pp 726–728).

[19] In applying this approach, and giving effect to the values protected by art 8, courts will often be aided by adopting the structure of art 8 in the same way as they now habitually apply the Strasbourg court's approach to art 10 when

resolving questions concerning freedom of expression. Articles 8 and 10 call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41. a

[20] I should take this a little further on one point. Article 8(1) recognises the need to respect private and family life. Article 8(2) recognises there are occasions when intrusion into private and family life may be justified. One of these is where the intrusion is necessary for the protection of the rights and freedoms of others. Article 10(1) recognises the importance of freedom of expression. But art 10(2), like art 8(2), recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged art 8 at all by being within the sphere of the complainant's private or family life. b

[21] Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy. c

[22] Different forms of words, usually to much the same effect, have been suggested from time to time. The second *Restatement of Torts in the United States* (1977) p 394, art 652D, uses the formulation of disclosure of matter which 'would be highly offensive to a reasonable person'. In *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 13 (para 42), Gleeson CJ used words, widely quoted, having a similar meaning. This particular formulation should be used with care, for two reasons. First, the 'highly offensive' phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the 'highly offensive' formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality, for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion. d

THE PRESENT CASE

[23] I turn to the present case and consider first whether the information whose disclosure is in dispute was private. Mr Caldecott QC placed the information published by the newspaper into five categories: (1) the fact of Miss Campbell's drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at NA; (4) the details of the treatment—how long she had been attending meetings, how often she went, how she was treated within the sessions themselves, the extent of her commitment, and the nature of her entrance on the specific occasion; and (5) the visual portrayal of her leaving a specific meeting with other addicts. e

[24] It was common ground between the parties that in the ordinary course the information in all five categories would attract the protection of art 8. But Mr Caldecott recognised that, as he put it, Miss Campbell's 'public lies' precluded her from claiming protection for categories (1) and (2). When talking to the media Miss Campbell went out of her way to say that, unlike many fashion f

a models, she did not take drugs. By repeatedly making these assertions in public
Miss Campbell could no longer have a reasonable expectation that this aspect of
her life should be private. Public disclosure that, contrary to her assertions, she
did in fact take drugs and had a serious drug problem for which she was being
treated was not disclosure of private information. As the Court of Appeal noted
b ([2003] 1 All ER 224 at [43]), where a public figure chooses to present a false image
and make untrue pronouncements about his or her life, the press will normally
be entitled to put the record straight. Thus the area of dispute at the trial
concerned the other three categories of information.

[25] Of these three categories I shall consider first the information in
categories (3) and (4), concerning Miss Campbell's attendance at NA meetings.
In this regard it is important to note this is a highly unusual case. On any view of
c the matter, this information related closely to the fact, which admittedly could be
published, that Miss Campbell was receiving treatment for drug addiction. Thus
when considering whether Miss Campbell had a reasonable expectation of
privacy in respect of information relating to her attendance at NA meetings the
relevant question can be framed along the following lines: Miss Campbell having
d put her addiction and treatment into the public domain, did the further
information relating to her attendance at NA meetings retain its character of
private information sufficiently to engage the protection afforded by art 8?

[26] I doubt whether it did. Treatment by attendance at NA meetings is a
form of therapy for drug addiction which is well known, widely used and much
e respected. Disclosure that Miss Campbell had opted for this form of treatment
was not a disclosure of any more significance than saying that a person who has
fractured a limb has his limb in plaster or that a person suffering from cancer is
undergoing a course of chemotherapy. Given the extent of the information,
otherwise of a highly private character, which admittedly could properly be
disclosed, the additional information was of such an unremarkable and
f consequential nature that to divide the one from the other would be to apply
altogether too fine a toothcomb. Human rights are concerned with substance,
not with such fine distinctions.

[27] For the same reason I doubt whether the brief details of how long
Miss Campbell had been undergoing treatment, and how often she attended
meetings, stand differently. The brief reference to the way she was treated at the
g meetings did no more than spell out and apply to Miss Campbell common
knowledge of how NA meetings are conducted.

[28] But I would not wish to found my conclusion solely on this point. I prefer
to proceed to the next stage and consider how the tension between privacy and
freedom of expression should be resolved in this case, on the assumption that the
h information regarding Miss Campbell's attendance at NA meetings retained its
private character. At this stage I consider Miss Campbell's claim must fail. I can
state my reason very shortly. On the one hand, publication of this information in
the unusual circumstances of this case represents, at most, an intrusion into
Miss Campbell's private life to a comparatively minor degree. On the other
j hand, non-publication of this information would have robbed a legitimate and
sympathetic newspaper story of attendant detail which added colour and
conviction. This information was published in order to demonstrate
Miss Campbell's commitment to tackling her drug problem. The balance ought
not to be held at a point which would preclude, in this case, a degree of
journalistic latitude in respect of information published for this purpose.

[29] It is at this point I respectfully consider Morland J fell into error. Having held that the details of Miss Campbell's attendance at NA had the necessary quality of confidentiality, the judge seems to have put nothing into the scales under art 10 when striking the balance between arts 8 and 10. This was a misdirection. The need to be free to disseminate information regarding Miss Campbell's drug addiction is of a lower order than the need for freedom to disseminate information on some other subjects such as political information. The degree of latitude reasonably to be accorded to journalists is correspondingly reduced, but it is not excluded altogether.

[30] There remains category (5): the photographs taken covertly of Miss Campbell in the road outside the building she was attending for a meeting of NA. I say at once that I wholly understand why Miss Campbell felt she was being hounded by the Mirror. I understand also that this could be deeply distressing, even damaging, to a person whose health was still fragile. But this is not the subject of complaint. Miss Campbell, expressly, makes no complaint about the taking of the photographs. She does not assert that the taking of the photographs was itself an invasion of privacy which attracts a legal remedy. The complaint regarding the photographs is of precisely the same character as the nature of the complaints regarding the text of the articles: the information conveyed by the photographs was private information. Thus the fact that the photographs were taken surreptitiously adds nothing to the only complaint being made.

[31] In general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words. But the pictorial information in the photographs illustrating the offending article of 1 February 2001 added nothing of an essentially private nature. They showed nothing untoward. They conveyed no private information beyond that discussed in the article. The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distraught about her appearance. The same is true of the smaller picture on the front page. Until spotted by counsel in the course of preparing the case for oral argument in your Lordships' House no one seems to have noticed that a sharp eye could just about make out the name of the café on the advertising board on the pavement.

[32] For these reasons and those given by my noble and learned friend Lord Hoffmann, I agree with the Court of Appeal that Miss Campbell's claim fails. It is not necessary for me to pursue the claim based on the Data Protection Act 1998. The parties were agreed that this claim stands or falls with the outcome of the main claim.

[33] In reaching this overall conclusion I have well in mind the distress that publication of the article on 1 February 2001 must have caused Miss Campbell. Public exposure of this sort, especially for someone striving to cope with a serious medical condition, would almost inevitably be extremely painful. But it is right to recognise the source of this pain and distress. First, Miss Campbell realised she had been betrayed by an associate or fellow sufferer. Someone whom she trusted had told the newspaper she was attending NA meetings. This sense of betrayal, and consequential anxiety about continuing to attend NA meetings, flowed from her becoming aware she had been betrayed. The newspaper articles were only the means by which she became aware of her betrayal. Secondly, Miss Campbell realised her addiction was now public knowledge, as was the fact she was

a undergoing treatment. She realised also that it was now public knowledge that she had repeatedly lied. Thirdly, as already mentioned, Miss Campbell would readily feel she was being harassed by the Mirror employing a photographer to 'spy' on her.

b [34] That Miss Campbell should suffer real distress under all these heads is wholly understandable. But in respect of none of these causes of distress does she have reason for complaint against the newspaper for misuse of private information. Against this background I find it difficult to envisage Miss Campbell suffered any significant additional distress based on public disclosure that her chosen form of treatment was attendance at NA meetings.

c [35] Nor have I overlooked the further distress caused by the subsequent mean-spirited attack, with its shabby reference to a chocolate soldier, made by the Mirror on a person known to be peculiarly vulnerable. If Miss Campbell had a well-founded cause of action against the newspaper the trial judge rightly recognised that an award of aggravated damages was called for. But for reasons already given I would dismiss this appeal.

d **LORD HOFFMANN.**

e [36] My Lords, the House is divided as to the outcome of this appeal, but the difference of opinion relates to a very narrow point which arises on the unusual facts of this case. The facts are unusual because the plaintiff is a public figure who had made very public false statements about a matter in respect of which even a public figure would ordinarily be entitled to privacy, namely her use of drugs. It was these falsehoods which, as was conceded, made it justifiable, for a newspaper to report the fact that she was addicted. The division of opinion is whether in doing so the newspaper went too far in publishing associated facts about her private life. But the importance of this case lies in the statements of general principle on the way in which the law should strike a balance between the right f to privacy and the right to freedom of expression, on which the House is unanimous. The principles are expressed in varying language but speaking for myself I can see no significant differences.

g [37] Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her personal appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up. That is no criticism of her. It is a trade like any other. But it does mean that her relationship with the media is different from that of people who expose less of their private life to the public.

h [38] The image which she has sought to project of herself to the international media is that of a black woman who started with few advantages in life and has by her own efforts attained international success in a glamorous profession. There is much truth in this claim. Unfortunately she has also given wide publicity, in interviews with journalists and on television, to a claim which was false, namely that (unlike many of her colleagues in the fashion business) she had j not succumbed to the temptation to take drugs.

[39] In January 2001 the Daily Mirror (the Mirror) obtained information that Ms Campbell had acknowledged her drug dependency by going regularly to meetings of Narcotics Anonymous (NA) for help in ridding herself of the addiction. It was told that she would be going to a meeting at an address in the King's Road. The informant was either a member of Ms Campbell's numerous

entourage or another participant in the meetings. The Mirror sent a photographer to sit unobtrusively in a car. As she left the meeting, he took a couple of pictures of her on the pavement. a

[40] On 1 February 2001 the Mirror published an article on the front page under the headline: 'Naomi: I am a drug addict.' It was accompanied by one of the pictures. The text said that she was attending NA meetings in a 'courageous bid' to beat her addiction. She had been 'a regular at counselling sessions for three months, often attending twice a day'. It described her dress (jeans and a baseball cap) and said that later the same day she made a 'low-key entrance' to a women-only gathering. A source was quoted as saying that it was easy in the fashion world to be led astray but that 'Naomi has realised she has a problem and has bravely vowed to do something about it'. b

[41] There was more on pp 12 and 13, with another picture of her in the doorway of the house where the meeting took place. The address was not identified but someone very familiar with that part of the King's Road could no doubt have recognised it. The article said that her commitment to conquering her problem was such that 'she regularly goes twice a day to group counselling'. The article described the way group counselling at NA worked: the anonymity which meant that to the group she was 'simply Naomi, the addict. Not the supermodel'. A friend was quoted as saying: 'She's still fragile, but she's getting healthy.' Later it said that her 'long rumoured problems with drugs' had emerged in public in 1997 when she was rushed to hospital, reportedly after taking an overdose, but that she had then insisted that it was an allergic reaction: 'It's ridiculous. I've never had a drug problem.' But, said the article 'those closest to her knew the truth'. There was also a good deal more about men with whom she had been associated and other past incidents, taken no doubt from a bulging cuttings file. c

[42] On the same day as the article appeared, Ms Campbell issued proceedings for damages for 'breach of confidence and/or unlawful invasion of privacy'. The narrowness of the dispute between the parties emerged at the trial when Mr Caldecott QC conceded that because of the publicity which Ms Campbell had given to her claim that she had 'never had a drug problem' the Mirror was entitled to publish that she was an addict and also, in fairness to her, that she was now attempting to deal with it. The matters which were alleged to be in breach of confidence or an unlawful invasion of privacy were, first, the fact that she was attending meetings at NA, secondly, the published details of her attendance and what happened at the meetings and thirdly, the photographs taken in the street without her knowledge or consent. d

[43] In order to set both the concession and the residual claim in their context and to identify the point of law at issue, I must say something about the cause of action on which Ms Campbell relies. This House decided in *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137 that there is no general tort of invasion of privacy. But the right to privacy is in a general sense one of the values, and sometimes the most important value, which underlies a number of more specific causes of action, both at common law and under various statutes. One of these is the equitable action for breach of confidence, which has long been recognised as capable of being used to protect privacy. Thus in the seminal case of *Prince Albert v Strange* (1849) 2 De G & Sm 652 the defendant was a publisher who had obtained copies of private etchings made by the Prince Consort of members of the royal family at home. The publisher had got them e

a from an employee of a printer to whom the Prince had entrusted the plates. Knight-Bruce V-C, in granting an injunction restraining the publication of a catalogue containing descriptions of etchings, said (at 698) that it was—

b ‘an intrusion,—an unbecoming and unseemly intrusion ... offensive to that inbred sense of propriety natural to every man,—if, intrusion, indeed, fitly describes a sordid spying into the privacy of domestic life,—into the home (a word hitherto sacred among us) ...’

[44] But although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of personal information, it was not founded on the notion that such information was in itself entitled to protection. Breach of confidence was an equitable remedy and equity c traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. Equity imposed an obligation of d confidentiality upon the latter and (by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.

[45] Thus the cause of action in *Prince Albert*’s case was based upon the defendant’s actual or constructive knowledge of the confidential relationship e between the Prince Consort and the printer to whom he had entrusted the plates of his etchings. It was not essential that the information should concern the Prince’s family life or be in any other way personal. Any confidential information would have done. Nor was it essential that the defendant should have intended widespread publication. Communication to a single unauthorised person would have been enough. Many of the cases on breach of confidence are concerned f with the communication of commercially valuable information to trade rivals and not with anything that could be described as a violation of privacy.

[46] In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through g the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), of the privacy of personal h information as something worthy of protection in its own right.

[47] The first development is generally associated with the speech of Lord Goff of Chieveley in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 658–659, [1990] 1 AC 109 at 281, where he gave, as illustrations of cases in which it would be illogical to insist upon violation of a confidential relationship, the j ‘obviously confidential document ... wafted by an electric fan out of a window into a crowded street’ and the ‘private diary ... dropped in a public place’. He therefore formulated the principle as being that—

‘a duty of confidence arises when confidential information comes to the knowledge of a person ... in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would

be just in all the circumstances that he should be precluded from disclosing the information to others.' a

[48] This statement of principle, which omits the requirement of a prior confidential relationship, was accepted as representing current English law by the European Court of Human Rights in *Earl Spencer v UK* (1998) 25 EHRR CD 105 and was applied by the Court of Appeal in *A v B (a company)* [2002] EWCA Civ 337 at [11](ix), [2002] 2 All ER 545 at [11](ix), [2003] QB 195. It is now firmly established. b

[49] The second development has been rather more subtle. Until the 1998 Act came into force, there was no equivalent in English domestic law of art 8 of the convention or the equivalent articles in other international human rights instruments which guarantee rights of privacy. So the courts of the United Kingdom did not have to decide what such guarantees meant. Even now that the equivalent of art 8 has been enacted as part of English law, it is not directly concerned with the protection of privacy against private persons or corporations. It is, by virtue of s 6 of the 1998 Act, a guarantee of privacy only against public authorities. Although the convention, as an international instrument, may impose upon the United Kingdom an obligation to take some steps (whether by statute or otherwise) to protect rights of privacy against invasion by private individuals, it does not follow that such an obligation would have any counterpart in domestic law. c d

[50] What human rights law has done is to identify private information as something worth protecting as an aspect of human autonomy and dignity. And this recognition has raised inescapably the question of why it should be worth protecting against the state but not against a private person. There may of course be justifications for the publication of private information by private persons which would not be available to the state—I have particularly in mind the position of the media, to which I shall return in a moment—but I can see no logical ground for saying that a person should have less protection against a private individual than he would have against the state for the publication of personal information for which there is no justification. Nor, it appears, have any of the other judges who have considered the matter. e f

[51] The result of these developments has been a shift in the centre of gravity of the action for breach of confidence when it is used as a remedy for the unjustified publication of personal information. It recognises that the incremental changes to which I have referred do not merely extend the duties arising traditionally from a relationship of trust and confidence to a wider range of people. As Sedley LJ observed in a perceptive passage in his judgment in *Douglas v Hello! Ltd* [2001] 2 All ER 289 at 320, [2001] QB 967 at 1001 (para 126), the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon the duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity—the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people. g h j

[52] These changes have implications for the future development of the law. They must influence the approach of the courts to the kind of information which is regarded as entitled to protection, the extent and form of publication which attracts a remedy and the circumstances in which publication can be justified.

[53] In this case, however, it is unnecessary to consider these implications because the cause of action fits squarely within both the old and the new law. The judge found that the information about Ms Campbell's attendance at NA had been communicated to the Mirror in breach of confidence and that the Mirror must have known that the information was confidential. As for human autonomy and dignity, I should have thought that the extent to which information about one's state of health, including drug dependency, should be communicated to other people was plainly something which an individual was entitled to decide for herself: compare *Z v Finland* (1999) 45 BMLR 107 at 124 (para 95). The whole point of NA is that participants in its meetings are anonymous. It offers them support and the possibility of recovery without requiring them to allow information about their drug dependency to become more widely known. If Ms Campbell had been an ordinary citizen, I think that the publication of information about her attendance at NA would have been actionable and I do not understand the Mirror to argue otherwise.

[54] What is said to make this case different is, first, that Ms Campbell is a public figure who has sought publicity about various aspects of her private life and secondly, that the aspects of her private life which she has publicised include her use of drugs, in respect of which she has made a false claim. The Mirror claims that on these grounds it was entitled in the public interest to publish the information and photographs and that its right to do so is protected by art 10 of the convention.

[55] I shall first consider the relationship between the freedom of the press and the common law right of the individual to protect personal information. Both reflect important civilised values, but, as often happens, neither can be given effect in full measure without restricting the other. How are they to be reconciled in a particular case? There is in my view no question of automatic priority. Nor is there a presumption in favour of one rather than the other. The question is rather the extent to which it is *necessary* to qualify the one right in order to protect the underlying value which is protected by the other. And the extent of the qualification must be proportionate to the need: see Sedley LJ in *Douglas's case* [2001] 2 All ER 289 at 324, [2001] QB 967 at 1005 (para 137).

[56] If one takes this approach, there is often no real conflict. Take the example I have just given of the ordinary citizen whose attendance at NA is publicised in his local newspaper. The violation of the citizen's autonomy, dignity and self-esteem is plain and obvious. Do the civil and political values which underlie press freedom make it necessary to deny the citizen the right to protect such personal information? Not at all. While there is no contrary public interest recognised and protected by the law, the press is free to publish anything it likes. Subject to the law of defamation, it does not matter how trivial, spiteful or offensive the publication may be. But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right. In the example I have given, there is no public interest whatever in publishing to the world the fact that the citizen has a drug dependency. The freedom to make such a statement weighs little in the balance against the privacy of personal information.

[57] One must therefore proceed to consider the grounds why the Mirror say there was a public interest in its publication of information about Ms Campbell which it would not have been justified in publishing about someone else. First,

there is the fact that she is a public figure who has had a long and symbiotic relationship with the media. In my opinion, that would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters. I think that the history of Ms Campbell's relationship with the media does have some relevance to this case, to which I shall return in due course, but that would not without more justify publication of confidential personal information. a b

[58] The reason why Mr Caldecott concedes that the Mirror was entitled to publish the fact of her drug dependency and the fact that she was seeking treatment is that she had specifically given publicity to the very question of whether she took drugs and had falsely said that she did not. I accept that this creates a sufficient public interest in the correction of the impression she had previously given. c

[59] The question is then whether the Mirror should have confined itself to these bare facts or whether it was entitled to reveal more of the circumstantial detail and print the photographs. If one applies the test of necessity or proportionality which I have suggested, this is a matter on which different people may have different views. That appears clearly enough from the judgments which have been delivered in this case. But judges are not newspaper editors. It may have been possible for the Mirror to satisfy the public interest in publication with a story which contained less detail and omitted the photographs. But the Mirror said that they wanted to show themselves sympathetic to Ms Campbell's efforts to overcome her dependency. For this purpose, some details about her frequency of attendance at NA meetings were needed. I agree with the observation of the Court of Appeal ([2002] EWCA Civ 1373 at [52], [2003] 1 All ER 224 at [52], [2003] QB 633) that it is harsh to criticise the editor for 'painting a somewhat fuller picture in order to show her in a sympathetic light'. d e

[60] To someone who started with the (legitimately communicated) knowledge that she was seeking treatment, there was nothing special about the additional details. The fact that she was going to NA would come as no surprise; there are, according to its website, 31,000 NA meetings a week in 100 different countries. The anonymity of participants and the general nature of the therapy is common knowledge. The details of her frequency of attendance (which were in fact inaccurate) could not be said to be discreditable or embarrassing. The relatively anodyne nature of the additional details is in my opinion important and distinguishes this case from cases in which (for example) there is a public interest in the disclosure of the existence of a sexual relationship (say, between a politician and someone whom she has appointed to public office) but the addition of salacious details or intimate photographs is disproportionate and unacceptable. The latter, even if accompanying a legitimate disclosure of the sexual relationship, would be too intrusive and demeaning. f g h

[61] That brings me to what seems to be the only point of principle which arises in this case. Where the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present the story? j

[62] In my opinion, it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper h

a to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure. And if any margin is to be allowed, it seems to me strange to hold the Mirror liable in damages for a decision which three experienced judges in the
b Court of Appeal have held to be perfectly justified.

[63] Ms Campbell now concedes the truth of the essentials of the Mirror's story but the editor said in evidence that he thought at the time, in view of her previous falsehoods, that it was necessary to include some detail and photographs by way of verification. It is unreasonable to expect that in matters of judgment
c any more than accuracy of reporting, newspapers will always get it absolutely right. To require them to do so would tend to inhibit the publication of facts which should in the public interest be made known. That was the basis of the decision of this House in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, [2001] 2 AC 127 and I think that it is equally applicable to the publication of private personal information in the cases in which the essential part of that
d information can legitimately be published.

[64] A similar point, in relation to the protection of private information, was made by the European Court of Human Rights in *Fressoz and Roire v France* (1999) 5 BHRC 654. Le Canard Enchaîné published the salary of Mr Calvet, the chairman of Peugeot, (which was publicly available information) and also, by
e way of confirmation, photographs of the relevant part of his tax assessment, which was confidential and could not lawfully be published. The Strasbourg court (at 669 (para 54)) said that the conviction of the journalists for publishing the assessment infringed their right of free speech under art 10:

f 'If, as the government accepted, the information about Mr Calvet's annual income was lawful and its disclosure permitted, the applicants' conviction merely for having published the documents in which that information was contained, namely the tax assessments, cannot be justified under art 10. In essence, that article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility.'

g [65] In my opinion the Court of Appeal was right in the present case to say ([2003] 1 All ER 224 at [64]):

h 'Provided that publication of particular confidential information is justifiable in the public interest, the journalist must be given reasonable latitude as to the manner in which that information is conveyed to the public or his art 10 right to freedom of expression will be unnecessarily inhibited.'

[66] It is only in connection with the degree of latitude which must be allowed to the press in the way it chooses to present its story that I think it is relevant to consider Ms Campbell's relationship with the media. She and they have for many
j years both fed upon each other. She has given them stories to sell their papers and they have given her publicity to promote her career. This does not deprive Ms Campbell of the right to privacy in respect of areas of her life which she has not chosen to make public. But I think it means that when a newspaper publishes what is in substance a legitimate story, she cannot insist upon too great a nicety of judgment in the circumstantial detail with which the story is presented.

[67] The trial judge described ([2002] EWHC 499 (QB) at [35], [2002] IT & T 612 at [35]) the 'essential question' as being—

'whether even if a public figure which includes an international celebrity, such as Miss Naomi Campbell, courts and expects media exposure, she is left with a residual area of privacy which the court should protect if its revelation would amount to a breach of confidentiality.'

[68] To that question I would certainly answer, Yes, but it was not the question which arose in this case. Accepting that Ms Campbell has a 'residual area of privacy', the question is whether it was infringed by the publication in this case. To answer that question one must assess the disclosures said to be objectionable in the light of the disclosures conceded to be legitimate. One must then ask whether the journalists exceeded the latitude which should be allowed to them in presenting their story.

[69] The judge made no attempt to answer either of these questions. He said (at [43]):

'In my judgment clearly the publication of information about details of her therapy in regularly attending meetings of [NA] was to Miss Naomi Campbell's detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings.'

[70] The judge did not analyse the details which were said to be likely to have this effect or explain why they should have this effect when the bare revelation that she was a drug addict seeking therapy would not. The question of the effect of the publication upon Ms Campbell's therapy was not pleaded. She is resident in the United States but travels widely and often visits London. In her witness statement she said that since the article she had not been back to that particular meeting place but had attended a few meetings in England and continued to attend NA meetings in other countries. The question was not further explored. Nor did the judge consider whether, even assuming that the article had included unnecessary details, it was within the margin of judgment which the newspaper should be allowed. In my opinion it was and the judge's failure to take this into account was an error of principle which the Court of Appeal was right to correct.

[71] As for the Court of Appeal's own approach, I do not understand the submission that it erred in saying ([2003] 1 All ER 224 at [48]) that it did not equate 'the information that Miss Campbell was receiving therapy from [NA] ... with disclosure of clinical details of medical treatment'. I do not imagine that the Court of Appeal was unaware of the nature of the therapy provided by NA or was attempting some obscure metaphysical distinction. It was saying only that the support provided by NA for large numbers of drug addicts is so well known that it cannot be compared with the details of individual clinical treatment. This seems to me no more than common sense.

[72] That leaves the question of the photographs. In my opinion a photograph is in principle information no different from any other information. It may be a more vivid form of information than the written word ('a picture is worth a thousand words'). That has to be taken into account in deciding whether its publication infringes the right to privacy of personal information. The publication of a photograph cannot necessarily be justified by saying that one would be entitled to publish a verbal description of the scene: see *Douglas v Hello! Ltd* [2001] 2 All ER 289, [2001] QB 967. But the principles by which one

a decides whether or not the publication of a photograph is an unjustified invasion of the privacy of personal information are in my opinion the same as those which I have already discussed.

b [73] In the present case, the pictures were taken without Ms Campbell's consent. That in my opinion is not enough to amount to a wrongful invasion of privacy. The famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent. As Gleeson CJ said in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 13 (para 41): 'Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people.'

c [74] But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of *Peck v UK* (2003) 13 BHRC 669 Mr Peck was filmed on a public street in an embarrassing moment by a closed circuit television camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said (at 684) that this was an invasion of his privacy contrary to art 8:

'... the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.'

e [75] In my opinion, therefore, the widespread publication of a photograph of someone which reveals him to be in a situation of humiliation or severe embarrassment, even if taken in a public place, may be an infringement of the privacy of his personal information. Likewise, the publication of a photograph taken by intrusion into a private place (for example, by a long distance lens) may f in itself be such an infringement, even if there is nothing embarrassing about the picture itself: see *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 at 476, [1995] 1 WLR 804 at 807. As Lord Mustill said in *R v Broadcasting Standards Commission, ex p BBC* [2000] 3 All ER 989 at 1002, [2001] QB 885 at 900 (para 48):

g 'An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.'

[76] In the present case, however, there was nothing embarrassing about the picture, which showed Ms Campbell neatly dressed and smiling among a number of other people. Nor did the taking of the picture involve an intrusion into h private space. Hundreds of such 'candid' pictures of Ms Campbell, taken perhaps on more glamorous occasions, must have been published in the past without objection. The only ground for claiming that the picture was a wrongful disclosure of personal information was by virtue of the caption, which said that she was going to or coming from a meeting of NA. But this in my opinion added j nothing to what was said in the text.

[77] No doubt it would have been possible for the Mirror to have published the article without pictures. But that would in my opinion again be to ignore the realities of this kind of journalism as much as to expect precision of judgment about the amount of circumstantial detail to be included in the text. We value the freedom of the press but the press is a commercial enterprise and can flourish

only by selling newspapers. From a journalistic point of view, photographs are an essential part of the story. The picture carried the message, more strongly than anything in the text alone, that the Mirror's story was true. So the decision to publish the pictures was in my opinion within the margin of editorial judgment and something for which appropriate latitude should be allowed.

[78] I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD.

[79] My Lords, the facts of this case have been described by my noble and learned friend Lord Nicholls of Birkenhead, and I gratefully adopt his account of them. But I should like to say a few more words about the general background before I explain why I have reached the conclusion that this appeal must be allowed.

THE BACKGROUND

[80] The business of fashion modelling, in which the appellant Naomi Campbell has built up such a powerful reputation internationally, is conducted under the constant gaze of the media. It is also highly competitive. It is a context where public reputation as a forceful and colourful personality adds value to the physical appearance of the individual. Much good can come of this, if the process is carefully and correctly handled. But there are aspects of Miss Campbell's exploitation of her status as a celebrity that have attracted criticism. She has been manipulative and selective in what she has revealed about herself. She has engaged in a deliberately false presentation of herself as someone who, in contrast to many models, has managed to keep clear of illegal drugs. The true position, it is now agreed, is that she has made a practice of abusing drugs. This has caused her medical problems, and it has affected her behaviour to such an extent that she has required and has received therapy for her addiction.

[81] Paradoxically, for someone in Miss Campbell's position, there are few areas of the life of an individual that are more in need of protection on the grounds of privacy than the combating of addiction to drugs or to alcohol. It is hard to break the habit which has led to the addiction. It is all too easy to give up the struggle if efforts to do so are exposed to public scrutiny. The struggle, after all, is an intensely personal one. It involves a high degree of commitment and of self-criticism. The sense of shame that comes with it is one of the most powerful of all the tools that are used to break the habit. But shame increases the individual's vulnerability as the barriers that the habit has engendered are broken down. The smallest hint that the process is being watched by the public may be enough to persuade the individual to delay or curtail the treatment. At the least it is likely to cause distress, even to those who in other circumstances like to court publicity and regard publicity as a benefit.

[82] The question in this case is whether the publicity which the respondents gave to Miss Campbell's drug addiction and to the therapy which she was receiving for it in an article which was published in the Daily Mirror (the Mirror) newspaper on 1 February 2001 is actionable on the ground of breach of confidence. Miss Campbell cannot complain about the fact that publicity was given in this article to the fact that she was a drug addict. This was a matter of legitimate public comment, as she had not only lied about her addiction but had sought to benefit from this by comparing herself with others in the fashion business who were addicted. As the Court of Appeal observed ([2002] EWCA Civ

a 1373 at [43], [2003] 1 All ER 224 at [43], [2003] QB 633), where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight.

b [83] Miss Campbell's case is that information about the details of the treatment which she was receiving for the addiction falls to be treated differently. This is because it was not the subject of any falsehood that was in need of correction and because it was information which any reasonable person who came into possession of it would realise was obtained in confidence. The argument was put succinctly in the particulars of her claim, where it was stated:

c 'Information about whether a person is receiving medical or similar treatment for addiction, and in particular details relating to such treatment or the person's reaction to it, is obviously confidential. The confidentiality is the stronger where, as here, disclosure would tend to disrupt the treatment and/or its benefits for the person concerned and others sharing in, or giving, or wishing to take or participate in, the treatment. The very name "Narcotics Anonymous" underlines the importance of privacy in the context of treatment as do the defendants' own words—"To the rest of the group she is simply Naomi, the addict."

d [84] The respondents' answer is based on the proposition that the information that was published about her treatment was peripheral and not sufficiently significant to amount to a breach of the duty of confidence that was owed to her. e They also maintain that the right balance was struck between Miss Campbell's right to respect for her private life under art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the right to freedom of expression that is enshrined in art 10(1) of the convention.

f [85] The questions that I have just described seem to me to be essentially questions of fact and degree and not to raise any new issues of principle. As Lord Woolf CJ said in *A v B (a company)* [2002] EWCA Civ 337 at [11](ix), (x), [2002] 2 All ER 545 at [11](ix), (x), [2003] QB 195, the need for the existence of a confidential relationship should not give rise to problems as to the law because a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably g expect his privacy to be protected. The difficulty will be as to the relevant facts, bearing in mind that, if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified: see also the exposition in *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545 at 659, [1990] 1 AC 109 h at 282 by Lord Goff of Chieveley, where he set out the three limiting principles to the broad general principle that a duty of confidence arises when confidential information comes to the knowledge of a person where he has notice that the information is confidential. The third limiting principle is particularly relevant in this case. This is the principle which may require a court to carry out a balancing j operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.

[86] The language has changed following the coming into operation of the 1998 Act and the incorporation into domestic law of arts 8 and 10 of the convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court of Human Rights

offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend Lord Hoffmann says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating. As Lord Woolf CJ said in *A v B* [2002] 2 All ER 545 at [4], new breadth and strength is given to the action for breach of confidence by these articles.

[87] Where a case has gone to trial it would normally be right to attach a great deal of weight to the views which the judge has formed about the facts and where he thought the balance should be struck after reading and hearing the evidence. The fact that the Court of Appeal felt able to differ from the conclusions which Morland J reached on these issues ([2002] EWHC 499 (QB), [2002] IP & T 612) brings me to the first point on which I wish to comment.

WAS THE INFORMATION CONFIDENTIAL?

[88] The information contained in the article consisted of the following five elements: (1) the fact that Miss Campbell was a drug addict; (2) the fact that she was receiving treatment for her addiction; (3) the fact that the treatment which she was receiving was provided by Narcotics Anonymous (NA); (4) details of the treatment—for how long, how frequently and at what times of day she had been receiving it, the nature of it and extent of her commitment to the process; and (5) a visual portrayal by means of photographs of her when she was leaving the place where treatment had been taking place.

[89] The trial judge drew the line between the first two and the last three elements. Mr Caldecott QC for Miss Campbell said that he was content with this distinction. So the fact that she was a drug addict was open to public comment in view of her denials, although he maintained that this would normally be treated as a medical condition that was entitled to protection. He accepted that the fact that she was receiving treatment for the condition was not in itself intrusive in this context. Moreover disclosure of this fact in itself could not harm her therapy. But he said that the line was crossed as soon as details of the nature and frequency of the treatment were given, especially when these details were accompanied by a covertly taken photograph which showed her leaving one of the places where she had been undertaking it. This was an area of privacy where she was entitled to be protected by an obligation of confidence.

[90] The Court of Appeal recognised at the start of their discussion of this point that some categories of information are well recognised as confidential (see [2003] 1 All ER 224 at [47]). They noted that these include details of a medical condition or its treatment. But they were not prepared to accept that information that Miss Campbell was receiving therapy from NA was to be equated with disclosure of clinical details of the treatment of a medical condition (see [48]). This was contrary to the view which Morland J appears to have taken when he said ([2002] IP & T 612 at [41]) that it mattered not whether therapy was obtained by means of professional medical input or by alternative means such as group counselling or by organised meetings between sufferers. The Court of Appeal were also of the view that the publication of this information was not, in its context, sufficiently significant to shock the conscience and thus to amount to a breach of the duty of confidence which was owed to her. They accepted the respondents' argument that disclosure of these details was peripheral. They had

a regard too to the fact that some of the additional information that was given in the article was inaccurate.

[91] I do not think that the Court of Appeal were right to reject the analogy which the judge drew between information that Miss Campbell was receiving therapy from NA and information about details of a medical condition or its treatment. Mr Brown QC for the respondents said that it was not his case that b there was an essential difference or, as he put it, a bright line distinction between therapy and medical treatment. He maintained that the Court of Appeal were simply drawing attention to a difference of degree. But it seems to me that there is more in this passage in the Court of Appeal's judgment and its criticism of the judge's analogy than a difference of degree. The implication of the Court of c Appeal's criticism of the judge's reasoning is that the details of non-medical therapy are less deserving of protection than the details of a medical condition or its treatment. That seems to be why, as they put it ([2003] 1 All ER 224 at [48]), the two are not 'to be equated'.

[92] The underlying question in all cases where it is alleged that there has been a breach of the duty of confidence is whether the information that was disclosed d was private and not public. There must be some interest of a private nature that the claimant wishes to protect: see *A v B* [2002] 2 All ER 545 at [11](vii). In some cases, as the Court of Appeal said in that case, the answer to the question whether the information is public or private will be obvious. Where it is not, the broad test is whether disclosure of the information about the individual (A) would give e substantial offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities.

[93] The trial judge applied the test which was suggested by Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1. In that case the respondent sought an interlocutory injunction against the broadcasting f of a film about its operations at a brushtail possum processing facility. It showed the stunning and killing of possums. Gleeson CJ said (at 11–12 (paras 34–35)), that information about the respondent's slaughtering methods was not confidential in its nature and that, while the activities filmed were carried out on private property, they were not shown, or alleged, to be private in any other sense. He observed (at 13 (para 42)) that there was a large area in between what g was necessarily public and what was necessarily private:

h 'An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The j requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.'

Applying to the facts of the case the test which he had described in the last sentence of this paragraph, he said (at 13 (para 43)) that the problem for the

respondent was that the activities secretly observed and filmed were not relevantly private. a

[94] The test which Gleeson CJ has identified is useful in cases where there is room for doubt, especially where the information relates to an activity or course of conduct such as the slaughtering methods that were in issue in that case. But it is important not to lose sight of the remarks which preceded it. The test is not needed where the information can easily be identified as private. It is also important to bear in mind its source, and the guidance which the source offers as to whether the information is public or private. It is taken from the definition of the privacy tort in the United States, where the right of privacy is invaded if the matter which is publicised is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public: *Restatement of the Law of Torts (Second)* (1977) p 383, art 652D. The reference to a person of ordinary sensibilities is, as Gleeson CJ acknowledged in his footnote (at 13), a quotation from William L Prosser *Privacy* (1960) 48 Calif LR 383. As Dean Prosser put it (pp 396–397), the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities, who must expect some reporting of his daily activities. The law of privacy is not intended for the protection of the unduly sensitive. b c d

[95] I think that the judge was right to regard the details of Miss Campbell's attendance at NA as private information which imported a duty of confidence. He said that information relating to Miss Campbell's therapy for drug addiction giving details that it was by regular attendance at NA meetings was easily identifiable as private. With reference to the guidance that the Court of Appeal gave in *A v B* [2002] 2 All ER 545 at [11](vii), he said that it was obvious that there existed a private interest in this fact that was worthy of protection. The Court of Appeal, on the other hand, seem to have regarded the receipt of therapy from NA as less worthy of protection in comparison with treatment for the condition administered by medical practitioners. I would not make that distinction. Views may differ as to what is the best treatment for an addiction. But it is well known that persons who are addicted to the taking of illegal drugs or to alcohol can benefit from meetings at which they discuss and face up to their addiction. The private nature of these meetings encourages addicts to attend them in the belief that they can do so anonymously. The assurance of privacy is an essential part of the exercise. The therapy is at risk of being damaged if the duty of confidence which the participants owe to each other is breached by making details of the therapy, such as where, when and how often it is being undertaken, public. I would hold that these details are obviously private. e f g

[96] If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published. The trial judge nevertheless asked himself, as a check, whether the information that was disclosed about Miss Campbell's attendance at these meetings satisfied Gleeson CJ's test of confidentiality. His conclusion, echoing the words of Gleeson CJ, was that disclosure that her therapy for drug addiction was by regular attendance at meetings of NA would be highly offensive to a reasonable person of ordinary sensibilities. The Court of Appeal disagreed with this assessment. They said ([2003] 1 All ER 224 at [53]) that, given that it was legitimate for the respondents to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it was not particularly significant to h j

a add the fact that the treatment consisted of attendance at meetings of NA. They
said (at [54]) that they did not consider that a reasonable person of ordinary
sensibilities, on reading that Miss Campbell was a drug addict, would have found
it highly offensive, or even offensive. They acknowledged that the reader might
b have found it offensive that what were obviously covert photographs had been
taken of her, but that this of itself was not relied upon as a ground for legal
complaint. Having drawn these conclusions they held (at [58]) that the
publication of the information of which Miss Campbell complains was not, in its
context, sufficiently significant to amount to a breach of duty of confidence owed
to her.

[97] This part of the Court of Appeal's examination of the issue appears to
have been influenced by the fact that they did not regard disclosure of the fact that
c Miss Campbell was receiving therapy from NA capable of being equated with
treatment of a clinical nature. If one starts from the position that a course of
therapy which takes this form is of a lower order, it is relatively easy to conclude
that a reasonable person of ordinary sensibilities would not regard the publication
of the further details of her therapy as particularly significant. But I think that it
d is unrealistic to look through the eyes of a reasonable person of ordinary
sensibilities at the degree of confidentiality that is to be attached to a therapy for
drug addiction without relating this objective test to the particular circumstances.

[98] Where the person is suffering from a condition that is in need of
treatment one has to try, in order to assess whether the disclosure would be
e objectionable, to put oneself into the shoes of a reasonable person who is in need
of that treatment. Otherwise the exercise is divorced from its context. The fact
that no objection could be taken to disclosure of the first two elements in the
article does not mean that they must be left out of account in a consideration as
to whether disclosure of the other elements was objectionable. The article must
be read as whole along with the photographs to give a proper perspective to each
f element. The context was that of a drug addict who was receiving treatment. It
is her sensibilities that needed to be taken into account. Critical to this exercise
was an assessment of whether disclosure of the details would be liable to disrupt
her treatment. It does not require much imagination to appreciate the sense of
unease that disclosure of these details would be liable to engender, especially
g when they were accompanied by a covertly taken photograph. The message that
it conveyed was that somebody, somewhere, was following her, was well aware
of what was going on and was prepared to disclose the facts to the media. I would
expect a drug addict who was trying to benefit from meetings to discuss her
problem anonymously with other addicts to find this distressing and highly
offensive.

h [99] The approach which the Court of Appeal took to this issue seems to me,
with great respect, to be quite unreal. I do not think that they had a sound basis
for differing from the conclusion reached by the trial judge as to whether the
information was private. They were also in error, in my opinion, when they were
asking themselves whether the disclosure would have offended the reasonable
j man of ordinary susceptibilities. The mind that they examined was the mind of
the reader (see [54]). This is wrong. It greatly reduces the level of protection that
is afforded to the right of privacy. The mind that has to be examined is that, not
of the reader in general, but of the person who is affected by the publicity. The
question is what a reasonable person of ordinary sensibilities would feel if she was
placed in the same position as the claimant and faced with the same publicity.

[100] In *P v D* [2000] 2 NZLR 591 the claimant was a public figure who was told that publicity was about to be given to that fact that he had been treated at a psychiatric hospital. In my opinion the objective test was correctly described and applied by Nicholson J (at 601 (para 39)) when he said:

‘The factor that the matter must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities prescribes an objective test. But this is on the basis of what a reasonable person of ordinary sensibilities would feel if they were in the same position, that is, in the context of the particular circumstances. I accept that P has the stated feelings and consider that a reasonable person of ordinary sensibilities would in the circumstances also find publication of information that they had been a patient in a psychiatric hospital highly offensive and objectionable.’

That this is the correct approach is confirmed by the *Restatement* p 387, which states at the end of its comment on cl (a) of art 652D:

‘It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.’ (My emphasis.)

[101] These errors have an important bearing on the question whether the Court of Appeal were right to differ from the decision of the trial judge on the question where the balance lay between the private interest of Miss Campbell and the public interest in the publication of these details.

[102] In view of the conclusion that I have reached on this issue it is not necessary for me to say anything about the weight that the Court of Appeal attached to the inaccuracies, except to observe that there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not. The inaccuracies that were relied on here fall into the later category. The length of time that Miss Campbell had been attending meetings was understated, while the frequency of her attendance at meetings was exaggerated. And the caption to the photograph in the first article stated that she was arriving at the meeting, when the fact was that she was leaving it. These were errors of a minor nature only, which did not affect the overall significance of the details that were published. I would hold that they did not detract from the private nature of what was being published.

THE COMPETING RIGHTS OF FREE SPEECH AND PRIVACY

[103] Morland J ([2002] IP & T 612 at [75]) did not give any detailed reasons for his conclusion that, striking the balance between arts 8 and 10 and having full regard to s 12(4) of the 1998 Act, Miss Campbell was entitled to the remedy of damages. But he did recognise (at [103]) that neither art 10 nor art 8 had pre-eminence, the one over the other. The Court of Appeal’s approach to the respondents’ entitlement to publish what they described as the peripheral details was based on their view that the provision of these details as background to support the story that Miss Campbell was a drug addict was a legitimate part of the journalistic package which was designed to demonstrate that she had been deceiving the public when she said that she did not take drugs (see [2003] 1 All ER 224 at [62]). They said (at [64]) that its publication was justified in order to give a factual account that had the detail necessary to carry credibility. But they do not appear to have attempted to balance the competing convention rights against

a each other. No doubt this was because they had already concluded (at [58]) that these details were peripheral and that their publication was not, in its context, sufficiently significant to amount to a breach of duty of confidence.

[104] In my opinion the Court of Appeal's approach is open to the criticism that, because they wrongly held that these details were not entitled to protection under the law of confidence, they failed to carry out the required balancing exercise.

b [105] The context for this exercise is provided by arts 8 and 10 of the convention. The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in art 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but art 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.

c [106] There is nothing new about this, as the need for this kind of balancing exercise was already part of English law: see *A-G v Guardian Newspapers Ltd (No 2)* [1988] 3 All ER 545, [1990] 1 AC 109 per Lord Goff of Chieveley. But account must now be taken of the guidance which has been given by the European Court of Human Rights on the application of these articles. As Sedley LJ pointed out in *Douglas v Hello! Ltd* [2001] 2 All ER 289 at 323, [2001] QB 967 at 1004 (para 135):

e 'The European Court of Human Rights has always recognised the high importance of free media of communication in a democracy, but its jurisprudence does not—and could not consistently with the convention itself—give art 10(1) of the convention the presumptive priority which is given, for example, to the First Amendment in the jurisprudence of the United States' courts. Everything will ultimately depend on the proper balance between privacy and publicity in the situation facing the court.'

f [107] I accept, of course, that the importance which the Court of Appeal attached to the journalistic package finds support in the authorities. In *Jersild v Denmark* (1995) 19 EHRR 1 at 25–26 (para 31) the European Court of Human Rights, repeating what was said in *Observer v UK* (1992) 14 EHRR 153 at 191 (para 59), declared that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. It then added these comments:

g 'Whilst the press must not overstep the bounds set, *inter alia*, in the interest of "the protection of the reputation and rights of others", it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog".'

j [108] The freedom of the press to exercise its own judgment in the presentation of journalistic material was emphasised in a further passage in *Jersild's* case where the court said (at 26 (para 31)):

'At the same time, the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question.'

It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. In this context the Court recalls that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.’ a

In *Fressoz and Roire v France* (1999) 5 BHRC 654 at 669 (para 54) the court said that in essence art 10 leaves it for journalists to decide whether or not it is necessary to reproduce material to ensure credibility, adding: b

‘It protects journalists’ rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism ...’ c

[109] There was no need for the court in *Jersild’s* case to examine the question how the art 10 right which was relied on was to be balanced against a competing right under art 8 of the convention. The applicants maintained that their right to freedom of expression under art 10 was infringed when they were charged and convicted of committing offences which resulted from their choice of the material that had been published. The objectionable remarks which were contained in the television broadcast of a news programme were of a racist nature. The focus of the case was on the right to impart information and ideas of public interest and the right of the public to receive such ideas. The *Fressoz* case on the other hand was about the disclosure of information which was confidential as it was contained in the taxpayer’s tax file. It was lawful to disclose information about the taxpayer’s income. The question was whether publication of the documents in which that information was contained could be justified under art 10. So the court addressed itself to the question whether the objective of preserving fiscal confidentiality, which in itself was legitimate, constituted a relevant and sufficient justification for the interference with the art 10 right. There was a balance to be struck by weighing the interference with freedom to disclose against the need for confidentiality. d

[110] The need for a balancing exercise to be carried out is also inherent in the provisions of art 10 itself, as the court explained in *Bladet Tromsø v Norway* (1999) 6 BHRC 599. In that case a newspaper and its editor complained that their right to freedom of expression had been breached when they were found liable in defamation proceedings for statements in articles which they had published about the methods used by seal hunters in the hunting of harp seals. The court said (at 624 (para 59)): e

‘Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart—in a manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest ...’ f

The court dealt with the question of balance (at 625–626 (para 65)): g

‘Article 10 of the convention does not, however, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of art 10(2) the exercise of this freedom carries with it “duties and responsibilities”, which also apply h

i

a to the press. These “duties and responsibilities” are liable to assume significance when, as in the present case, there is question of attacking the reputation of private individuals and undermining the “rights of others”. As pointed out by the government, the seal hunters’ right to protection of their honour and reputation is itself internationally recognised under art 17 of the ICCPR (International Covenant on Civil and Political Rights). Also of
b relevance for the balancing of competing interests which the court must carry out is the fact that under art 6(2) of the convention the seal hunters had a right to be presumed innocent of any criminal offence until proven guilty. By reason of the “duties and responsibilities” inherent in the exercise of the freedom of expression, the safeguard afforded by art 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that
c they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism ...’

[111] Section 12(4) of the 1998 Act provides:

d ‘The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—(a) the extent to which—(i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the
e public interest for the material to be published; (b) any relevant privacy code.’

But, as Sedley LJ said in *Douglas v Hello! Ltd* [2001] 2 All ER 289 at 322, [2001] QB 967 at 1003 (para 133), you cannot have particular regard to art 10 without having
f equally particular regard at the very least to art 8: see also *Re S (a child) (identification: restriction on publication)* [2003] EWCA Civ 963 at [52], [2003] 2 FCR 577 at [52], [2004] Fam 43 where Hale LJ said that s 12(4) does not give either article pre-eminence over the other. These observations seem to me to be entirely consistent with the jurisprudence of the European Court of Human Rights, as is the following passage in Sedley LJ’s opinion in *Douglas’s* case ([2001]
g 2 All ER 289 at 324, [2001] QB 967 at 1005 (para 137)):

h ‘The case being one which affects the convention right of freedom of expression, s 12 of the [1998 Act] requires the court to have regard to art 10 of the convention (as, in its absence, would s 6 of that Act). This, however, cannot, consistently with s 3 of the [1998 Act] and art 17 of the convention, give the art 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider art 10(2) along with art 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in art 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free
j expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality.’

It is to be noted too that cl 3(i) of the Code of Practice of the Press Complaints Committee acknowledges this limitation. It states that a person may have a reasonable expectation of privacy in a public place.

STRIKING THE BALANCE

[112] There is no doubt that the presentation of the material that it was legitimate to convey to the public in this case without breaching the duty of confidence was a matter for the journalists. The choice of language used to convey information and ideas, and decisions as to whether or not to accompany the printed word by the use of photographs, are pre-eminently editorial matters with which the court will not interfere. The respondents are also entitled to claim that they should be accorded a reasonable margin of appreciation in taking decisions as to what details needed to be included in the article to give it credibility. This is an essential part of the journalistic exercise.

[113] But decisions about the publication of material that is private to the individual raise issues that are not simply about presentation and editing. Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither art 8 nor art 10 has any pre-eminence over the other in the conduct of this exercise. As Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998), para 11, pointed out, they are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society.

THE ARTICLE 10 RIGHT

[114] In the present case it is convenient to begin by looking at the matter from the standpoint of the respondents' assertion of the art 10 right and the court's duty as a public authority under s 6(1) of the 1998 Act, which s 12(4) reinforces, not to act in a way which is incompatible with that convention right.

[115] The first question is whether the objective of the restriction on the art 10 right—the protection of Miss Campbell's right under art 8 to respect for her private life—is sufficiently important to justify limiting the fundamental right to freedom of expression which the press assert on behalf of the public. It follows from my conclusion that the details of Miss Campbell's treatment were private that I would answer this question in the affirmative. The second question is whether the means chosen to limit the art 10 right are rational, fair and not arbitrary and impair the right as minimally as is reasonably possible. It is not enough to assert that it would be reasonable to exclude these details from the article. A close examination of the factual justification for the restriction on the freedom of expression is needed if the fundamental right enshrined in art 10 is to remain practical and effective. The restrictions which the court imposes on the art 10 right must be rational, fair and not arbitrary, and they must impair the right no more than is necessary.

[116] In my opinion the factors that need to be weighed are, on the one hand, the duty that was recognised in *Jersild v Denmark* (1995) 19 EHRR 1 at 25–26 (para 31) to impart information and ideas of public interest which the public has a right to receive, and the need that was recognised in *Fressoz and Roire v France*

a (1999) 5 BHRC 654 at 669 (para 54) for the court to leave it to journalists to decide what material needs to be reproduced to ensure credibility; and, on the other hand, the degree of privacy to which Miss Campbell was entitled under the law of confidence as to the details of her therapy. Account should therefore be taken of the respondents' wish to put forward a story that was credible and to present Miss Campbell in a way that commended her for her efforts to overcome her addiction.

b [117] But it should also be recognised that the right of the public to receive information about the details of her treatment was of a much lower order than the undoubted right to know that she was misleading the public when she said that she did not take drugs. In *Dudgeon v UK* (No 2) (1981) 4 EHRR 149 at 164–165 (para 52) the European Court of Human Rights said that the more intimate the aspects of private life which are being interfered with, the more serious must be the reasons for doing so before the interference can be legitimate. Clayton and Tomlinson *The Law of Human Rights* (2000) vol 1, p 1067 (para 15.162) point out that the court has distinguished three kinds of expression: political expression, artistic expression and commercial expression, and that it consistently attaches great importance to political expression and applies rather less rigorous principles to expression which is artistic and commercial. According to the court's well-established case law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and the self-fulfilment of each individual: see *Tammer v Estonia* (2001) 10 BHRC 543 at 555 (para 59). But there were no political or democratic values at stake here, nor has any pressing social need been identified: contrast *Goodwin v UK* (1996) 1 BHRC 81 at 95–96 (para 40).

e [118] As for the other side of the balance, Keene LJ said in *Douglas v Hello! Ltd* [2001] 2 All ER 289 at 330–331, [2001] QB 967 at 1012 (para 168), that any consideration of art 8 rights must reflect the fact that there are different degrees of privacy. In the present context the potential for disclosure of the information to cause harm is an important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Miss Campbell's right to privacy.

g THE ARTICLE 8 RIGHT

h [119] Looking at the matter from Miss Campbell's point of view and the protection of her art 8 convention right, publication of details of the treatment which she was undertaking to cure her addiction—that she was attending NA, for how long, how frequently and at what times of day she had been attending this therapy, the nature of it and extent of her commitment to the process and the publication of the covertly taken photographs (the third, fourth and fifth of the five elements contained in the article)—had the potential to cause harm to her, for the reasons which I have already given. So I would attach a good deal of weight to this factor.

j [120] As for the other side of the balance, a person's right to privacy may be limited by the public's interest in knowing about certain traits of her personality and certain aspects of her private life, as L'Heureux-Dubé and Bastarache JJ in the Supreme Court of Canada recognised in *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591 at 616 (paras 57–58). But it is not enough to deprive Miss Campbell of her right to privacy that she is a celebrity and that her private life is newsworthy. A margin of appreciation must, of course, be given to the journalist. Weight

must be given to this. But to treat these details merely as background was to undervalue the importance that was to be attached to the need, if Miss Campbell was to be protected, to keep these details private. And it is hard to see that there was any compelling need for the public to know the name of the organisation that she was attending for the therapy, or for the other details of it to be set out. The presentation of the article indicates that this was not fully appreciated when the decision was taken to publish these details. The decision to publish the photographs suggests that greater weight was being given to the wish to publish a story that would attract interest rather than to the wish to maintain its credibility.

[121] Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between these rights as about even. Such is the effect of the margin of appreciation that must, in a doubtful case, be given to the journalist. In that situation the proper conclusion to draw would have been that it had not been shown that the restriction on the art 10 right for which Miss Campbell argues was justified on grounds of proportionality. But the text cannot be separated from the photographs. The words 'Therapy: Naomi outside meeting' underneath the photograph on the front page and the words 'Hugs: Naomi, dressed in jeans and baseball hat, arrives for a lunchtime group meeting this week' underneath the photograph on p 13 were designed to link that what might otherwise have been anonymous and uninformative pictures with the main text. The reader would undoubtedly make that link, and so too would the reasonable person of ordinary sensibilities. The reasonable person of ordinary sensibilities would also regard publication of the covertly taken photographs, and the fact that they were linked with the text in this way, as adding greatly overall to the intrusion which the article as a whole made into her private life.

[122] The photographs were taken of Miss Campbell while she was in a public place, as she was in the street outside the premises where she had been receiving therapy. The taking of photographs in a public street must, as Randerson J said in *Hosking v Runting* [2003] 3 NZLR 385 at 415 (para 138), be taken to be one of the ordinary incidents of living in a free community. The real issue is whether publicising the content of the photographs would be offensive: Gault and Blanchard JJ in the [New Zealand] Court of Appeal (25 March 2004, unreported). A person who just happens to be in the street when the photograph was taken and appears in it only incidentally cannot as a general rule object to the publication of the photograph, for the reasons given by L'Heureux-Dubé and Bastarache JJ in *Aubry's case* [1998] 1 SCR 591 at 617 (para 59). But the situation is different if the public nature of the place where a photograph is taken was simply used as background for one or more persons who constitute the true subject of the photograph. The question then arises, balancing the rights at issue, where the public's right to information can justify dissemination of a photograph taken without authorisation: see *Aubry's case* (at 617–618 (para 61)). The European Court of Human Rights has recognised that a person who walks down a public street will inevitably be visible to any member of the public who is also present and, in the same way, to a security guard viewing the scene through closed circuit television: see *PG v UK* [2001] ECHR 44787/98 (para 57). But, as the court pointed out in the same paragraph, private life considerations may arise once any systematic or permanent record comes into existence of such material from the public domain. In *Peck v UK* (2003) 13 BHRC 669 at 683–684 (para 62)

a the court held that the release and publication of closed circuit television footage which showed the applicant in the process of attempting to commit suicide resulted in the moment being viewed to an extent that far exceeded any exposure to a passer-by or to security observation that he could have foreseen when he was in that street.

b [123] The same process of reasoning that led to the findings in *Peck*'s case that the art 8 right had been violated and by the majority in *Aubry*'s case that there had been an infringement of the claimant's right to respect for her private life can be applied here. Miss Campbell could not have complained if the photographs had been taken to show the scene in the street by a passer-by and later published simply as street scenes. But these were not just pictures of a street scene where she happened to be when the photographs were taken. They were taken c deliberately, in secret and with a view to their publication in conjunction with the article. The zoom lens was directed at the doorway of the place where the meeting had been taking place. The faces of others in the doorway were pixilated so as not to reveal their identity. Hers was not, the photographs were published and her privacy was invaded. The argument that the publication of the photograph added credibility to the story has little weight. The photograph was d not self-explanatory. Neither the place nor the person were instantly recognisable. The reader only had the editor's word as to the truth of these details.

e [124] Any person in Miss Campbell's position, assuming her to be of ordinary sensibilities but assuming also that she had been photographed surreptitiously outside the place where she had been receiving therapy for drug addiction, would have known what they were and would have been distressed on seeing the photographs. She would have seen their publication, in conjunction with the article which revealed what she had been doing when she was photographed and other details about her engagement in the therapy, as a gross interference with f her right to respect for her private life. In my opinion this additional element in the publication is more than enough to outweigh the right to freedom of expression which the defendants are asserting in this case.

CONCLUSION

g [125] Despite the weight that must be given to the right to freedom of expression that the press needs if it is to play its role effectively, I would hold that there was here an infringement of Miss Campbell's right to privacy that cannot be justified. In my opinion publication of the third, fourth and fifth elements in the article (see [88], above) was an invasion of that right for which she is entitled to damages. I would allow the appeal and restore the orders that were made by h the trial judge.

BARONESS HALE OF RICHMOND.

j [126] My Lords, this case raises some big questions. How is the balance to be struck between everyone's right to respect for their private and family life under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and everyone's right to freedom of expression, including the freedom to receive and impart information and ideas under art 10? How do those rights come into play in a dispute between two private persons? But the parties are largely agreed about the answers to these. They disagree about where that balance is to be

struck in the individual case. In particular, how far is a newspaper able to go in publishing what would otherwise be confidential information about a celebrity in order to set the record straight? And does it matter that the article was illustrated by a covertly taken photograph?

THE FACTS

[127] Even the judges know who Naomi Campbell is. On 1 February 2001, the Daily Mirror (the Mirror) published a front page article under the headline: 'Naomi: I am a drug addict.' This did not refer to any public confession she had made. The Mirror had discovered that she was attending meetings of Narcotics Anonymous (NA). It knew enough about those meetings to construct an article based on what would have gone on there. It had also discovered that this had been going on for some time and that on the day in question she had been to two meetings at different places in London. The front page article had a small picture of her emerging from the first meeting. The fuller article spread across pp 12 and 13 had a larger picture of her and others outside a building with a prominent café signboard in the foreground. The others' faces were pixillated. The article gave a full account of her history of difficult behaviour but was sympathetic to her attempts to 'beat the demons that have been haunting her'. It quoted anonymous friends of hers, and acknowledged both the seriousness of her commitment to therapy and the fragility of her state of recovery.

[128] The original source of the story was either a fellow sufferer attending NA meetings or a member of Miss Campbell's staff or entourage. The Mirror had sent along a photographer in the hope of catching her outside the meeting. This done, the editor rang her agent the evening before publication. He pretended that the photographer had happened to be in the street when he saw Miss Campbell coming out of a shop and followed her to the meeting. The agent told the editor that she had 'no comment' but that NA was a 'medical thing' and that it would be 'morally wrong' to publish it.

[129] At trial and ever since, however, it has been accepted that the Mirror was entitled to publish the fact that Miss Campbell was a drug addict and was having therapy. She had publicly denied any involvement with illegal drugs, in particular in a television interview after an admission to a clinic in America in 1997, and the paper was entitled to put the record straight. It was also entitled, even obliged, to balance that disclosure with the fact that she was addressing the problem by having therapy. But, it was argued, the paper was not entitled to disclose that she was attending meetings of NA, or that she had been doing so for some time and with some frequency. Nor was it entitled to illustrate the story with covert photography of Miss Campbell in the company of other participants in the meeting.

[130] Proceedings for breach of confidence and infringement of privacy were issued that same day. At trial only the former was pursued (along with a claim under the Data Protection Act 1998 which it is agreed adds nothing to the claim for breach of confidence). The judge held ([2002] EWHC 499 (QB) at [41], [2002] IP & T 612 at [41]) that the information 'giving details that [her treatment] was by regular attendance at NA meetings' clearly bore the badge of confidentiality. The details were obtained surreptitiously, assisted by covert photography when Miss Campbell was engaged, deliberately 'low key and drably dressed', in the private activity of therapy to advance her recovery from drug addiction. Given the source, they must have been imparted in circumstances importing an

- a obligation of confidence. Publication was to her detriment. It was, viewed objectively, likely to affect adversely her attendance and participation in therapy meetings. Although the disclosure of her addiction and previous lying denial caused her 'considerable' distress, publication of the details about her sessions with NA caused her 'significant' distress. Article 8 was thus engaged and striking the balance with art 10 she was entitled to a remedy.
- b [131] The Court of Appeal reversed this decision ([2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 663). Given what it was accepted could be disclosed, the 'peripheral details' about her attendance at NA were part of the 'journalistic package' adding colour and credibility to the story without increasing the breach of confidence. As complaint could not be made about the taking of the photographs, their publication added nothing.

c THE BASIC PRINCIPLES

- d [132] Neither party to this appeal has challenged the basic principles which have emerged from the Court of Appeal in the wake of the 1998 Act. The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence, as Lord Woolf CJ held in *A v B (a company)* [2002] EWCA Civ 337 at [4], [2002] 2 All ER 545 at [4], [2003] QB 195:
- e 'Articles 8 and 10 have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been
- f modified because under s 6 of the 1998 Act, the court, as a public authority, is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which arts 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.'

- g [133] The action for breach of confidence is not the only relevant cause of action: the inherent jurisdiction of the High Court to protect the children for whom it is responsible is another example: see *Re S (a child) (identification: restriction on publication)* [2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43. But the courts will not invent a new cause of action to cover types of activity
- h which were not previously covered: see *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137. Mrs Wainwright and her disabled son suffered a gross invasion of their privacy when they were strip-searched before visiting another son in prison. The common law in this country is powerless to protect them. As they suffered at the hands of a public authority, the 1998 Act would have given them a remedy if it had been in force at the time, but it was not.
- j That case indicates that our law cannot, even if it wanted to, develop a general tort of invasion of privacy. But where existing remedies are available, the court not only can but must balance the competing convention rights of the parties.

[134] This begs the question of how far the convention balancing exercise is premised on the scope of the existing cause of action. Clearly outside its scope

is the sort of intrusion into what ought to be private which took place in *Wainwright's* case. Inside its scope is what has been termed the protection of the individual's informational autonomy' by prohibiting the publication of confidential information. How does the scope of the action for breach of confidence accommodate the art 8 rights of individuals? As Randerson J summed it up in *Hosking v Runting* [2003] 3 NZLR 385 at 403 (para 83):

'[The English Courts] have chosen to develop the claim for breach of confidence on a case-by-case basis. In doing so, it has been recognised that no pre-existing relationship is required in order to establish a cause of action and that an obligation of confidence may arise from the nature of the material or may be inferred from the circumstances in which it has been obtained.'

The position we have reached is that the exercise of balancing arts 8 and 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential. That is the way in which Lord Woolf CJ put it in *A v B (a company)* [2002] 2 All ER 545 at [11](ix), (x), (in which he also referred to the approach of Dame Elizabeth Butler-Sloss P in *Venables v News Group Newspapers Ltd* [2001] 1 All ER 908, [2001] Fam 430). It is, as I understand it, also the way in which it is put by my noble and learned friends, Lord Nicholls of Birkenhead (at [21]) and Lord Hope of Craighead (at [84]) in this case.

[135] An objective reasonable expectation test is much simpler and clearer than the test sometimes quoted from the judgment of Gleeson CJ in the High Court of Australia in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 13 (para 42), that 'disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities'. It is important to set those words in their full context, bearing in mind that there is no constitutional protection of privacy in Australia:

'There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.'

[136] It is apparent, therefore, that Gleeson CJ did not intend those last words to be the only test, particularly in respect of information which is obviously private, including information about health, personal relationships or finance. It

a is also apparent that he was referring to the sensibilities of a reasonable person placed in the situation of the subject of the disclosure rather than to its recipient.

[137] It should be emphasised that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail.

b [138] The parties agree that neither right takes precedence over the other. This is consistent with Resolution 1165 of 1998 of the Parliamentary Assembly of the Council of Europe (para 10):

c 'The Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.'

d [139] Each right has the same structure. Article 8(1) states: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' Article 10(1) states:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...'

e Unlike the art 8 right, however, it is accepted in art 10(2) that the exercise of this right 'carries with it duties and responsibilities'. Both rights are qualified. They may respectively be interfered with or restricted provided that three conditions are fulfilled. (a) The interference or restriction must be 'in accordance with the law'; it must have a basis in national law which conforms to the convention standards of legality. (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for 'the protection of the rights and freedoms of others'. Article 10(2) provides for 'the protection of the reputation or rights of others' and for 'preventing the disclosure of information received in confidence'. The rights referred to may either be rights protected under the national law or, as in this case, other convention rights. (c) Above all, the interference or restriction must be 'necessary in a democratic society'; it must meet a 'pressing social need' and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both 'relevant' and 'sufficient' for this purpose.

f g h j [140] The application of the proportionality test is more straightforward when only one convention right is in play: the question then is whether the private right claimed offers sufficient justification for the degree of interference with the fundamental right. It is much less straightforward when two convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a 'pressing social need' to protect it. The convention jurisprudence offers us little help with this. The European Court of Human Rights has been concerned with whether the state's interference with privacy (as, for example, in *Z v Finland* (1999) 45 BMLR 107) or a restriction on freedom of expression (as, for example, in *Jersild v Denmark* (1995) 19 EHRR 1, *Fressoz and Roire v France* (1999) 5 BHRC 654, and *Tammer v Estonia* (2001) 10 BHRC 543)

could be justified in the particular case. In the national court, the problem of balancing two rights of equal importance arises most acutely in the context of disputes between private persons. a

[141] Both parties accepted the basic approach of the Court of Appeal in *Re S* [2003] 2 FCR 577 at [54]–[60]. This involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each. The parties in this case differed about whether the trial judge or the Court of Appeal had done this, the appellant arguing that the Court of Appeal had assumed primacy for the art 10 right while the respondent argued that the trial judge had assumed primacy for the art 8 right. b

STRIKING THE BALANCE c

[142] The considerations on each side in *Re S* were of an altogether more serious order than those in this case. On the one hand was respect for the private and family life of a little boy who had had his whole world turned upside down by the death of his older brother allegedly at the hands of his mother. He faced having to live and go to school with daily publicity about the most intimate details of his family life over the several months while his mother was being tried for his brother's murder. That publicity would include the names and photographs of both his mother and his brother from which he could readily be identified. There was psychiatric evidence of the harm which he was likely to suffer as a result. This would include not only the further increase in the already much heightened risk of mental illness in adulthood but also the harm to his relationship with his mother, which on any view was important to his continuing health and development. On the other hand was the public interest in the free reporting of murder trials. This is not only important in itself, as a manifestation both of freedom of expression and of freedom to receive information. It is also an essential component in a fair trial (albeit one which this accused was more than willing to relinquish for the sake of her surviving son) and in securing that justice is done in the open and not in secret, so that the public can have confidence in the system both in general and in the particular case. In *Re S* it was also possible to consider how the interference with each right might be minimised by tailoring the restrictions to meet the case: it was not an 'all or nothing' question. d
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[143] No one can pretend that the interests at stake on either side of this case are anywhere near as serious as the interests involved in *Re S*. Some might even regard them as trivial. Put crudely, it is a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each in their time has profited from the other. Both are assumed to be grown-ups who know the score. On the one hand is the interest of a woman who wants to give up her dependence on illegal and harmful drugs and wants the peace and space in which to pursue the help which she finds useful. On the other hand is a newspaper which wants to keep its readers informed of the activities of celebrity figures, and to expose their weaknesses, lies, evasions and hypocrisies. This sort of story, especially if it has photographs attached, is just the sort of thing that fills, sells and enhances the reputation of the newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to sell in order to ensure that we still have newspapers at all. It may be said that newspapers should be allowed considerable latitude in their intrusions into private grief so that they can h
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a maintain circulation and the rest of us can then continue to enjoy the variety of newspapers and other mass media which are available in this country. It may also be said that newspaper editors often have to make their decisions at great speed and in difficult circumstances, so that to expect too minute an analysis of the position is in itself a restriction on their freedom of expression.

b [144] Examined more closely, however, this case is far from trivial. What is the nature of the private life, respect for which is in issue here? The information revealed by the article was information relating to Miss Campbell's health, both physical and mental. Drug abuse can be seriously damaging to physical health; indeed it is sometimes life-threatening. It can also lead to a wide variety of recognised mental disorders (see the *ICD-10 Classification of Mental and Behavioural Disorders* (WHO 1992) F10–F19). Drug addiction needs treatment if it is to be overcome. Treatment is at several levels. There is the quick 'detox' to rid the body of the harmful substances. This will remove the immediate physical danger but does nothing to tackle the underlying dependence. Then there is therapy aimed at tackling that underlying dependence, which may be combined with a transfer of the dependence from illegal drugs to legally prescribed substitutes.

d Then there is therapy aimed at maintaining and reinforcing the resolve to keep up the abstinence achieved and prevent relapse. This is vital. Anyone who has had anything to do with drug addiction knows how easy it is to relapse once returned to the temptations of the life in which it began and how necessary it is to try, try and try again to achieve success.

e [145] It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself. As the European Court of Human Rights put it in *Z v Finland* (1999) 45 BMLR 107 at 124 (para 95):

f 'Respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature

g as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community ...'

[146] The Court of Appeal in this case held that the information revealed here was not in the same category as clinical medical records. That may be so, in the sense that it was not the notes made by a doctor when consulted by a patient. But the information was of exactly the same kind as that which would be recorded by a doctor on those notes: the presenting problem was addiction to illegal drugs, the diagnosis was no doubt the same, and the prescription was therapy, including the self-help group therapy offered by regular attendance at NA.

j [147] I start, therefore, from the fact—indeed, it is common ground—that all of the information about Miss Campbell's addiction and attendance at NA which was revealed in the Mirror article was both private and confidential, because it related to an important aspect of Miss Campbell's physical and mental health and the treatment she was receiving for it. It had also been received from an insider in breach of confidence. That simple fact has been obscured by the concession

properly made on her behalf that the newspaper's countervailing freedom of expression did serve to justify the publication of some of this information. But the starting point must be that it was all private and its publication required specific justification.

[148] What was the nature of the freedom of expression which was being asserted on the other side? There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.

[149] But it is difficult to make such claims on behalf of the publication with which we are concerned here. The political and social life of the community, and the intellectual, artistic or personal development of individuals, are not obviously assisted by pouring over the intimate details of a fashion model's private life. However, there is one way in which the article could be said to be educational. The editor had considered running a highly critical piece, adding the new information to the not inconsiderable list of Miss Campbell's faults and follies detailed in the article, emphasising the lies and hypocrisy it revealed. Instead he chose to run a sympathetic piece, still listing her faults and follies, but setting them in the context of her now-revealed addiction and her even more important efforts to overcome it. Newspapers and magazines often carry such pieces and they may well have a beneficial educational effect.

[150] The crucial difference here is that such pieces are normally run with the co-operation of those involved. Private people are not identified without their consent. It is taken for granted that this is otherwise confidential information. The editor did offer Miss Campbell the opportunity of being involved with the story but this was refused. Her evidence suggests that she was concerned for the other people in the group. What entitled him to reveal this private information about her without her consent?

[151] The answer which she herself accepts is that she had presented herself to the public as someone who was not involved in drugs. It would have been a very good thing if she were not. If other young women do see her as someone to be admired and emulated, then it is all to the good if she is not addicted to narcotic substances. It might be questioned why, if a role model has adopted a stance which all would agree is beneficial rather than detrimental to society, it is so important to reveal that she has feet of clay. But the possession and use of illegal drugs is a criminal offence and a matter of serious public concern. The press must be free to expose the truth and put the record straight.

[152] That consideration justified the publication of the fact that, contrary to her previous statements, Miss Campbell had been involved with illegal drugs. It

a also justified publication of the fact that she was trying to do something about it by seeking treatment. It was not necessary for those purposes to publish any further information, especially if this might jeopardise the continued success of that treatment.

b [153] The further information includes the fact that she was attending NA meetings, the fact that she had been doing so for some time, and with some regularity, and the photographs of her either arriving at or leaving the premises where meetings took place. All of these things are interrelated with one another and with the effect which revealing them might have upon her. Revealing that she was attending NA enabled the paper to print the headline 'Naomi: I am a drug addict', not because she had said so to the paper but because it could assume that she had said this or something like it in a meeting. It also enabled the paper to c talk about the meetings and how she was treated there, in a way which made it look as if the information came from someone who had been there with her, even if it simply came from general knowledge of how these meetings work. This all contributed to the sense of betrayal by someone close to her of which she spoke and which destroyed the value of NA as a safe haven for her.

d [154] Publishing the photographs contributed both to the revelation and to the harm that it might do. By themselves, they are not objectionable. Unlike France and Quebec, in this country we do not recognise a right to one's own image: cf *Aubry v Editions Vice-Versa Inc* [1998] 1 SCR 591. We have not so far held e that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private. If this had been, and had been presented as, a picture of Naomi Campbell f going about her business in a public street, there could have been no complaint. She makes a substantial part of her living out of being photographed looking stunning in designer clothing. Readers will obviously be interested to see how she looks if and when she pops out to the shops for a bottle of milk. There is g nothing essentially private about that information nor can it be expected to damage her private life. It may not be a high order of freedom of speech but there is nothing to justify interfering with it. (This was the view of Randerson J in *Hosking v Runting* [2003] 3 NZLR 385, which concerned a similarly innocuous outing; see now the decision of the [New Zealand] Court of Appeal (25 March 2004, unreported).)

g [155] But here the accompanying text made it plain that these photographs were different. They showed her coming either to or from the NA meeting. They showed her in the company of others, some of whom were undoubtedly h part of the group. They showed the place where the meeting was taking place, which will have been entirely recognisable to anyone who knew the locality. A picture is 'worth a thousand words' because it adds to the impact of what the words convey; but it also adds to the information given in those words. If nothing else, it tells the reader what everyone looked like; in this case it also told the reader what the place looked like. In context, it also added to the potential harm, by making her think that she was being followed or betrayed, and deterring her j from going back to the same place again.

[156] There was no need to do this. The editor accepted that even without the photographs, it would have been a front page story. He had his basic information and he had his quotes. There is no shortage of photographs with which to illustrate and brighten up a story about Naomi Campbell. No doubt some of those available are less flattering than others, so that if he had wanted to

run a hostile piece he could have done so. The fact that it was a sympathetic story is neither here nor there. The way in which he chose to present the information he was entitled to reveal was entirely a matter for him. The photographs would have been useful in proving the truth of the story had this been challenged, but there was no need to publish them for this purpose. The credibility of the story with the public would stand or fall with the credibility of Mirror stories generally.

[157] The weight to be attached to these various considerations is a matter of fact and degree. Not every statement about a person's health will carry the badge of confidentiality or risk doing harm to that person's physical or moral integrity. The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do? Sometimes there will be other justifications for publishing, especially where the information is relevant to the capacity of a public figure to do the job. But that is not this case and in this case there was, as the judge found, a risk that publication would do harm. The risk of harm is what matters at this stage, rather than the proof that actual harm has occurred. People trying to recover from drug addiction need considerable dedication and commitment, along with constant reinforcement from those around them. That is why organisations like NA were set up and why they can do so much good. Blundering in when matters are acknowledged to be at a 'fragile' stage may do great harm.

[158] The trial judge was well placed to assess these matters. He could tell whether the impact of the story on her was serious or trivial. The fact that the story had been published at all was bound to cause distress and possibly interfere with her progress. But he was best placed to judge whether the additional information and the photographs had added significantly both to the distress and the potential harm. He accepted her evidence that it had done so. He could also tell how serious an interference with press freedom it would have been to publish the essential parts of the story without the additional material and how difficult a decision this would have been for an editor who had been told that it was a medical matter and that it would be morally wrong to publish it.

[159] The judge was also obliged by s 12(4)(b) of the 1998 Act, not only to have particular regard to the importance of the convention right to freedom of expression, but also to any relevant privacy code. The Press Complaints Commission Code of Practice supports rather than undermines the conclusion he reached:

'3. * Privacy

(i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusions into any individual's private life without consent. (ii) The use of long lens photography to take pictures of people in private places without their consent is unacceptable. Note—Private places are public or private property where there is a reasonable expectation of privacy ...

The public interest

There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes: (i) Detecting or exposing crime or a serious misdemeanour. (ii) Protecting public health and safety.

(iii) Preventing the public from being misled by some statement or action of an individual or organisation ...'

This would appear to expect almost exactly the exercise conducted above and to lead to the same conclusion as the judge.

[160] I would therefore allow this appeal and restore the order of the judge.

LORD CARSWELL.

[161] My Lords, I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, and I agree with them that the appeal should be allowed.

[162] The arguments advanced to your Lordships ranged over a wide spectrum of issues in the law of breach of confidence, but in the end they seemed to me to come down to fairly short points and straightforward questions, which involved the application of reasonably well-settled principles.

[163] The material in the article the subject of this appeal was divided by counsel into five categories, set out in para [88] of Lord Hope's opinion, above, to which I would refer. It was not in dispute that the information was imparted in confidence to the respondents, but that they were in the circumstances of the case justified in publishing that contained in the first two categories, the facts that the appellant was a drug addict and that she was receiving treatment for her addiction. These facts would ordinarily be regarded as matters of confidential information. The justification for their publication in this case, however, consists in the fact that the appellant is a well-known figure who courts rather than shuns publicity, described as a role model for other young women, who had consistently lied about her drug addiction and compared herself favourably with others in the fashion business who were regular users of drugs. By these actions she had forfeited the protection to which she would otherwise have been entitled and made the information about her addiction and treatment a matter of legitimate public comment on which the press were entitled to put the record straight. The contest in this litigation centred round the question whether the respondents were on the same basis entitled to publish the material comprised in the third, fourth and fifth categories, as the Court of Appeal held ([2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633), or whether it fell outside the class of information the subject of legitimate comment and should be treated as information received in confidence which should not have been published.

[164] The Court of Appeal drew a distinction between the information that the appellant was receiving therapy from Narcotics Anonymous (NA) and details of the treatment of a medical condition, regarding the latter but not the former as private information. They did not regard it as more than a 'peripheral disclosure' and considered that the publication of the details given in the Daily Mirror (the Mirror) about the appellant's attendance at NA meetings was not in its context sufficiently significant to amount to a breach of duty of confidence owed to her. They held ([2003] 1 All ER 224 at [54]) that a reasonable person of ordinary sensibilities, on reading that the appellant was a drug addict, would not find it offensive that the Mirror newspaper also disclosed that she was attending meetings of NA. It was therefore not of sufficient significance to shock the conscience and justify the intervention of the court (at [56]).

[165] I am unable to agree with the distinction drawn by the Court of Appeal and for the reasons given by Lord Hope and Baroness Hale I consider that the information was private. It seems to me that the publication of the details of the

appellant's course of treatment at NA and of the photographs taken surreptitiously in the street of her emerging from a meeting went significantly beyond the publication of the fact that she was receiving therapy or that she was engaged in a course of therapy with NA. It revealed where the treatment was taking place and the text went into the frequency of her treatment. In this way it intruded into what had some of the characteristics of medical treatment and it tended to deter her from continuing the treatment which was in her interest and also to inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge. This in my view went beyond disclosure which was, in the words of the Court of Appeal, 'peripheral to' the publication of the information that the appellant was a drug addict who was receiving treatment and was capable of constituting breach of confidence. One cannot disregard the fact that photographs are a powerful prop to a written article and a much valued part of newspaper reporting, especially in the tabloid or popular press (hence the enthusiasm of paparazzi to obtain pictures of celebrities for publication in the newspapers). I think that the Court of Appeal dismissed them too readily as adding little to the reports already published and that they were not justified in rejecting the judge's conclusions on this.

[166] It follows that it is not necessary in this case to ask, in the terms formulated in the judgment of Gleeson CJ in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 13 (para 42), whether disclosure of the information would be highly offensive to a reasonable person of ordinary sensibilities. It is sufficiently established by the nature of the material that it was private information which attracted the duty of observing the confidence in which it was imparted to the respondents. It also follows in my opinion that the motives of the respondents in publishing the information, which they claim to have done in order to give a sympathetic treatment to the subject, do not constitute a defence, if the publication of the material in the third, fourth and fifth categories revealed confidential material.

[167] One must then move to the balancing exercise, which involves consideration of arts 8 and 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), the process which was described in some detail by Lord Woolf CJ in *A v B (a company)* [2002] EWCA Civ 337 at [11], [2002] 2 All ER 545 at [11], [2003] QB 195. The carrying out of the balancing is at the centre of this case and forms the point at which the two currents of opinion divide. I agree with the analysis contained in paras [105]–[113] of Lord Hope's opinion in the present appeal and am gratefully content to adopt it. I also agree with him that in order to justify limiting the art 10 right to freedom of expression the restrictions imposed must be rational, fair and not arbitrary, and they must impair the right no more than necessary.

[168] Resolution of this question depends on the weight which one attributes to several factors, the extent of the distress to the appellant and the potential adverse effects on her drug therapy, the extent to which one judges the material in categories (3), (4) and (5) to have gone beyond that contained in categories (1) and (2), and the degree of latitude which should be allowed to the press in the way in which it chooses to present a story. Weighing and balancing these factors is a process which may well lead different people to different conclusions, as one may readily see from consideration of the judgments of the courts below and the

a opinions given by the several members of the Appellate Committee of your Lordships' House.

[169] In my opinion it is a delicately balanced decision, and the answer to the questions which one must ask is by no means self-evident. My own conclusion is the same as that reached by Lord Hope and Baroness Hale. My reasons can be expressed in fairly short compass. Publication of the details about the appellant's attendance at therapy carried out by NA, highlighted by the photographs printed, constituted in my judgment a considerable intrusion into her private affairs, which was capable of causing substantial distress, and on her evidence did cause it to her. It is difficult to assess how much, if any, actual harm it may have done to her progress in therapy. In her evidence the appellant said that she had not gone back to the World's End centre of NA since the article was published and that she had only attended about four meetings in other centres in England, though she had gone to meetings abroad and met privately at her home with other NA attendees. It seems to me clear, however, that the publication of the article did create a risk of causing a significant setback to her recovery. In favour of the respondents it is urged that the material in categories (3), (4) and (5) differed very little in kind from that in categories (1) and (2), the view which found favour with the Court of Appeal. My noble and learned friends, Lord Nicholls of Birkenhead and Lord Hoffmann, also emphasised the importance of allowing a proper degree of journalistic margin to the press to deal with a legitimate story in its own way, without imposing unnecessary shackles on its freedom to publish detail and photographs which add colour and conviction. I do not minimise these factors, which are part of the legitimate function of a free press and require to be given proper weight.

[170] In my opinion the balance comes down in favour of the appellant on the issues in this appeal. I would not myself attempt to isolate which of the contents of categories (3), (4) and (5) is more harmful or tips the balance. I find it sufficient to hold that the information contained in categories (3) and (4), allied to the photographs in category (5), went significantly beyond the revelation that the appellant was a drug addict and was engaged in drug therapy. I consider that it constituted such an intrusion into the appellant's private affairs that the factors relied upon by respondents do not suffice to justify publication. I am unable to accept that such publication was necessary to maintain the newspaper's credibility.

[171] I would accordingly hold that the publication of the third, fourth and fifth elements in the article constituted an infringement of the appellant's right to privacy that cannot be justified and that she is entitled to a remedy. I would allow the appeal and restore the judge's order.

h *Appeal allowed*

Kate O'Hanlon Barrister.

Re West End Networks Ltd (in liquidation) a

Secretary of State for Trade and Industry v Frid

[2004] UKHL 24

HOUSE OF LORDS b

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD PHILLIPS OF WORTH MATRAVERS AND LORD BROWN OF EATON-UNDER-HEYWOOD

1 APRIL, 13 MAY 2004

Company – Winding up – Set-off – Whether VAT credit owing to company in liquidation to be set off against Crown's subrogated claim against company for compensatory notice pay and redundancy payments owed to employees – Employment Rights Act 1996, s 167(3) – Insolvency Rules 1986, r 4.90. c

The respondent was the liquidator of a company which had gone into creditors' voluntary liquidation. The company's assets included a credit of £7,185.77 with Customs and Excise in respect of overpaid value added tax (VAT). Its liabilities included compensatory notice pay and redundancy payments due to former employees under the Employment Rights Act 1996. The company did not make those payments, and the appellant Secretary of State accordingly became liable under provisions of the 1996 Act to pay all or part of them out of the National Insurance Fund. Pursuant to that obligation, the Secretary of State paid the employees £11,574.49. By virtue of s 167(3)^a of the 1996 Act, all the rights and remedies of the employees against the company thereupon vested in the Secretary of State. In addition to the Secretary of State's claim under s 167(3), there were claims against the company for PAYE and National Insurance contributions which, by themselves, exceeded the VAT credit. Customs and Excise allocated the credit rateably between the three Crown claimants, paying £2,344.03 to the Secretary of State as her share. The Secretary of State submitted a proof in the liquidation for £9,230.46, giving credit for the £2,344.03 as having been set off against the VAT credit. That set-off was purportedly made in accordance with r 4.90^b of the Insolvency Rules 1986 which applied where, before the company went into liquidation, there had been 'mutual debts or other mutual dealings' between the company and any creditor of the company proving or claiming to prove in the liquidation. The liquidator rejected the proof, saying that it should have been for the full sum of £11,574.49. The Secretary of State challenged that decision before the registrar, but he upheld it, holding that he was bound to reject a set-off by a long-standing Court of Appeal decision. A subsequent appeal to the deputy judge was dismissed for the same reason, and d

^a Section 167(3) provides: 'Where under this section the Secretary of State pays a sum to an employee in respect of an employer's payment (a) all rights and remedies of the employee with respect to the employer's payment, or (if the Secretary of State has paid only part of it) all the rights and remedies of the employee with respect to that part of the employer's payment, are transferred to and vest in the Secretary of State, and (b) any decision of an employment tribunal requiring the employer's payment to be paid to the employee has effect as if it required that payment, or that part of it which the Secretary of State has paid, to be paid to the Secretary of State.'

^b Rule 4.90, so far as material, is set out at [5], below e

- a the Secretary of State appealed from that decision directly to the House of Lords. On the appeal, the liquidator contended that the requirements of r 4.90 of the 1986 rules had not been satisfied since, at the time when the company had gone into liquidation, there had been no debt owing under s 167(3) of 1996 Act, but only a possibility that such a debt would come into existence afterwards. As well as dealing with that submission, their Lordships considered what constituted
- b 'mutual dealings' for the purposes of r 4.90.

Held – In determining the claims against the Crown by a company in liquidation or the Crown's right to prove in the liquidation, a VAT credit owing to the company was to be set off, under r 4.90 of the 1986 rules, against a subrogated claim by the Crown against the company under s 167(3) of the 1996 Act. It was not necessary, for the purposes of r 4.90, that the debt should have been due and payable before the company had gone into liquidation. It was sufficient that there should have been an obligation arising out of the terms of a contract or statute by which a debt sounding in money would become payable upon the occurrence of some future event or events. Thus if the Secretary of State had agreed by a

c contract before the company had gone into liquidation to guarantee any future liability of the company to pay compensatory notice pay or make redundancy payments to employees under the 1996 Act, the contract of guarantee would have created a contingent liability on the part of the company to reimburse the Secretary of State which was a 'debt' at the time that the company went into

d liquidation and became capable of set-off when the employees were afterwards paid. Statutory origin did not prevent set-off in the case of debts due and payable at the time the company went into liquidation, and there was no reason why it should make any difference that the statute created a contingent liability which existed before the company went into liquidation but fell due for payment and was paid afterwards. The term 'mutual debts' did not in itself require anything

e more than commensurable cross-obligations between the same people in the same capacity. How those debts arose—whether by contract, statute, or tort, voluntarily or by compulsion—was not material. The analogy with a contractual guarantee was exact. The failure of the insolvent employer to pay was the contingency which crystallised the liability imposed upon the Secretary of State by provisions of the 1996 Act, and the payment of those liabilities was in turn the contingency upon which the right of subrogation depended. But when it became

f payable, it was a debt arising out of a statutory obligation which existed before the company went into liquidation. As regards the words 'or other mutual dealings', all that was necessary was that there should have been 'dealings' (in an extended sense which included the commission of a tort or the imposition of a statutory obligation) which gave rise to commensurable cross-claims. Mutuality required that each party should be debtor and creditor in the same capacity. There was such mutuality between a claim against the Customs and Excise and a claim by the Secretary of State on behalf of the National Insurance Fund. It followed that the set-off of the £2,344.03 due to the Secretary of State under

g s 167(3) should have been allowed and the proof in the lesser sum accepted. Accordingly, the appeal would be allowed (see [1], [2], [9], [17]–[21], [24], [26], [28]–[30], [39], [40], below).

Re a Debtor (No 66 of 1955), *ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* [1956] 3 All ER 225 and dicta of Millett J in *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 319 disapproved.

Notes

For set-off and payment to the employee by the Secretary of State, see respectively 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) para 2551 and 16 *Halsbury's Laws* (4th edn reissue) para 590. a

For the Employment Rights Act 1996, s 167, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 770.

For the Insolvency Rules 1986, r 4.90, see 3 *Halsbury's Statutory Instruments* (2001 issue) 481. b

Cases referred to in opinions

Asphaltic Wood Pavement Co, Re, Lee and Chapman's Case (1885) 30 Ch D 216, CA.
Booth v Hutchinson (1872) LR 15 Eq 30.

Charge Card Services Ltd, Re [1986] 3 All ER 289, [1987] Ch 150, [1986] 3 WLR 697; *affd* [1988] 3 All ER 702, [1989] Ch 497, [1988] 3 WLR 723, CA. c

Curtis (DH) Builders Ltd, Re [1978] 2 All ER 183, [1978] Ch 162, [1978] 2 WLR 28.

Day and Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd (1982) 150 CLR 85, Aust HC.

Debtor, Re a (No 66 of 1955), ex p The Debtor v The Trustee of the Property of Waite (a bankrupt) [1956] 2 All ER 94, [1956] 1 WLR 480; *affd* [1956] 3 All ER 225, [1956] 1 WLR 1226, CA. d

Fenton, Re, ex p Fenton Textile Association Ltd [1931] 1 Ch 85, [1930] All ER Rep 15, CA.

Gye v McIntyre (1991) 171 CLR 609, Aust HC.

Jones v Mossop (1844) 3 Hare 568, 67 ER 506, V-C. e

Mann v Secretary of State for Employment [1999] IRLR 566, [1999] ICR 898, HL.

Moseley Green Coal and Coke Co Ltd, Re, Barrett's Case (1865) 34 LJ Bcy 41, 46 ER 1116, [1861-73] All ER Rep 459, CA.

Peat v Jones & Co (1881) 8 QBD 147, CA.

Stein v Blake [1995] 2 All ER 961, [1996] AC 243, [1995] 2 WLR 710, HL. f

Swain v Law Society [1982] 2 All ER 827, [1983] 1 AC 598, [1982] 3 WLR 261, HL.

Cases referred to in list of authorities

Bank of Credit and Commerce International SA (No 8), Re [1997] 4 All ER 568, [1998] AC 214, [1997] 3 WLR 909, HL.

Banque Financière de la Cité v Parc (Battersea) Ltd [1998] 1 All ER 737, [1999] 1 AC 221, [1998] 2 WLR 475, HL. g

Brown v Cork [1985] BCLC 363, CA.

Cushla Ltd, Re [1979] 3 All ER 415.

Daintrey, Re, ex p Mant [1900] 1 QB 546, [1895-9] All ER Rep 657, CA.

Forster v Wilson (1843) 12 M & W 191, 152 ER 1165. h

Glen Express Ltd, Re [2000] BPIR 456.

Lee v Bullen (1858) 27 LJQB 161, 120 ER 258.

MS Fashions Ltd v Bank of Credit and Commerce International SA (in liq) (No 2), High Street Services Ltd v Bank of Credit and Commerce International SA (in liq), Impexbond Ltd v Bank of Credit and Commerce International SA (in liq) [1993] 3 All ER 769, [1993] Ch 425, [1993] 3 WLR 220, Ch D and CA. j

Middleton v Pollock, ex p Nugee (1875) LR 20 Eq 29.

Milan Tramways Co, Re, ex p Theys (1884) 25 Ch D 587, CA.

Murray v Legal & General Assurance Society [1969] 3 All ER 794, [1970] 2 QB 495, [1970] 2 WLR 465.

- a Northern Counties of England Fire Insurance Co, Re, Macfarlane's Claim* (1881) 17 Ch D 337.
- Pailin v Northern Employers' Mutual Indemnity Co Ltd* [1925] 2 KB 73, CA.
- Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573, [1891–4] All ER Rep 246, CA.
- Turner v Thomas* (1871) LR 6 CP 610.
- Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72, 53 ER 563.
- b Westwood v Secretary of State for Employment* [1984] 1 All ER 874, [1985] AC 20, [1984] 2 WLR 418, HL.

Appeal

- c* The Secretary of State for Trade and Industry appealed with permission of the Appeal Committee of the House of Lords given on 13 March 2003 from the decision of David Mackie QC, sitting as a deputy judge of the High Court, on 6 December 2002 ([2002] EWHC 3192 (Ch); [2003] 2 BCLC 284) dismissing her appeal from the decision of Mr Registrar Jacques on 31 May 2002 ([2002] BPIR 1040) dismissing her application to reverse the decision of the respondent,
- d Trevor Frid, the liquidator of West End Networks Ltd, to reject the Secretary of State's proof in the liquidation in the sum of £9,230.46. The facts are set out in the opinion of Lord Hoffmann.*

- e Richard Ritchie* (instructed by the *Treasury Solicitor*) for the Secretary of State. *Stephen Davies QC* and *Richard Ascroft* (instructed by *Clarke Willmott, Bristol*) for liquidator.

Their Lordships took time for consideration.

- f* 13 May 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

- g* [1] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree that, for the reasons he gives, this appeal should be allowed.

LORD HOFFMANN.

- h* [2] On 10 March 1999 West End Networks Ltd (the company) resolved to go into creditors' voluntary liquidation. Its assets included a credit of £7,185.77 with HM Customs and Excise in respect of overpaid value added tax (VAT). Its liabilities included compensatory notice pay and redundancy payments due to nine former employees under ss 88 and 135 of the Employment Rights Act 1996. The company did not make these payments and the Secretary of State accordingly became liable under ss 166(1)(b) and 167(1) of the 1996 Act to pay all or part of them out of the National Insurance Fund. Pursuant to this
- j* obligation the Secretary of State paid the employees £11,574.49 and by virtue of s 167(3) all the rights and remedies of the employees against the company thereupon vested in her. The question of principle raised by this appeal is whether in determining the company's claims against the Crown or the Crown's right to prove in the liquidation of the company, the VAT credit must be set off against the Crown's subrogated claim under s 167(3).

[3] The procedure by which this question has been brought before the House is somewhat unusual. Besides the claim of the Secretary of State under s 167(3), there were claims against the company for PAYE and National Insurance contributions which even by themselves exceeded the VAT credit. HM Customs and Excise allocated the credit rateably between the three Crown claimants and paid £2,344.03 to the Secretary of State (for the account of the National Insurance Fund) as her share. The Secretary of State submitted a proof in the liquidation for £9,230.46, giving credit for the £2,344.03 as having been set off against the VAT credit. The liquidator rejected the proof on the somewhat paradoxical ground that it was too low. He said that it should have been for the full sum of £11,574.49. The purpose of the rejection was to raise the question of principle without requiring the liquidator to bring proceedings against HM Customs and Excise. The matter has since been litigated on this basis.

[4] The Secretary of State appealed to Mr Registrar Jacques, who upheld the liquidator's decision on the ground that he was bound by the decision of the Court of Appeal in *Re a Debtor (No 66 of 1955)*, *ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* [1956] 3 All ER 225, [1956] 1 WLR 1226. A further appeal to Mr David Mackie QC, sitting as a deputy High Court judge ([2002] EWHC 3192 (Ch), [2003] 2 BCLC 284), was dismissed for the same reason. Both the registrar and the judge expressed regret over their decisions, saying that they appeared to be contrary to justice and principle. As it appeared likely that the Court of Appeal would also consider itself bound by the earlier case, Mr Mackie gave leave for an appeal to be brought directly to your Lordships' House.

[5] Set-off between an insolvent company and its creditors is currently governed by r 4.90 of the Insolvency Rules 1986, SI 1986/1925:

'(1) This Rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.

(2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other ...'

[6] If the requirements of para (1) are satisfied, the account and set-off required by para (2) are mandatory and apply whenever it is necessary to ascertain the net amount owing by one party to the other: see *Stein v Blake* [1995] 2 All ER 961, [1996] AC 243. Such an ascertainment is necessary for the purpose of determining the amount for which the Secretary of State is entitled to prove in the liquidation. So the question in this appeal is whether the requirements of para (1) are satisfied.

[7] The rule requires that there should have been 'mutual credits, mutual debts or other mutual dealings' between the company and the Secretary of State before the company went into liquidation, that is to say, before the date of the resolution to wind it up. I shall call this 'the insolvency date'. In considering whether this requirement was satisfied, I shall put aside two matters for later consideration. One is the question of whether HM Customs and Excise is the same party as the Secretary of State and the second is the effect of the words 'or other mutual dealings'. I shall consider first whether 'mutual

a debts' existed at the relevant time between the company and the Crown, treating HM Customs and Excise and the Secretary of State as both being manifestations of the Crown.

b [8] There is no doubt that the liability to repay VAT was a debt which existed at the relevant time. It was quantified, due and payable. But nothing was yet due under s 167(3) of the 1996 Act. The liability arose by virtue of the payment made by the Secretary of State under s 167(1) and her liability to make that payment had in turn arisen because the company had become insolvent: see s 166(1)(b). So Mr Davies QC, who appeared for the liquidator, says that there was no debt owing under s 167(3) at the insolvency date. There was only a possibility that such a debt would come into existence afterwards.

c [9] It is not however necessary for the purposes of r 4.90(2) that the debt should have been due and payable before the insolvency date. It is sufficient that there should have been an obligation arising out of the terms of a contract or statute by which a debt sounding in money would become payable upon the occurrence of some future event or events. The principle has typically been applied to claims for breach of contract where the contract was made before the d insolvency date but the breach occurred afterwards (*Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 Ch D 216) or claims for indemnity by a guarantor where the guarantee was given before the insolvency date but the guarantor was called upon and paid afterwards (*Jones v Mossop* (1844) 3 Hare 568, 67 ER 506, *Re Moseley Green Coal and Coke Co Ltd, Barrett's Case* (1865) 34 LJ Bcy 41, 46 ER 1116).

e [10] The effect of these and similar cases was summed up by Millett J in *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 313, [1987] Ch 150 at 182:

f 'By the turn of the [twentieth] century, therefore, the authorities showed that debts whose existence and amount were alike contingent at the date of the receiving order and claims to damages for future breaches of contracts existing at that date were capable of proof and, being capable of proof, could be set off under the section provided that they arose from mutual credits or mutual dealings. The only requirement was that they must in fact have resulted in quantified money claims by the time the claim g to set-off was made.'

[11] I agree that this principle was firmly established, but in view of the reasoning in *Ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)*, which the registrar and the judge held to require a rejection of a set-off in this case, I should give some examples of its application to claims by guarantors h under pre-insolvency guarantees. In *Jones v Mossop* (1844) 3 Hare 568, 67 ER 506, Mr Reed was holder of a bond for £500 given by Mr Jones, who had also guaranteed some loans to Mr Reed by third parties. Mr Reed died insolvent and Mr Jones was called to pay £377 to the lenders under the guarantees. When Mr Reed's assignee Mr Mossop sued Mr Jones on the bond, he brought j proceedings in equity claiming to be entitled to set off the £377 he had paid. Because Mr Reed had never actually been made bankrupt, the then equivalent of r 4.90 did not apply and Wigram V-C gave relief under general equitable principles, but he said (*Jones v Mossop* (1844) 3 Hare 568 at 571, 67 ER 506 at 508): '... if Richard Reed had been bankrupt; I should have had no difficulty in deciding this case.'

[12] The same principle was applied to a winding up in *Re Moseley Green Coal and Coke Co Ltd, Barrett's Case* (1865) 34 LJ Bcy 41, 46 ER 1116. Mr Barrett owed the company money on his partly-paid shares for which calls were made after it went into insolvent liquidation. He had also guaranteed the company's liability for the purchase price of a coal mine, for which the vendor held security in the form of a mortgage and the company's promissory note. After the winding up Mr Barrett's sister paid off the vendor and took over the mortgage and promissory note. Mr Barrett then entered into an arrangement which was treated as a payment of the company's debt and he took over the promissory note. Lord Westbury LC held that he was entitled to set off the debt on the promissory note against his liability to pay calls on his shares. The facts give rise in my mind to some doubt about whether Mr Barrett could truly be said to have paid under his guarantee but, assuming that he had, the application of the principle of contingent liability is clear enough.

[13] In *Re Fenton, ex p Fenton Textile Association Ltd* [1931] 1 Ch 85, [1930] All ER Rep 15 was another case of a surety under a pre-insolvency guarantee, but this time he had not actually paid. Nor could he pay, because he was bankrupt and his assets had vested in his trustee. The creditor was still owed the money and entitled to prove in the liquidation. The Court of Appeal held, first, that one could not have more than one proof in respect of the same debt ('the rule against double proof'); otherwise, if there had been, say, four guarantors, there could have been five people receiving dividends on the same debt. Secondly, the Court of Appeal said that until the creditor had been paid, he had the superior right of proof and a proof by a surety was excluded. Thirdly, the court said that a debt which could not be proved could not be relied upon for set-off. There is no longer doubt about any of these propositions. But the judgments of Lawrence and Romer LJ make it clear (that of Lord Hanworth MR is a little obscure) that if the guarantor had paid off the debt after the insolvency date, he would have been entitled to set it off against a debt which he owed to the company.

[14] That brings me to *Ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* which is the reason why leave was given to appeal to your Lordships' House. One Waite owed the debtor £101, being the balance of the price of goods sold and delivered. Waite was made bankrupt, having previously guaranteed the debtor's overdraft and deposited the deeds of his property as security. Waite's trustee paid the bank £133 out of the bankrupt's assets which had vested in him as trustee to pay off the overdraft and obtain the release of the deeds. When he claimed reimbursement, the debtor claimed to set off the £101 he was owed by Waite, for which he would otherwise have had to prove in the bankruptcy.

[15] Dankwerts J, giving the judgment of himself and Harman J in the Divisional Court in bankruptcy said that Waite and his trustee were not for this purpose the same person. Waite had held his assets for his own benefit. The trustee held the assets that vested in him for the benefit of the creditors:

'There was in fact no mutuality at the date of the receiving order in Waite's bankruptcy and the debt on which the action was founded was due not to Mr. Waite but to his trustee.' (See [1956] 2 All ER 94 at 100, [1956] 1 WLR 480 at 487.)

- a [16] My Lords, it is unnecessary to express a concluded view but, speaking for myself, I find this reasoning convincing. But the Court of Appeal ([1956] 3 All ER 225, [1956] 1 WLR 1226) seem to have put the matter on a much broader basis. I say 'seem' because I agree with Millett J in *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 318–319, [1987] Ch 150 at 189 that the judgments of Lord Evershed MR and Hodson LJ are not easy to follow. But they both appear to
- b have decided that a surety under a pre-insolvency guarantee is not entitled to set-off unless he has actually paid the debt before the insolvency date. *Re Moseley Green Coal & Coke Co* was distinguished ('depending on its own special facts' ([1956] 3 All ER 225 at 229, [1956] 1 WLR 1226 at 1232)) and the other cases were not mentioned. In *Day & Dent Constructions Pty Ltd (in liq) v North Australian Properties Pty Ltd* (1982) 150 CLR 85 at 94, 106 the High Court of Australia said that *Ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* was contrary to principle and authority and declined to follow it.
- c Mr Davies on behalf of the liquidator did not support the broad reasoning of the Court of Appeal (although he did propose a third ground upon which the case could be supported, to which I shall in due course return). I also respectfully
- d think that the broad reasoning was wrong.
- [17] This means that if the Secretary of State had agreed by contract before the insolvency date to guarantee any future liability of the company to pay compensatory notice pay or make redundancy payments to employees under the 1996 Act, the contract of guarantee would have created a contingent
- e liability on the part of the company to reimburse the Secretary of State which was a 'debt' at the insolvency date and became capable of set-off when the employees were afterwards paid. The next question is whether it makes a difference that the contingent liability existed by virtue of a statute rather than a contract and, not being consensual, that it involved no direct contract or other
- f relationship with the employees or the company.
- [18] The question of whether the set-off provisions apply to debts arising under statute was decided by Brightman J in *Re DH Curtis (Builders) Ltd* [1978] 2 All ER 183, [1978] Ch 162, a case which has since been consistently followed in this country and approved by the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609. The debts in that case were, on the one side, the liability
- g of the company to the Inland Revenue and the Department of Health and Social Security for PAYE and National Insurance contribution respectively and, on the other, the liability of HM Customs and Excise to the company for excess input VAT. All the debts were due and payable at the insolvency date. Brightman J ([1978] 2 All ER 183 at 189, [1978] Ch 162 at 171), ejected the
- h argument that the mutuality required by the statute meant that the claims sought to be set off 'must be such as result in pecuniary liabilities arising out of contract'. He said that the type of acts or events giving rise to the liabilities were immaterial provided that those liabilities were 'commensurable', that is to say, capable of being expressed in money.
- j [19] If a statutory origin does not prevent set-off in the case of debts due and payable at the insolvency date, I do not see why it should make any difference that the statute creates a contingent liability which exists before the insolvency date but falls due for payment and is paid afterwards. The term 'mutual debts' does not in itself require anything more than commensurable cross-obligations between the same people in the same capacity. How those debts

arose—whether by contract, statute or tort, voluntarily or by compulsion—is not material. a

[20] The analogy with a contractual guarantee appears to me exact. Indeed, s 167 of the 1996 Act was enacted to give effect to Council Directive (EEC) 80/987 (on the approximation of the laws of the member states relating to the protection of employees in the event of the insolvency of their employer) (OJ 1980 L283 p 23) which required member states, by art 3, to— b

‘take the measures necessary to ensure that guarantee institutions guarantee ... payment of employees’ outstanding claims resulting from contracts of employment or employment relationships ...’

[21] The United Kingdom has complied with this directive by enacting that the Secretary of State is to be our ‘guarantee institution’. In *Mann v Secretary of State for Employment* [1999] IRLR 566 at 568, [1999] ICR 898 at 902 I described the provisions of ss 166 and 167 of the 1996 Act as a ‘state guarantee’ and ([1999] IRLR 566 at 569, [1999] ICR 898 at 904) said that the Secretary of State was a ‘guarantor, liable only for whatever the employee was entitled to be paid by his employer’. In truth, however, it does not matter how the liability is characterised. The failure of the insolvent employer to pay is the contingency which crystallises the liability imposed upon the Secretary of State by ss 166 and 167 and the payment of those liabilities is in turn the contingency upon which the right of subrogation depends. But when it does become payable, it is a debt arising out of a statutory obligation which existed before the insolvency date. c

[22] My Lords, so far I have been concentrating upon the effect of the words ‘mutual debts’. The words ‘or other mutual dealings’ was added for the first time by the Bankruptcy Act 1869. These words, and particularly the word ‘other’ create what the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609 at 623 tactfully called ‘a linguistic problem’. The language suggests that the previous words ‘mutual credits, mutual debts’ must be qualified by a requirement that the credits or debts can in some sense be described as ‘mutual dealings’. But all the authorities since the 1869 Act have been unanimous in saying that Parliament in no way intended to restrict the ambit of the original formula. On the contrary, the purpose was to broaden it. In *Booth v Hutchinson* (1872) LR 15 Eq 30 at 35, Malins V-C said that the additional words ‘were intended to give a more extended right of set-off than previously existed’ and in *Peat v Jones & Co* (1881) 8 QBD 147 at 149, Jessel MR said: d

‘Now the enactment as to “mutual credits” is a very old one, first appearing in 5 Geo. 2, c. 30, but the whole tendency of the subsequent legislation, as of the legislation respecting proveable debts, has been to extend the principle on which it is founded.’ e

[23] What then is the answer to the ‘linguistic problem’ identified by the High Court of Australia in *Gye v McIntyre* (1991) 171 CLR 609 at 623? That court gave a clear answer: f

‘... “credits” and “debts” will ordinarily represent the outcome of dealings rather than the dealings themselves. Conversely, “dealings” commonly do not, of themselves as distinct from their outcome, represent credits or debts susceptible of direct set-off ... the requirement of mutuality in respect of “other ... dealings”, as distinct from “credits” or “debts” susceptible of immediate set-off, is directed not so much to the relationship g

a between the dealings as such but to the relationship between the claims which have arisen from them.'

[24] All that is necessary therefore is that there should have been 'dealings' (in an extended sense which includes the commission of a tort or the imposition of a statutory obligation) which give rise to commensurable cross-claims. In *Gye v McIntyre* itself, the one party was liable to the other for money lent and the cross-claim was for damages in tort for fraudulently inducing the borrower to enter into a separate contract to which the lender was not a party.

b [25] In *Re Charge Card Services Ltd* [1986] 3 All ER 289 at 319, [1987] Ch 150 at 189, Millett J suggested that an alternative ratio for *Ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* was that the contingent obligation of the principal debtor to his surety was not referable to any transaction between debtor and surety, the parties to the alleged set-off, but rather to the guarantee which the surety had given to the creditor. The implication is that a mutual transaction may be required by r 4.90. But there is nothing in the term 'mutual debts' which requires that both debts must be, as Millett J put it ([1986] 3 All ER 289 at 319, [1987] Ch 150 at 190), 'exclusively referable' to a contract or other 'transaction' between the parties to the set-off. It is true that if it were not for the historical background, one might have been able to argue that such a notion was implied by the words 'mutual dealings'. But once one accepts that the debts need not arise from consensual transactions at all, but can arise from statutory obligations as in *Re DH Curtis (Builders) Ltd* or torts as in *Gye v McIntyre* such a requirement of mutuality in the transactions giving rise to the cross-claims becomes untenable. Mr Davies, in his written case, was constrained to say of Millett J's suggestion that it was 'objectionable only to the extent that it appears to require an agreement rather than a dealing'. But that, in my opinion, is a very large objection when one considers the extended meaning which has been given to 'dealing'. I can quite understand why Millett J wanted to find some reasoning to explain *Ex p The Debtor v The Trustee of the Property of Waite (a bankrupt)* which was not plainly and obviously wrong. But I respectfully think that the alternative explanation, though it may have served well enough for the case before him, is ultimately also unsuccessful.

e [26] The final question is whether there is mutuality between a claim against HM Customs and Excise and a claim by the Secretary of State on behalf of the National Insurance Fund. Mutuality requires that each party should be debtor and creditor in the same capacity. A claim by a trustee on behalf of a beneficiary cannot be set off against a debt owing to the trustee personally. The law is concerned with beneficial ownership and not mere legal title.

h [27] The constitutional accountability of the Crown to Parliament for the expenditure of public money means that, as a matter of public law, the Crown may have to deal differently with money from different sources. Part XII of the Social Security Administration Act 1992 prescribes what may be paid out of the National Insurance Fund, what must be paid in, how it must be invested and so forth. But these provisions do not in my opinion create a trust in private law: compare *Swain v Law Society* [1982] 2 All ER 827 at 837-838, [1983] 1 AC 598 at 618 per Lord Brightman. In private law the Crown through its various emanations is the beneficial owner of all central funds. If it fails to comply with the provisions which require such funds to be segregated, the remedy lies in public law.

[28] In fact, there has been no difficulty in reconciling the Crown's set-off with the segregation of the various funds. All that happened was that HM Customs and Excise, instead of writing a cheque to the company, wrote three cheques to the Inland Revenue, the Department of Social Security and CSL Management Group Ltd, which administers the Secretary of State's obligations to make payments under ss 166 and 167 of the 1996 Act and which paid the money into the National Insurance Fund. Thus were the proprieties of public finance preserved.

[29] It follows that in my opinion the set-off of the £2,344.03 due to the Secretary of State under s 167(3) should have been allowed and the proof in the lesser sum accepted. I would allow the appeal accordingly.

LORD HOPE OF CRAIGHEAD.

[30] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons which he has given I too would allow the appeal. I should like to add only two brief comments.

[31] The first comment relates to the question whether it should make a difference for the purposes of r 4.90 of the Insolvency Rules 1986, SI 1986/1925 that ss 167(3) and 189(2) of the Employment Rights Act 1996, which enable the Secretary of State to recover the amounts paid to former employees in respect of redundancy payments and compensatory notice pay respectively, create contingent liabilities on the part of the company which exist before the insolvency date but fall due for payment and are paid afterwards. Section 411(1) of the Insolvency Act 1986 contains separate rule-making powers in relation to England and Wales on the one hand and to Scotland on the other for the purposes of giving effect to Pts I–VII of the Act. Rule 4.90 of the Insolvency Rules 1986, which reproduces the provisions regarding mutual credit and set-off in bankruptcy that are set out in s 323 of the 1986 Act (which do not extend to Scotland), has no counterpart in the Insolvency (Scotland) Rules 1986, SI 1986/1915. In Scotland the question of set-off (or compensation, as it is usually referred to in Scots law) is regulated, both in personal bankruptcy and in the winding of a company, by the common law.

[32] In Scotland it is well established that, while in compensation both debts must be due at the same time, this rule is applied only when both parties are solvent: Goudy *A Treatise on The Law of Bankruptcy in Scotland* (4th edn, 1914) pp 550–553. As Goudy puts it (p 551), the term compensation as applied in insolvency has generally to be understood in a sense very closely akin to that of retention. It is based on a principle of equity which is designed to prevent the hardship of a debtor who is also a creditor being forced to pay in full, while he only receives a dividend for his debt. So every kind of claim may be set off in a case of insolvency, the only general restriction being that the debt sought to be set off against the bankrupt estate must be one that is capable of being ranked for.

[33] Bell *Commentaries on the Law of Scotland* (7th edn, 1870) vol ii, p 122 sets out the qualification that applies in the case of insolvency in this way:

'2. In compensation the debts must both be due at the same time. One who is due money presently payable, cannot defend himself against the demand by setting off money due to him six months after, or the payment

a of which depends on a condition. But this is a rule which holds strictly only while the parties are solvent. If one of them become bankrupt, the other may defend himself against a present demand, by setting off a debt that is future or contingent, although the term of payment be after the bankruptcy. He cannot so plead, however, on a debt arising after bankruptcy.

b 3. In compensation the debts must both be liquid, or capable of immediate liquidation. A debt is deemed liquid when it is actually due and the amount ascertained, "*Cum certum an et quantum debeatur.*" But if the debt itself be contested, and the creditor has not his proof ready; or if the amount be disputed, and it depend on a long discussion what is to be adjudged due; the debtor will not be allowed to avoid payment of what is liquid and due till that litigation be terminated. This, however, does not hold as to the balancing of accounts on bankruptcy. If one party have failed, and a demand be made on the other, he will not be obliged to pay the liquid debt, and come in as creditor only for a dividend. The immediate necessity for payment of the liquid debt is taken away by the bankruptcy; and there is no impediment to the equity which holds the one debt an extinction of the other.'

[34] So the fact that nothing was yet due to the Secretary of State by the company at the insolvency date would not be an obstacle to the application of the principle. And, although the point has not arisen for decision in Scotland, there seems to be no reason to doubt that the question how the debts arose is not a material consideration either. Any kind of debt will do for the purposes of the plea of compensation in a case of insolvency in Scots law, so long as it is a debt that is capable of being ranked for. That general approach makes it unnecessary to distinguish between debts that arise out of contract and those that, because they are purely statutory, do not involve any kind of direct contact or other similar relationship. It would appear that, had this case arisen in Scotland, there would have been no difficulty in holding that the company's claim against the Crown in respect of overpaid value added tax (VAT) must be set off against the Crown's subrogated claim under s 167(3) of the 1996 Act. It is satisfactory that it has been possible to reach the same conclusion as to the effect in England of r 4.90 of the Insolvency Rules 1986.

[35] Secondly, as to the question of mutuality, I would add the following explanation as to the general background. The National Insurance Fund, out of which the Secretary of State became liable to pay the employees under ss 166(1)(b) and 167(1) of the 1996 Act (in the case of the redundancy payments) and ss 182 and 184(1)(b) of that Act (in the case of compensatory notice pay), was first established by s 35 of the National Insurance Act 1946 as a fund maintained under the control and management of the minister. All contributions paid by employers and insured persons were to be paid into this fund, and out of it were to be paid all claims for benefit and certain other sums payable under various statutes. The fund was continued in being for these purposes by s 83 of the National Insurance Act 1965. Section 83(4) of that Act provided for accounts of the National Insurance Fund to be prepared, for them to be examined and certified by the Comptroller and Auditor General and for copies of these accounts together with his report thereon to be laid before Parliament.

[36] In the same year s 26 of the Redundancy Payments Act 1965 established a new fund, to be called the Redundancy Fund, into which all sums received by the minister under Pt II of the Redundancy Payments Act 1965 were to be paid and out of which were to be made the payments provided for by that Act. Its original function was to provide for the payment of rebates to employers who had made redundancy payments. Section 26(2) of the Redundancy Payments Act 1965 provided for the preparation, examination and certification of accounts of this fund and their laying before Parliament in the same way as was done in the case of the National Insurance Fund. The Redundancy Fund was continued in being by s 103 of the Employment Protection (Consolidation) Act 1978. Section 106 of the 1978 Act, the statutory predecessor of s 167 of the 1996 Act, provided for the making of redundancy payments direct to employees out of the fund in the event of the employer's insolvency. Sections 122–127 of the 1978 Act, the statutory predecessors of ss 182–189 of the 1996 Act, provided for the payment out of the fund of the debts to employees, including arrears of wages, which were guaranteed in the event of the insolvency.

[37] The system for the payment of rebates to employers was abolished by s 17 of the Employment Act 1989. In the following year the Redundancy Fund was abolished by s 13 of the Employment Act 1990, as there was no longer a good reason for its existence as a separate fund. Its assets and liabilities were merged with those of the National Insurance Fund. By that time the National Insurance Fund was under the control and management of the Secretary of State under s 133 of the Social Security Act 1975, which s 161 of the Social Security Administration Act 1992 has replaced. It is from the merged fund that the sums at issue in this case were paid to the former employees of the company. Its important characteristic for present purposes is that it is a fund which is under the control and management of the Secretary of State for the statutory purposes and for which she is accountable under the statute to Parliament. In the performance of these functions the Secretary of State is not in the position of a trustee under a private trust. She is performing a public duty on behalf of the Crown. So too is HM Customs and Excise when it accounts to taxable persons for overpayments of VAT. It too is performing on behalf of the Crown a public duty which has been laid upon it by statute.

[38] It is a general rule of the doctrine that allows for one debt to be set off against another that each of the two parties be both creditor and debtor in his own right. This is as true under the law of Scotland as it is under the English common law. As *Bell Commentaries on the Law of Scotland* vol ii, p 124 puts it:

'Compensation can be pleaded only when the demands are mutual; and this whether the plea be strictly compensation, or the more extended remedy of the balancing of claims in bankruptcy. To constitute this mutuality of debt and credit, the sums reciprocally due must be owing to the parties in their own right respectively.'

I agree that in the present case this requirement is satisfied. The Crown is acting both as debtor and as creditor in the same capacity. The claims to the sums in question on either side are claims due to and owed by the Crown in its own right. It is clear that there is, in this situation, no lack of mutuality.

LORD PHILLIPS OF WORTH MATRAVERS.

a [39] I agree that this appeal should be allowed for the reasons given by my noble and learned friend, Lord Hoffmann.

LORD BROWN OF EATON-UNDER-HEYWOOD.

b [40] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I too agree that, for the reasons he gives, this appeal should be allowed.

Appeal allowed.

Celia Fox Barrister.

Drury v Secretary of State for the Environment, Food and Rural Affairs

[2004] EWCA Civ 200

COURT OF APPEAL, CIVIL DIVISION

WARD, MUMMERY LJJ AND WILSON J

11 DECEMBER 2003, 26 FEBRUARY 2004

Land – Summary proceedings for possession – Extent of court’s jurisdiction – Persons unlawfully occupying woodland – Owner obtaining possession order against unlawful occupiers in respect of woodland unlawfully occupied by them and in respect of other separate areas of woodland within 20-mile radius – Whether court having jurisdiction to grant order for possession in relation to other separate areas – CPR Pt 55.

The claimant owned woodland known as Fermyn Woods which was managed by the Forestry Commission. The defendant and others began to occupy Fermyn Woods wrongfully. The claimant issued a possession claim against trespassers seeking possession not only of Fermyn Woods but of 30 other named areas of woodland separate from Fermyn Woods, being all the woodlands owned by the claimant and managed by the Forestry Commission which lay within a 20-mile radius of Fermyn Woods. The case for an order in relation to the other 30 areas was founded upon concern that, on departure from Fermyn Woods, the trespassers would move into occupation of one or more of them. The supporting statement of the Forestry Commission’s land agent included evidence that one or more of the occupiers of Fermyn Woods had occupied that area of woodland previously and that one or more of those who in the past had occupied one or more of the other 30 areas had done so on more than one occasion. There was no evidence which linked past or present occupiers of Fermyn Woods with past or present occupiers of any of the other areas and there had been no wrongful occupation of any of the other areas during the previous three years. The judge made the possession order sought. The defendant appealed contending: (i) that in a possession claim against trespassers the court could make an order for possession in relation only to the area of land which the trespassers were occupying, and not also in relation to separate land owned by the claimant; and (ii) that if a claimant feared that trespassers would decamp from one area of his land to a second, separate area of it, his remedy was an injunction against entry into the second area as well as a possession order relating to the first area.

Held – Where a claimant entitled to an order for possession of a certain area of land contended that its occupants were likely to decamp to a separate area of land owned by him the separate area should be included in the order for possession if, but only if, he would have been entitled to a quia timet injunction against the occupants in relation to the separate area. He would have to prove that there was an imminent danger of very substantial damage. It followed that the inclusion in a possession order of an area of land owned by a claimant which had not yet been occupied by the defendants should be exceptional. The necessary evidence would usually take the form either of an expression of intention to decamp to the other area or of a history of movement between the two areas from which a real danger of repetition could be inferred, or of such propinquity and similarity

a between the two areas as to command the inference of a real danger of decampment from one to the other. In the instant case there had been insufficient evidence that there had been a real danger that the defendants would decamp to one or another of the other areas, and the appeal would therefore be allowed (see [19]–[21], [25], [26], [37], [45]–[47], below).

Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48 applied.

b University of Essex v Djemal [1980] 2 All ER 742 considered.

Notes

For summary proceedings for possession, and for threatened invasion of legal right, see respectively, 39(2) *Halsbury's Laws* (4th edn reissue) paras 270–300 and 24 *Halsbury's Laws* (4th edn reissue) para 832.

c Cases referred to in judgments

A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd [1919] AC 999, PC.

Ellis v Loftus Iron Co (1874) LR 10 CP 10, [1874–80] All ER Rep 232.

d Ministry of Agriculture, Fisheries and Food v Heyman (1989) 59 P & CR 48.

R v Wandsworth County Court, ex p Wandsworth London Borough [1975] 3 All ER 390, [1975] 1 WLR 1314, DC.

Redland Bricks Ltd v Morris [1969] 2 All ER 576, [1970] AC 652, [1969] 2 WLR 1437, HL.

e University of Essex v Djemal [1980] 2 All ER 742, [1980] 1 WLR 1301, CA.

White v Mellin [1895] AC 154, HL.

Appeal

The appellant defendant, Angela Drury, appealed from the decision of Judge Waine, sitting as a judge of the Queen's Bench Division, Northampton District Registry, on 23 May 2003, granting the order for possession sought by the respondent claimant, the Secretary of State for the Environment, Food and Rural Affairs, of Fermyn Woods and 30 other areas of woodland owned by the claimant. The facts are set out in the judgment of Wilson J.

g Richard Drabble QC and Richard Hickmet (instructed by the Community Law Partnership, Birmingham) for the appellant.

John Hobson QC (instructed by Whitehead Vizard, Salisbury) for the respondent.

Cur adv vult

h 26 February 2004. The following judgments were delivered.

WILSON J (giving the first judgment at the invitation of Ward LJ).

[1] Ms Drury, the appellant, appeals against an order made by Judge Waine, sitting as a judge of the High Court, Queen's Bench Division, Northampton District Registry, on 23 May 2003.

j [2] The appeal raises the question: in a possession claim against trespassers can the court—and, if so, to what extent and by reference to what principle—make an order for possession in relation not only to the area of land which the trespassers are occupying but also to a separate area of land owned by the claimant?

[3] The respondent is the owner of Fermyn Woods, which lie to the south east of Corby. The Forestry Commission manages the woodland on her behalf.

[4] On about 15 April 2003 11 travellers, including the appellant and her two children, wrongfully began to occupy Fermyn Woods. On that date an officer of the respondent requested them to leave the woodland forthwith. They did not do so. Indeed during subsequent weeks a number of other travellers took up occupation of the woodland with them. a

[5] On 15 May 2003 the respondent issued 'a possession claim against trespassers', as defined in CPR 55.1(b). Being unaware of the names of any of the occupants of the woodland, she brought the claim against 'persons unknown' pursuant to r 55.3(4). At the appellant's request, she was added as a named defendant to the claim only after the order under appeal had been made. b

[6] By her claim form the respondent sought an order for possession not just of Fermyn Woods but also of 30 other named areas of woodland separate from Fermyn Woods. These other areas comprised all the woodlands owned by her and managed by the Forestry Commission which lay within a 20-mile radius of Fermyn Woods. Although the particulars of claim suggested that all 31 areas of woodland were occupied by the unnamed defendants, the supporting statement of Mr Ashley, a land agent employed by the Forestry Commission, made clear that the defendants were in occupation only of Fermyn Woods and that the case for an order in relation to the other 30 areas of woodland was founded upon concern that, on departure from Fermyn Woods, the defendants would move into occupation of one or more of them. c
d

[7] In his statement Mr Ashley said that: (a) there had been previous unlawful encampments by travellers on Fermyn Woods; (b) in 1998 one such encampment had led to an order for possession; (c) the registration plate noted upon a vehicle which was part of the encampment on Fermyn Woods in 1998 was noted upon one of the vehicles which on 13 May 2003 were parked there; (d) between 1997 and January 2000 there had been a number of other unlawful encampments by travellers on areas of woodland managed by the Forestry Commission within a 20-mile radius of Fermyn Woods; (e) on six occasions a registration plate noted upon a vehicle which was part of one such other unlawful encampment had also been noted upon a vehicle which was part of another; and (f) much of the respondent's land in the east of England had been the subject of almost continuous adverse occupation for many years. e
f

[8] The respondent effected service of the proceedings in accordance with r 55.6, namely by attaching copies of the documents to stakes placed in the land. On the day prior to the hearing, along with other of the defendants, the appellant instructed solicitors, who wrote by fax to the court, with a copy to the respondent's solicitors. By their letter they requested a fortnight's adjournment so that they could file a defence; they raised concerns about the welfare of some of the defendants, including the then unnamed appellant who was pregnant and whose two children attended a local nursery school; and they protested that in any event the width of the area covered by the proposed order was unjustified. g
h

[9] At the hearing on 23 May the respondent was represented by a solicitor. None of the defendants was present. The judge read the letter from the solicitors instructed by some of the defendants but resolved to proceed. He made the order as sought, namely that the defendants, being persons unknown, should give possession of Fermyn Woods and of the other 30 areas of woodland to the respondent forthwith. He delivered no judgment other than to state that, in the light of the history of trespass upon the respondent's other woodlands within a 20-mile radius of Fermyn Woods, an order for possession relating also to them was fully justified. j

a [10] The appellant appeals not against the order for possession of Fermyn Woods but against the order for possession of the other 30 areas of woodland. Mr Drabble QC submits on her behalf that the court has no jurisdiction to make an order for possession against a defendant, named or unnamed, in relation to an area of land which she or he does not occupy. His subsidiary submission is that, if such jurisdiction does exist, the criterion for its exercise was not satisfied.

b [11] The wrongful occupation by Romanies and other travellers of land managed by the Forestry Commission has become a substantial problem for the respondent. Mr Hobson QC on her behalf tells us that since August 1998 she and her predecessors have obtained 25 orders for possession of areas of woodland in England and Wales against such trespassers. In order to address the risk of the defendants' decampment into other areas of the respondent's woodland

c in the vicinity of their camp and thus the need for the issue of further proceedings, a practice has evolved, in cases where such risk seemed demonstrable, of asking the court to include in its order for possession not only the area of woodland in wrongful occupation but all other areas of woodland owned by the respondent within a specified radius of it. Thus Mr Hobson says

d that 13 of the 25 orders included all areas of woodland owned by the respondent within a 20-mile radius of the area in wrongful occupation and that another of the orders, made against defendants who had escaped the reach of a previous order with a 20-mile radius by occupying woodland four miles outside it, included all areas within a 30-mile radius.

e [12] Recognition of the above practice is to be found in a note in the White Book (*Civil Procedure*, 2003) vol 1, p 1748 (para sc 113.0.11). Notwithstanding transfer of the rules relating to possession claims against trespassers from RSC Ord 113 to CPR Pt 55 in October 2001, extensive commentary upon them is still to be found under the heading of the old order. The note is as follows:

f 'Where a Claimant, such as the Forestry Commission, owns a number of parcels of land in a particular area which are susceptible to unlawful occupation and is seeking possession in respect of one such parcel which is unlawfully occupied but apprehends that if the order is made the unlawful occupiers will move to one or more of the other parcels and seeks to include them in the possession order such other areas must be clearly defined. A

g claim for possession of "The Forest of Greenwood and all other woodland owned by them within a radius of 20 miles thereof" is not sufficient. Each parcel should be identified by name in the Claim Form preferably by reference to a plan. The court can then include in the possession order those parcels to which on the evidence and the law the Claimants are found to be entitled. An order so made should present no problem in execution.'

h No authority is cited in support of the proposition in the note, which first appeared in *Supreme Court Practice* (1999 edn) vol 1, p 1798 (para 113/8/14), and Mr Hobson is unable to shed light on its origin. In any event, apart from stressing the need for woodlands in any radius order to be clearly identified (lack of such

j identification being a ground of appeal no longer pressed in the present case), the note begs the question raised in the present appeal by making clear that such an order is subject to 'the evidence and the law'.

[13] Counsel agree that there are only two authorities of direct relevance.

[14] The first is the decision of this court in *University of Essex v Djemal* [1980] 2 All ER 742, [1980] 1 WLR 1301. The subject matter of the case was a sit-in of university premises by students. They had occupied the administrative offices

and, following an order for possession of that part of the premises, they had moved to another part known as Level 6. Thereupon the university applied for an order for possession of the whole of its premises. Just prior to the hearing before the judge the students vacated Level 6 but left behind a note threatening 'further direct action' against the university unless their demands were met. The university proceeded with its application but the judge refused to make an order for possession other than in relation to Level 6. He held that the words of RSC Ord 113 restricted the court's jurisdiction to making an order for possession of such part of the premises as was being or had been wrongly occupied. The university's appeal was allowed and an order was substituted for possession 'of the premises at the University of Essex, Wivenhoe Park, Colchester'. Buckley LJ, with whom the other members of the court agreed, said ([1980] 2 All ER 742 at 744-745, [1980] 1 WLR 1301 at 1304):

'I think the order is in fact an order which deals with procedural matters; in my judgment it does not affect in any way the extent or nature of the jurisdiction of the court where the remedy that is sought is a remedy by way of an order for possession. The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgment the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the court may think fit to make will no doubt depend on the circumstances of the particular case. In the present case there was, when the matter was before the judge, a threat to take what is described as "further direct action", which presumably meant similar action to the action which had already been taken, action which might be taken in respect of any part of the university property. In those circumstances it would, in my judgment, have been open to the judge to have made an order extending to the whole of the university property, or he might have made an order extending to particular parts, such as the administrative offices, of the university property. In my judgment he was in error in thinking that he was bound, by the terms of RSC Ord 113, to restrict his order to that particular part of the university property of which the students were then in actual adverse possession.'

Shaw LJ added ([1980] 2 All ER 742 at 745, [1980] 1 WLR 1301 at 1305) that the university's right of possession of its premises was indivisible, with the result that adverse occupation of any part infringed its rights in relation to the whole, but he observed that, had there been 'no danger of actual violation' of other parts, a limited order might have been appropriate.

[15] Although the report of *Djemal's* case might more clearly have described the geographical layout of the university premises, it seems, particularly from the reference to 'Wivenhoe Park', that, as Mr Drabble submits, they comprised only one single site or campus.

[16] Clearly, however, Mr Drabble cannot make an analogous submission in relation to the second authority, namely *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48, decided by Saville J, as he then was, on appeal from a district judge. The respondent travellers were in wrongful occupation of an area of woodland near Salisbury owned by the appellant, known as Hare Warren. The appellant sought an order for possession in relation not only to Hare Warren

a but also to Grovely Woods, an area of woodland in its ownership which was
separate from Hare Warren and lay two or three miles away. The appellant
argued that there was a danger that, upon eviction from Hare Warren, the
respondents would decamp to Grovely Woods. The appellant successfully
appealed against the refusal of the district judge to include Grovely Woods in the
order for possession. Having referred to *Djermal's* case, Saville J continued (at
b 49–50):

‘Given that the court’s powers are not limited to the particular area
adversely occupied, the question remains as to what is required to justify an
order for possession extending to other areas as well. To my mind neither
the fact that the land is rural rather than urban, nor the fact that there are
c parcels of land which are geographically separated from each other,
necessarily determines the matter one way or the other. In my judgment
what is needed (apart of course from the other requirements of Order 113) is
convincing evidence (not merely belief) to establish that there is a real
danger of actual violation of all the areas in question by those actually
d trespassing on at least one of the areas when the proceedings are instituted.’

The judge went on to conclude that the propinquity between the two areas of
woodland and the fact that each was ideal for use by the respondents, being close
to a public road and providing easy access for large vehicles, represented
convincing evidence of real danger of their decampment to Grovely Woods.

e [17] I agree with Mr Drabble that, whatever the terminology deployed by
Saville J in the *MAFF* case, he was invoking a broader jurisdiction than that
invoked in *Djermal's* case. In the latter this court had, in the words of Buckley LJ
already quoted, held that the jurisdiction extended ‘to the whole of the owner’s
property in respect of which his right of occupation has been interfered with’ and
f had made an order for possession of the whole of what appears to have been a
single site. In the *MAFF* case, by contrast, the order covered two separate areas
and it was impossible to say that the appellant’s right of occupation of the second
area, namely Grovely Woods, had been interfered with. Mr Drabble submits
that the decision in the *MAFF* case, reached without the benefit of argument by
or on behalf of any of the respondents, was wrong.

g [18] In support of his argument Mr Drabble points to the terminology of the
relevant rule, practice direction and form of order, as being indicative of the limit
of the court’s jurisdiction. Thus: (a) in CPR 55.1(b) the phrase ‘a possession claim
against trespassers’ is defined as ‘a claim for the recovery of land which the
claimant alleges is occupied only by a person or persons who entered or remained on
h the land without ... consent ...’ (my emphasis); (b) para 2.6 of CPR PD 55
requires the particulars of claim to set out ‘the circumstances in which [the land]
has been occupied without licence or consent’ (my emphasis); and (c) whereas the
form of the order for possession used until October 2001 (No 42A, prescribed by
RSC Ord 1, r 9(1)) was that the claimant ‘recover possession’ of the land, the form
j now used, and thus used in this case (No N26, prescribed by CPR 4(1)), is that the
defendants ‘give the claimant possession of’ the land (my emphasis). But it was
when he sought to discern the limit of his jurisdiction within the terminology of
RSC Ord 113 that the trial judge in *Djermal's* case fell into error. I do not consider
that the italicised words can illumine, still less resolve, the issue of jurisdiction,
particularly in circumstances in which on any view the actual occupation of one
area of land is required.

[19] If a claimant fears that trespassers will decamp from one area of his land to a second, separate area of it, the remedy to which he may be entitled, submits Mr Drabble, is an injunction against entry into the second area as well as a possession order relating to the first area. But in such circumstances an injunction is a useless remedy. It is enforceable by committal; and it would be wholly impracticable for the claimant to seek the committal to prison of a probably changing group of not easily identifiable travellers, including establishing service of the injunction and of the application. In relation to the second area, as to the first, the only effective remedy is an order for possession, enforceable against the land itself by the claimant's issue under RSC Ord 113, r 7 of a writ (or, in the county court, under CCR Ord 24, r 6 of a warrant) of possession, which requires the court enforcement officer to clear the land of all wrongful occupants (whether parties to the proceedings for the order or otherwise (see *R v Wandsworth County Court, ex p Wandsworth London Borough* [1975] 3 All ER 390, [1975] 1 WLR 1314)).

[20] In my view the key to this case indeed lies in the law's recognition that even an anticipated trespass sometimes gives rise to a right of action. But, where it does so, it should offer an effective remedy: otherwise the right is nugatory. Thus, if a claimant entitled to an order for possession of a certain area of land contends that its occupants are likely to decamp to a separate area of land owned by him, the separate area should in my view be included in the order for possession if, but only if, he would have been entitled to an injunction *quia timet* against the occupants in relation to the separate area. I believe that such was the basis of the jurisdiction which in the *MAFF* case *Saville J* rightly claimed. Echoing the phrase used by Shaw LJ in *Djermal's* case, he held that the threshold requirement was for convincing evidence of real danger of actual violation. I consider, if I may say so with respect, that *Saville J's* test represents a fair summary of what nowadays would be required for the grant of an injunction *quia timet*, such being conveniently summarised in *Snell's Equity* (30th edn, 2000) p 719 (para 45-13) as follows:

'Although the claimant must establish his right, he may be entitled to an injunction even though an infringement has not taken place but is merely feared or threatened; for "preventing justice excelleth punishing justice." This class of action, known as *quia timet*, has long been established, but the claimant must establish a strong case; "no one can obtain a *quia timet* order by merely saying "*Timeo*."" He must prove that there is an imminent danger of very substantial damage ...'

[21] It follows that the inclusion in a possession order of an area of land owned by the claimant which has not yet been occupied by the defendants should be exceptional. Although it would be foolish to be prescriptive about the nature of the necessary evidence, it seems safe to say that it will usually take the form either of an expression of intention to decamp to the other area or of a history of movement between the two areas from which a real danger of repetition can be inferred or, as in the *MAFF* case itself, of such propinquity and similarity between the two areas as to command the inference of a real danger of decampment from one to the other.

[22] Nevertheless in my view the existence of the jurisdiction to include an area of land in a possession order by reference only to an anticipated trespass creates a paradox. For it avails only the landowner who can complain of actual trespass on one area of his land at the time of issue of proceedings and who is

a entitled to a possession order by virtue thereof. However clear may be the evidence of risk that persons will wrongfully occupy an area of land, its owner will not at that stage be entitled to a possession order in relation to it unless they are already in wrongful occupation of another area of his land.

[23] Inherent in the same jurisdiction is also in my view a danger of injustice. It flows from the power, already noticed, to enforce an order for possession against all persons found by the enforcement officer to be in wrongful occupation of the land. Thus, for example, a traveller who was not a member of the encampment which gave rise to the action and so was not served with the proceedings and who takes occupation of a separate area of land may find himself confronted by an enforcement officer flourishing an order for possession which, on an anticipatory basis, had included that area of land. Mr Hobson states that it would be the practice at any rate of his client to give prior notice of such enforcement to all persons on the land and that every claimant needs the court's permission, albeit often obtainable without notice, to issue a writ or warrant of possession in aid of a possession order made more than three months earlier (see RSC Ord 113, r 7(1) and CCR Ord 24, r 6(2)). He also points out that anyone directly affected by an order for possession can apply under CPR 40.9 to set it aside; but it is far from clear that an enforcement officer upon the land would be obliged to stay his hand upon notification of such a proposed application. At all events the fact remains that an occupant in that situation will not have been served with proceedings and in particular will not have been notified of a hearing at least two days in advance under CPR 55.5(2)(b). Whether or not he would have had an arguable defence to raise at such a hearing, such notice would at any rate have guaranteed him a short period in which, if he wished, he could have protected himself and his family from the unpleasantness of forcible removal by effecting a voluntary removal.

f [24] I believe on balance that the law is right to tolerate both the paradox and the danger of injustice to which I have referred in the interest of avoiding the need for a succession of separate proceedings to address a succession of decampments, however predictable, on to separate areas of an owner's land. But they militate in favour of keeping the jurisdiction within the reasonably narrow bounds of the principles applicable to injunctions quia timet.

g [25] In that therefore in my view there is jurisdiction to include an area of land in a possession order by reference only to an anticipated trespass, the remaining question is whether the criterion for its exercise was satisfied in the present case. The 30 other areas of land included in the order all lay within 20 miles of Fermyn Woods; and all were also woodland. But, although there was evidence that one or more of the occupants of Fermyn Woods had occupied that area of woodland previously and that one or more of those who in the past had occupied one or more of the other 30 areas had done so on more than one occasion, there was no evidence which linked past or present occupants of Fermyn Woods with past or present occupants of any of the other areas. Moreover, by the time of the hearing before the judge, there had been no wrongful occupation of any of the other areas for more than three years. With great respect to the judge, the evidence was in my view insufficient to convince a court that there was a real danger that the defendants would decamp to one or other of the 30 areas; and so I would allow the appeal.

MUMMERY LJ.

[26] I agree that the appeal should be allowed for the reasons given in the judgment of Wilson J. Judge Stephen Waine was not justified in law, on the material before him, in making the order for possession dated 23 May 2003 extending beyond Fermyn Woods, in which Ms Angela Drury and other persons unknown had been trespassing since April 2003, so as to include 30 other separate woodland areas under the management of the Forestry Commission within a 20-mile radius of Fermyn Woods.

[27] I wish to add a few comments on several points of general interest thrown up by the case.

JURISDICTION TO MAKE SUMMARY POSSESSION ORDERS

[28] Mr Drabble QC, appearing for Ms Drury, accepted that the order for possession properly applied to the whole of Fermyn Woods, which are coloured red on the plan in evidence, and that the order did not have to be limited to the area of the woods actually occupied by the trespassing travellers at the relevant time. That concession is correct in the light of the decision of this court in *University of Essex v Djemal* [1980] 2 All ER 742, [1980] 1 WLR 1301, in which it was held that: (a) the procedural changes made by RSC Ord 113 to enable summary possession orders to be made against unknown squatters on land did not affect the nature or extent of the court's jurisdiction to make an order for possession to protect the right of the owner to the possession of his land; (b) an order could be made for possession of the whole of the owner's land in respect of which his right of occupation had been interfered with; (c) the area covered by the order for possession could extend beyond the particular parts occupied by the trespassers to parts of the claimant's land which were not actually in unauthorised occupation; and (d) the appropriate territorial extent of the possession order depended on the circumstances of the particular case.

[29] The critical issue is to identify the relevant criteria for delimiting the territorial extent of a possession order.

[30] On the one hand, Mr Hobson QC, appearing for the Secretary of State, sought to uphold the width of the 'radius order' made by the judge, both as a matter of law and on the available evidence. On the other hand, Mr Drabble QC contended that there were indications, both in the historical evolution of the action for recovery of possession of land and in the procedural provisions in the CPR, that the court had no power to make such a wide, pre-emptive order in rem as was made in this case.

WRIT OF EJECTMENT

[31] Legal history lends some support to Mr Drabble's approach. The modern action for the recovery of possession of land replaced the writ of ejectment, which is described by Sir John Baker QC in his *An Introduction to English Legal History* (2nd edn, 1979) p 253 as 'a trespassory action ... concerned only with wrongs already done and not with continuing rights'. The writ of ejectment was initially only available to enable a person holding a term of years to recover his term. It was a branch of the law of trespass. The termor had a limited interest in an area of land, as defined in the grant of the term. The specimen forms of writ (p 443) show that the land, of which specific recovery was sought from a trespasser, was defined in the writ as, for example, the 'messuage' or 'the manor' of a named person at a named place. It did not extend to all the land owned by the claimant anywhere in England or within a certain radius of the land trespassed

a upon. There is no reason to believe that this approach to defining the relevant land recoverable by the writ of ejectment changed when, by the introduction of the ingenious fictions of John Doe and Richard Roe, the writ supplanted in practice the use of the real actions and the possessory assizes for the recovery of possession of freehold land, or when the modern action for the recovery of possession replaced ejectment, when it was abolished by the Common Law Procedure Act 1852.

b [32] The in rem nature of the order, which means that the order takes effect against all persons found on the land, whether or not they are defendants in the proceedings, continues to reinforce a cautious approach to defining the area covered by it.

c CPR PROVISIONS

[33] The CPR provisions governing possession claims against 'persons unknown' are consistent with this approach, eg the provision in CPR 55.6 for service of the proceedings by attaching copies of the claim form to the main door or some other part of the land or by placing stakes in the land and attaching to each stake copies of the claim form. The practice direction (CPR PD 55, para 2.6) provides that the claim for possession against trespassers must state the circumstances in which the land 'has been occupied without licence or consent'. Those provisions, Mr Drabble submitted, demonstrated that the court had no power to make pre-emptive orders for possession before any act of trespass had occurred. The proper remedy for an anticipated or threatened act of trespass was, he argued, the equitable in personam remedy of a quia timet injunction enforceable by proceedings for contempt, rather than an in rem order for possession.

THE AUTHORITIES

f [34] As for the authorities, it has already been noted that the order in *Djermal's* case extended, on the facts of that case, to the whole of the property of the university ('the premises at the University of Essex, Wivenhoe Park, Colchester in the County of Essex'), but the case is not authority for the proposition that the premises can be defined in the possession order simply as all the land belonging to the claimant, wherever it is situated, or as all such land situated within a certain radius of the land trespassed upon, without reference to some connecting feature, linking occupation by the trespassers with other land of the claimant beyond the particular area on which they are trespassing. On the facts of that case there was evidence that, when the university executed a possession order in respect of one part (part of the administrative offices), the students occupied another area of the university buildings and, even after they had vacated that area, there were threats of further 'direct action'. The evidence justified the implicit reference by Shaw LJ to the case as one in which there was a danger of 'violation of many, or a succession of, parts of the premises' (see [1980] 2 All ER 742 at 745, [1980] 1 WLR 1301 at 1305).

j [35] Like Wilson J, I would adopt the same pragmatic approach as Saville J did in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48 in the passage (at 49–50) cited by Wilson J in [16], above. I reject Mr Drabble's contention that the *MAFF* case was wrongly decided. It is a legitimate, incremental development of the ruling in *Djermal's* case that a possession order can extend beyond the particular area of the actual trespass to other areas of the claimant's land by holding that the relevant criterion for determining the territorial scope of

the order is that of a real danger that actual trespasses might occur in the near future on those other parts of the claimant's land. In a case in which court exercises its undoubted power to make an order for possession of the claimant's land on which trespasses have actually occurred, it must also possess the power to determine the extent of the area to be covered by the possession order.

[36] Although there may be difficulties in knowing precisely where to draw the line in particular cases, a line has to be drawn somewhere. That should be done by the process of a commonsense assessment of the whole situation, taking account of the past conduct of the trespassers and their likely future conduct with respect to the claimant's land. If there is convincing evidence of a real danger that actual trespasses will be committed on other land of the claimant, a wider form of possession order may be justified. It should be made only in cases in which (a) trespasses have already been committed on an area of the claimant's land and (b) it is necessary to provide the claimant with an effective remedy in respect of the danger of serial violations of the right to possession of other areas of his land by persons who neither have, nor, indeed, even assert, any right to enter into possession of the claimant's land. As explained by Wilson J a *quia timet* injunction against individual persons in such a situation would not be an effective remedy for dealing with a situation.

[37] I agree with Wilson J that the evidence in this case did not justify the making of an order for possession in the 'radius' form, or one wider than the area of Fermyn Woods. I would therefore allow the appeal to that extent.

WARD LJ.

[38] This has been an interesting appeal. Travellers squatting illegally in the woodlands of England undoubtedly cause the Forestry Commission real trouble. That cannot be condoned but the process of eviction must be conducted with due compassion. It is not suggested that the Forestry Commission will act otherwise. The court must be sensitive to both interests and must sensibly extend the ambit of its jurisdiction or control its exercise in a way which not only does justice between the parties but also ensures that its own procedures are not made a mockery by those intent on evading them. There is no suggestion that Ms Drury's concerns for herself and her family are anything but genuine.

[39] Here the argument has ranged over two quite separate and distinct remedies. The first is the order for possession. As CPR 55 makes clear from the definition in r 55.1(b) this is a 'possession claim against trespassers'. Citing *Blackstone's Commentaries on the Laws of England* (2001) vol 3, p 209 as its authority, *Clerk & Lindsell on Torts* (18th edn, 2000) p 923 (para 18-01), defines trespass to land as consisting in any unjustifiable intrusion by one person upon land in possession of another. It is essential that there must be *some* actual intrusion on the land. Lord Coleridge CJ said in *Ellis v Loftus Iron Co* (1874) LR 10 CP 10 at 12, [1874-80] All ER Rep 232 at 233:

'It is clear that, in determining the question of trespass or no trespass, the Court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it.'

Once a trespass, any trespass, is shown then the court has the jurisdiction on the application of the person in lawful possession of the land to eject the trespasser from his land. This begs the question of what is comprised within his land.

a [40] The second remedy is an injunction. If there has been *no* intrusion upon the land of the claimant at all then the only remedy may be a quia timet prohibitory injunction: 'But no one can obtain a quia timet order by merely saying "Timeo"; he must aver and prove that what is going on is calculated to infringe his rights.' (See *A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 999 at 1005.)

b [41] The link between the two was explained by Lord Watson in *White v Mellin* [1895] AC 154 at 167:

c 'Damages and injunction are merely two different forms of remedy against the same wrong; and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second. The onus resting upon a plaintiff who asks an injunction, and does not say that he has as yet suffered any special damage, is if anything the heavier, because it is incumbent upon him to satisfy the Court that such damage will necessarily be occasioned to him in the future.'

d We see how much heavier from words as suitable for quia timet injunctions as for mandatory injunctions used by Lord Upjohn in *Redland Bricks Ltd v Morris* [1969] 2 All ER 576 at 579, [1970] AC 652 at 665:

e 'A mandatory injunction can only be granted where the plaintiff shows a very strong probability on the facts that grave danger will accrue to him in the future. As Lord Dunedin said [in *A-G for the Dominion of Canada v Ritchie Contracting and Supply Co Ltd*] it is not sufficient to say "timeo". It is a jurisdiction to be exercised sparingly and with caution but, in the proper case, unhesitatingly.'

f [42] The Forestry Commission could have applied but sensibly did not apply for a quia timet injunction to restrain the evicted travellers simply moving onto the next patch of woodland. As Wilson J has explained, the injunction would be a rather ineffective remedy. Nevertheless the purpose behind the extended order for possession sought in this case is similar to that which informs the injunction, namely to deter a threatened course of action. The question in this case is how, if at all, these injunction principles can be applied in order to give the court an effective remedy through an order for possession which is widely drawn so as to include parcels of land which could have been made the subject of a separate injunction. The desire to make such an effective order must be tempered against the potentially unfair effect of the execution of a wide order operating as it does in rem so as to eject travellers from land B who may have played no part in the original trespass of land A.

h [43] In my judgment one must start with the trespass. Once there is an intrusion on some part of the claimant's land, the tort is complete with respect to the whole of the claimant's land. That was the judgment of this court in *University of Essex v Djemal* [1980] 2 All ER 742, [1980] 1 WLR 1301. Buckley LJ said ([1980] 2 All ER 742 at 744-745, [1980] 1 WLR 1301 at 1304):

j 'The jurisdiction in question is a jurisdiction directed to protecting the right of the owner of property to the possession of the whole of his property, uninterfered with by unauthorised adverse possession. In my judgment the jurisdiction to make a possession order extends to the whole of the owner's property in respect of which his right of occupation has been interfered with, but the extent of the field of operation of any order for possession which the

court may think fit to make will no doubt depend on the circumstances of the particular case.'

Shaw LJ said ([1980] 2 All ER 742 at 745, [1980] 1 WLR 1301 at 1305):

'Its right of possession seems to me to be indivisible. If it is violated by adverse occupation of any part of the premises, that violation affects the right of possession of the whole of the premises.'

[44] This is authority for the proposition I have already enunciated that once a trespass has been committed to some part of the claimant's land the jurisdiction is established to make an order for possession of all or some of the claimant's land. Whether or not to make an order in respect of all or only of some is a matter of judgment. (I prefer to say 'judgment', rather than 'discretion', but the process is the same and the distinction pedantic). One set of factors which will influence that judgment will be the identity of the land concerned. Thus the geographical and occupational unity of the site may be important as it was in *Djermal's* case. Physical unity is not essential for reasons which quite rightly seemed good to Saville J in *Ministry of Agriculture, Fisheries and Food v Heyman* (1989) 59 P & CR 48 at 49-50:

'To my mind neither the fact that the land is rural rather than urban, nor the fact that there are parcels of land which are geographically separated from each other, necessarily determines the matter one way or the other. In my judgment what is needed ... is convincing evidence (not merely belief) to establish that there is a real danger of actual violation of all the areas in question by those actually trespassing on at least one of the areas when the proceedings are instituted.'

Nevertheless propinquity and proximity are obviously relevant. The further the separation of parcels of land, the less obvious the need for inclusion of the far parcel in the order. Any similarity in the characteristics of the land, its use and its attractiveness to a class of trespassers will be material. If, for example, one house in the terrace is unlawfully occupied, it may be appropriate for the order to include the other empty houses in the same terrace. The size of the estate itself might be a factor in extending or limiting the ambit of the order. All the features of the claimant's land are material to the need for the order to define how far the writ will run.

[45] That notion of there being a pressing need to protect the land affected by the trespass brings us back to the principles which underlie the quia timet injunction and to a consideration of the quality of the threat that if travellers are moved from part A they will then move to part B. Among the factors to be considered in this regard will be the imminence of the threat to move, the history of former illegal occupations of the several sites in order to establish what if any pattern can be seen in the illegal occupation and the frequency and timings of those occupations. There should also be evidence that the same or some of the same people are involved in the move from A to B to justify the inference that it is more likely than not that they will immediately encamp on C.

[46] My attempt to list the various factors is not intended to be all embracing. It is trite that it is always a matter of fact and degree. At the heart of it there has to be a commonsense decision which gives an answer to a question whether the established invasion of part A of the land is tantamount to, part and parcel of, all of a piece with a very probable invasion of part B. There must be a strong and

a unbroken link between the two parcels. Can one truly say, 'If we evict them from here they will simply move there?' I am satisfied, therefore, that the jurisdiction exists to include parcels of a claimant's land other than those in actual occupation but it is a jurisdiction which must be sparingly exercised bearing in mind that the court whilst taking account of all the circumstances of the case must always do justice between the invaded claimant and unidentified but potentially affected defendants.

b [47] For the reasons given by Wilson J and Mummery LJ I too would allow the appeal to the limited extent proposed.

Appeal allowed.

Kate O'Hanlon Barrister.

Practice Direction (Costs: Criminal proceedings)

COURT OF APPEAL, CRIMINAL DIVISION

LORD WOOLF CJ

18 MAY 2004

Criminal law – Costs – Award out of central funds – Amount of costs to be paid – Criminal proceedings – Criminal Defence Service funded work – Recovery of defence costs orders.

LORD WOOLF CJ gave the following direction at the sitting of the court:

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PART I: INTRODUCTION

I.1 Scope

I.1.1 This direction shall have effect in magistrates courts, the Crown Court, the Administrative Court and the Court of Appeal (Criminal Division) where the court, in the exercise of its discretion, considers an award of costs in criminal proceedings or deals with criminal defence service funded work and recovery of defence costs orders. The provisions in this practice direction will take effect from 18 May 2004.

I.2 The Power to award costs

I.2.1 The powers enabling the court to award costs in criminal proceedings are primarily contained in Pt II of the Prosecution of Offences Act 1985 (ss 16, 17 and 18) (POA 1985), the Access to Justice Act 1999 (in relation to funded clients) and in regulations made under those Acts including the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 (as amended). References in this direction are to the POA 1985 and those regulations unless otherwise stated. Schedule 1 sets out details of the relevant regulations

I.2.2 Section 16 of the Act makes provision for the award of defence costs out of central funds. Section 17 provides for an award of costs to a private prosecutor out of central funds. Section 18 gives power to order a convicted defendant or unsuccessful appellant to pay costs to the prosecutor. Section 19(1) of the Act and reg 3 of the 1986 regulations provide for awards of

a costs between parties and s 19A provides for the court to disallow or order a legal or other representative of a party to the proceedings to meet wasted costs.

1.2.3 The Supreme Court also has the power under its inherent jurisdiction over officers of the court to order a solicitor personally to pay costs thrown away. It may also give directions relating to CDS funded costs and recovery of defence costs orders.

b

1.3 Extent of orders for costs from central funds

1.3.1 Where a court orders that the costs of a defendant, appellant or private prosecutor should be paid from central funds, the order will be for such amount as the court considers sufficient reasonably to compensate the party for expenses incurred by him in the proceedings. This will include the costs incurred in the proceedings in the lower courts unless for good reason the court directs that such costs are not included in the order, but it cannot include expenses incurred which do not directly relate to the proceedings themselves, such as loss of earnings. Where the party in whose favour the costs order is made is CDS-funded, he will only recover his personal costs (see s 21(4A)(a)).

d Schedule 2 sets out the extent of availability of costs from central funds and the relevant statutory authority.

1.4 Amount of costs to be paid

e 1.4.1 Except where the court has directed, in an order for costs out of central funds, that only a specified sum shall be paid, the amount of costs to be paid shall be determined by the appropriate officer of the court. The court may however order the disallowance of costs out of central funds not properly incurred or direct the determining officer to consider whether or not specific items have been properly incurred. The court may also make observations regarding CDS funded costs. The procedures to be followed when such

f circumstances arise are set out in this direction.

1.4.2 Where the court orders an offender to pay costs to the prosecutor, orders one party to pay costs to another party, disallows or orders a legal or other representative to meet any wasted costs, the order for costs must specify the sum to be paid or disallowed.

g 1.4.3 Where the court is required to specify the amount of costs to be paid it cannot delegate the decision. Wherever practicable those instructing advocates should provide the advocate with details of costs incurred at each stage in the proceedings. The court may however require the appropriate officer of the court to make inquiries to inform the court as to the costs incurred and may adjourn the proceedings for inquiries to be made if necessary. Special

h provisions apply in relation to recovery of defence costs orders as to which see Pt XI, below.

PART II: DEFENCE COSTS FROM CENTRAL FUNDS

II.1 In a magistrates' court

II.1.1 Where an information laid before a justice of the peace charging a person with an offence is not proceeded with, a magistrates' court inquiring into an indictable offence as examining justices determines not to commit the accused for trial, or a magistrates' court dealing summarily with an offence dismisses the information, the court may make a defendant's costs order. An

order under s 16 of the Act may also be made in relation to breach of bind-over proceedings in a magistrates' court or the Crown Court (see reg 14(4) of 1986 regulations). As is the case with the Crown Court (see below) such an order should normally be made unless there are positive reasons for not doing so. For example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was, the defendant can be left to pay his own costs. In the case of a partial acquittal the court may make a part order (details are at paras II.2.1 and II.2.2, below).

II.1.2 Whether to make such an award is a matter in the discretion of the court in the light of the circumstances of each particular case.

II.2 In the Crown Court

II.2.1 Where a person is not tried for an offence for which he has been indicted, or in respect of which proceedings against him have been sent for trial or transferred for trial, or has been acquitted on any count in the indictment, the court may make a defendant's costs order in his favour. Such an order should normally be made whether or not an order for costs between the parties is made, unless there are positive reasons for not doing so. For example, where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him was stronger than it was, the defendant can be left to pay his own costs. The court when declining to make a costs order should explain, in open court, that the reason for not making an order does not involve any suggestion that the defendant is guilty of any criminal conduct but the order is refused because of the positive reason that should be identified.

II.2.2 Where a person is convicted of some count(s) in the indictment and acquitted on other(s) the court may exercise its discretion to make a defendant's costs order but may order that only part of the costs incurred be paid. The court should make whatever order seems just having regard to the relative importance of the two charges and the conduct of the parties generally. Where the court considers that it would be inappropriate that the defendant should recover all of the costs properly incurred, the amount must be specified in the order.

II.2.3 The Crown Court may make a defendant's costs order in favour of a successful appellant (see s 16(3) of the Act).

II.3 In the Administrative Court

II.3.1 The court may make a defendant's costs order on determining proceedings in a criminal cause or matter.

II.4 In the Court of Appeal, Criminal Division

II.4.1 A successful appellant under Pt 1 of the Criminal Appeal Act 1968 may be awarded a defendant's costs order. Orders may also be made on an appeal against an order or ruling at a preparatory hearing (s 16(4A)), to cover the costs of representing an acquitted defendant in respect of whom there is an Attorney General's reference under s 36 of the Criminal Justice Act 1972 (see s 36(5) and (5A) of the 1972 Act) and in the case of a person whose sentence is reviewed under s 36 of the Criminal Justice Act 1988 (see s 36 of and para 11 of Sch 3 to the 1988 Act).

a II.4.2 On determining an application for leave to appeal to the House of Lords under Pt II of the 1968 Act, whether by prosecutor or by defendant, the court may make a defendant's costs order.

II.4.3 In considering whether to make such an order the court will have in mind the principles applied by the Crown Court in relation to acquitted defendants (see paras II.2.1 and II.2.2, above).

b

PART III: PRIVATE 1PROSECUTOR'S COSTS FROM CENTRAL FUNDS

c III.1.1 There is no power to order the payment of costs out of central funds of any prosecutor who is a public authority, a person acting on behalf of a public authority, or acting as an official appointed by a public authority as defined in the Act. In the limited number of cases in which a prosecutor's costs may be awarded out of central funds, an application is to be made by the prosecution in each case. An order should be made save where there is good reason for not doing so, for example, where proceedings have been instituted or continued without good cause. This provision applies to proceedings in respect of an indictable offence or proceedings before the Administrative Court in respect of a summary offence. Regulation 14(1) of the 1986 regulations extends it to certain committals for sentence from a magistrates' court.

d

PART IV: COSTS OF WITNESS, INTERPRETER OR MEDICAL EVIDENCE

e IV.1 The costs of attendance of a witness required by the accused, a private prosecutor or the court, or of an interpreter required because of the accused's lack of English or of an oral report by a medical practitioner are allowed out of central funds unless the court directs otherwise (see s 19(3) of the POA 1985 and reg 16(1) of the 1986 regulations). If, and only if, the court makes such a direction can the expense of the witness be claimed as a disbursement out of CDS funds. A witness includes any person properly attending to give evidence whether or not he gives evidence or is called, but it does not include a character witness unless the court has certified that the interests of justice require his attendance.

f

g IV.2 The Crown Court may order the payment out of central funds of such sums as appear to be sufficient reasonably to compensate any medical practitioner for the expenses, trouble or loss of time properly incurred in preparing and making a report on the mental condition of a person accused of murder (see s 34(5) of the Mental Health (Amendment) Act 1982).

g

PART V: DISALLOWANCE OF COSTS OUT OF CENTRAL FUNDS

h V.1.1 Where the court makes an order for costs out of central funds, it must: (a) direct the appropriate authority to disallow the costs incurred in respect of any items if it is plain that those costs were not properly incurred; such costs are not payable under ss 16(6) and 17(1) of the Act, and it may: (b) direct the appropriate authority to consider or investigate on determination any items which may have been improperly incurred. Costs not properly incurred include costs in respect of work unreasonably done, eg, if the case has been conducted unreasonably so as to incur unjustified expense, or costs have been wasted by failure to conduct proceedings with reasonable competence and expedition. In a plain case it will usually be more appropriate to make a wasted costs order under s 19A of the Act (see Pt VIII, below). The precise terms of the order for costs and of any direction must be entered in the court record.

j

V.1.2 Where the court has in mind that a direction in accordance with para V.1.1(a) or (b) might be given it must inform any party whose costs might be affected, or his legal representative, of the precise terms thereof and give a reasonable opportunity to show cause why no direction should be given. a

If a direction is given under para V.1.1(b) the court should inform the party concerned of his rights to make representations to the appropriate authority.

V.1.3 The appropriate authority may consult the court on any matter touching upon the allowance or disallowance of costs. It is not appropriate for the court to make a direction under para V.1.1(a) when so consulted. b

PART VI: AWARD OF COSTS AGAINST OFFENDERS AND APPELLANTS

VI.1.1 A magistrates' court or the Crown Court may make an order for costs against a person convicted of an offence before it or in dealing with it in respect of certain orders as to sentence specified in reg 14(3) of the 1986 regulations. The Crown Court may make an order against an unsuccessful appellant and against a person committed by a magistrates' court in respect of the proceedings specified in reg 14(1) and (2). The court may make such order payable to the prosecutor as it considers just and reasonable (s 18(1) of the Act). c

VI.1.2 In a magistrates' court where the defendant is ordered to pay a sum not exceeding £5 by way of fine, penalty, forfeiture or compensation the court must not make a costs order unless in the particular circumstances of the case it considers it right to do so (s 18(4) of the Act). Where the defendant is under 18 the amount of any costs awarded against him by a magistrates' court shall not exceed the amount of any fine imposed on him (s 18(5)). d

VI.1.3 The Court of Appeal Criminal Division may order an unsuccessful appellant to pay costs to such person as may be named in the order. Such costs may include the costs of any transcript obtained for the proceedings in the Court of Appeal (s 18(2), (6) of the Act). e

VI.1.4 An order should be made where the court is satisfied that the offender or appellant has the means and the ability to pay. f

VI.1.5 The amount must be specified in the order by the court.

VI.1.6 The Administrative Court is not covered by s 18 of the Act but it has complete discretion over all costs between the parties in relation to proceedings before it.

VI.1.7 An order under s 18 of the Act includes Legal Services Commission (LSC)-funded costs (see s 21(4A)(b) of the Act). g

PART VII: AWARD OF COSTS BETWEEN THE PARTIES

VII.1 *Costs incurred as a result of unnecessary or improper act or omission* h

VII.1.1 A magistrates' court, the Crown Court and the Court of Appeal Criminal Division may order the payment of any costs incurred as a result of any unnecessary or improper act or omission by or on behalf of any party to the proceedings as distinct from his legal representative (s 19 of the Act and reg 3 of the 1986 regulations). i

VII.1.2 The court must hear the parties and may then order that all or part of the costs so incurred by one party shall be paid to him by the other party.

VII.1.3 Before making such an order the court must take into account any other order as to costs and the order must specify the amount of the costs to be paid. The court is entitled to take such an order into account when making any other order as to costs in the proceedings (see regs 3(2)–(4) of the 1986

- a regulations). The order can extend to LSC costs incurred on behalf of any party (s 21 (4A)(b) of the Act).

VII.1.4 In a magistrates' court no order may be made which requires a convicted person under 17 to pay an amount by way of costs which exceeds the amount of any fine imposed upon him (see reg 3(5) of the 1986 regulations).

- b VII.1.5 Such an order is appropriate only where the failure is that of the defendant or of the prosecutor. Where the failure is that of the legal representative(s) Pts VIII and IX (below) apply.

VII.2 *Costs in restraint, confiscation or receivership proceedings*

- c The order for costs

VII.2.1 This part of this practice direction applies where the Crown Court is deciding whether to make an order for costs under r 12 of the Crown Court Rules 1982, SI 1982/1109 in relation to restraint proceedings or receivership proceedings brought under the Crown Court (Confiscation, Restraint and

- d Receivership) Rules 2003, SI 2003/421. (Confiscation proceedings are treated for costs purposes as part of the criminal trial.) The court has discretion as to: whether costs are payable by one party to another; the amount of those costs; and, when they are to be paid. The general rule is that if the court decides to make an order about costs the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order (see r 50 of the 2003 rules).

- e VII.2.2 Attention is drawn to the fact that in receivership proceedings the 2003 rules provide that the Crown Court may make orders in respect of security to be given by a receiver to cover his liability for his acts and omissions as a receiver (r 25). The court may also make orders in relation to determining the remuneration of the receiver (r 26). (Paragraph VII.2.15, below, deals with determination of the remuneration of a receiver.)

- f VII.2.3 In deciding what if any order to make about costs the court is required to have regard to all the circumstances including the conduct of all the parties and whether a party has succeeded on part of an application, even if that

- g party has not been wholly successful.
- VII.2.4 The 2003 rules set out the type of order which the court may make (the list is not exclusive): (a) a proportion of another party's costs; (b) a stated amount in respect of another party's costs; (c) costs from or until a certain date only; (d) costs incurred before proceedings have begun; (e) costs relating to particular steps taken in the proceedings; (f) costs relating only to a distinct part of the proceedings; and (g) interest on costs from or until a certain date including a date before the making of an order.

- h VII.2.5 The court is required, where it is practicable, to award a proportion (eg a percentage) of the costs, or costs between certain dates, rather than making an order relating only to a distinct part or issue in the proceedings. The latter type of order makes it extremely difficult for the costs to be assessed.

- j VII.2.6 Where the court orders a party to pay costs it may, in addition, order an amount to be paid on account by one party to another before the costs are assessed. Where the court makes such an order, the order should state the amount to be paid and the date on or before which payment is to be made.

Assessment of costs

VII.2.7 Where the Crown Court makes an order for costs in restraint, or receivership proceedings it may make an assessment of the costs itself there and then (a summary assessment), or order assessment of the costs under r 14 of the 1982 rules (see r 51 of the 2003 rules). If the court neither makes an assessment of the costs nor orders assessment as specified above, the order for costs will be treated as an order for the amount of costs to be decided by assessment under r 14 of the 1982 rules unless the order otherwise provides. a
b

VII.2.8 Whenever the court awards costs to be assessed under r 14 of the 1982 rules it should consider whether to exercise the power to order the paying party to pay such sum of money, as it thinks just, on account of those costs.

VII.2.9 In carrying out the assessment of costs the court or the taxing authority is required to allow only costs which are proportionate to the matters in issue, and to resolve any doubt which it may have, as to whether the costs were reasonably incurred or were reasonable and proportionate in amount, in favour of the paying party. c

VII.2.10 The court or taxing authority carrying out the assessment should have regard to all the circumstances in deciding whether costs were proportionately or reasonably incurred or proportionate and reasonable in amount. Effect must be given to any orders for costs which have already been made. The court or the taxing authority should also have regard to: (a) the conduct of all the parties, including in particular conduct before as well as during the proceedings; (b) the amount or value of any property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge and responsibility involved; (f) the time spent on the case; and (g) the place where and the circumstances in which work or any part of it was done. d
e

VII.2.11 In applying the test of proportionality regard should be had to the objective of dealing with cases justly. Dealing with a case justly includes, so far as practicable, dealing with it in ways which are proportionate to: (i) the amount of money involved; (ii) the importance of the case; (iii) the complexity of the issues; and (iv) the financial position of each party. The relationship between the total of the costs incurred and the financial value of the claim may not be a reliable guide. f
g

VII.2.12 In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic, thus in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or possibly exceed the amount in dispute. h

VII.2.13 Where a hearing takes place, the time taken by the court in dealing with a particular issue may not be an accurate guide to the amount of time properly spent by the legal or other representatives in preparing for the trial of that issue.

VII.2.14 The 2003 rules do not apply to the assessment of costs in proceedings to the extent that s 11 of the Access to Justice Act 1999 (costs in funded cases) applies and statutory instruments made under that Act make different provision (in this regard attention is drawn to the guidance notes issued by the senior costs judge: 'Costs Orders Against an LSC Funded Client and Against the LSC under s 11(1) of the Access to Justice Act 1999'). j

Remuneration of a receiver

- a* VII.2.15 A receiver may only charge for his services if the Crown Court so directs and specifies the basis on which the receiver is to be remunerated (see r 26 of the 2003 rules). The Crown Court (unless it orders otherwise) is required to award such sum as is reasonable and proportionate in all the circumstances. In arriving at the figure for remuneration the court should take into account:
- b* (a) the time properly given by the receiver and his staff to the receivership; (b) the complexity of the receivership; (c) any responsibility of an exceptional kind or degree which falls on the receiver in consequence of the receivership; (d) the effectiveness with which the receiver appears to be carrying out or to have carried out his duties; and (e) the value and nature of the subject matter of the receivership.
- c* VII.2.16 The Crown Court may instead of determining the receiver's remuneration itself refer it to be ascertained by the taxing authority of the Crown Court. In these circumstances rr 15–18 of the 1982 rules (which deal with review by the taxing authority, further review by a taxing master/costs judge and appeal to a High Court judge) have effect as if the taxing authority was ascertaining costs.
- d*

Procedure on Appeal to the Court of Appeal

- VII.2.17 The costs of and incidental to all proceedings on an appeal to the Criminal Division of the Court of Appeal against orders made in restraint proceedings, or appeals against or relating to the making of receivership orders,
- e* are in the discretion of the court (see s 89(4) of the Proceeds of Crime Act 2002).

VII.2.18 The court has full power to determine by whom and to what extent the costs are to be paid.

- VII.2.19 In any such proceedings the court may disallow or (as the case may be) order the legal or other representative concerned to meet the whole of any
- f* wasted costs or such part of them as may be determined in accordance with the Criminal Procedure Rules. (As to wasted costs orders see Pt VIII, below.)

VII.2.20 These provisions have retrospective effect in relation to proceedings on appeals in respect of offences committed or alleged to have been committed on or after 24 March 2003 (see s 94(3) of the Courts Act 2003).

g VII.3 Award of costs against third parties

- VII.3.1 The magistrates' court, the Crown Court and the Court of Appeal may make a third-party costs order if there has been serious misconduct (whether or not constituting a contempt of court) by a third party and the court considers it appropriate, having regard to that misconduct, to make a
- h* third-party costs order against him. A 'third party costs order' is an order as to the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings (the third party) (see s 19B of the POA 1985 as inserted by s 93 of the Courts Act 2003).

- VII.3.2 The Lord Chancellor may make regulations:
- j* (a) specifying types of conduct in respect of which a third party costs order may not be made; (b) allowing the making of a third-party costs order at any time; (c) making provision for any other order as to costs which has been made in respect of the proceedings to be varied on, or taken account of in, the making of a third-party costs order; (d) making provision for account to be taken of any third-party costs order in the making of any other order as to costs in respect of the proceedings.

VII.3.4 Regulations will provide that the third party may appeal to the Crown Court against a third-party costs order made by a magistrates' court and to the Court of Appeal against a third-party costs order made by the Crown Court.

VII.3.5 These provisions came into force on 1 February 2004.

PART VIII: COSTS AGAINST LEGAL REPRESENTATIVES—WASTED COSTS

VIII.1.1 Section 19A of the Act allows a magistrates' court, the Crown Court or the Court of Appeal Criminal Division to disallow or order the legal or other representative to meet the whole or any part of the wasted costs. The order can be made against any person exercising a right of audience or a right to conduct litigation (in the sense of acting for a party to the proceedings). 'Wasted costs' are costs incurred by a party (which includes an LSC-funded party) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or his employee, or which, in the light of any such act or omission occurring after they were incurred, the court considers it unreasonable to expect that party to pay (s 19A(3) of the POA 1985; s 89(8) of the Proceeds of Crime Act 2002).

VIII.1.2 The judge has a much greater and more direct responsibility for costs in criminal proceedings than in civil and should keep the question of costs in the forefront of his mind at every stage of the case and ought to be prepared to take the initiative himself without any prompting from the parties.

VIII.1.3 Regulation 3B of the 1986 regulations requires the court to specify the amount of the wasted costs and before making the order to allow the legal or other representative and any party to the proceedings to make representations. In making the order the court must take into account any other orders for costs and must take the wasted costs order into account when making any other order as to costs. The court should also give reasons for making the order and must notify any interested party (which includes the CDS fund and central funds determining authorities) of the order and the amount.

VIII.1.4 Judges contemplating making a wasted costs order should bear in mind the guidance given by the Court of Appeal in *Re a barrister (wasted costs order)* (No.1 of 1991) [1992] 3 All ER 429, [1993] QB 293. The guidance, which is set out below, is to be considered together with all the statutory and other rules and recommendations set out by Parliament and in this practice direction:

(i) There is a clear need for any judge or court intending to exercise the wasted costs jurisdiction to formulate carefully and concisely the complaint and grounds upon which such an order may be sought. These measures are draconian and, as in contempt proceedings, the grounds must be clear and particular. (ii) Where necessary a transcript of the relevant part of the proceedings under discussion should be available and in accordance with the rules a transcript of any wasted cost hearing must be made. (iii) A defendant involved in a case where such proceedings are contemplated should be present if, after discussion with counsel, it is thought that his interest may be affected and he should certainly be present and represented if the matter might affect the course of his trial. Regulation 3B(2) of the Costs in Criminal Cases (General) (Amendment) Regulations 1991, SI 1991/789 furthermore requires that before a wasted costs order is made 'the court shall allow the legal or other representative and any party to the proceedings to make representations'. There may be cases where it may be appropriate for counsel for the Crown to be present. (iv) A three-stage test or approach is recommended when a wasted costs order is contemplated: (a) Has

a there been an improper, unreasonable or negligent act or omission? (b) As a result have any costs been incurred by a party? (c) If the answers to (a) and (b) are 'yes', should the court exercise its discretion to disallow or order the representative to meet the whole or any part of the relevant costs, and if so what specific sum is involved? (v) It is inappropriate to propose any settlement that the representative might forego fees. The complaint should be formally stated by the judge and the representative invited to make his own comments. After any other party has been heard the judge should give his formal ruling. Discursive conversations may be unfair and should certainly not take place. (vi) The judge must specify the sum to be allowed or ordered. Alternatively the relevant available procedure should be substituted should it be impossible to fix the sum (see para VIII.1.7, below).

c VIII.1.5 The Court of Appeal has given further guidance in *Re P (a barrister)* [2001] EWCA Crim 1728, [2002] 1 Cr App R 207 (Court of Appeal) as follows: (i) The primary object is not to punish but to compensate, albeit as the order is sought against a non-party, it can from that perspective be regarded as penal. (ii) The jurisdiction is a summary jurisdiction to be exercised by the court which has 'tried the case in the course of which the misconduct was committed'. (iii) Fairness is assured if the lawyer alleged to be at fault has sufficient notice of the complaint made against him and a proper opportunity to respond to it. (iv) Because of the penal element a mere mistake is not sufficient to justify an order there must be a more serious error. (v) Although the trial judge can decline to consider an application in respect of costs, for example on the ground that he or she is personally embarrassed by an appearance of bias, it will only be in exceptional circumstances that it will be appropriate to pass the matter to another judge, and the fact that, in the proper exercise of his judicial function, a judge has expressed views in relation to the conduct of a lawyer against whom an order is sought, does not of itself normally constitute bias or the appearance of bias so as to necessitate a transfer. (vi) If the allegation is one of serious misconduct or crime the standard of proof will be higher but otherwise it will be the normal civil standard of proof.

VIII.1.6 Though the court cannot delegate its decision to the appropriate authority, it may require the appropriate officer of the court to make inquiries and inform the court as to the likely amount of costs incurred.

g VIII.1.7 The court may postpone the making of a wasted costs order to the end of the case if it appears more appropriate to do so, for example, because the likely amount is not readily available, there is a possibility of conflict between the legal representatives as to the apportionment of blame, or the legal representative concerned is unable to make full representations because of a possible conflict with the duty to the client.

h VIII.1.8 A wasted costs order should normally be made regardless of the fact that the client of the legal representative concerned is CDS-funded. However where the court is minded to disallow substantial costs out of the CDS fund, it may, instead of making a wasted costs order, make observations to the determining authority that work may have been unreasonably done (see para X.1.1, below). This practice should only be adopted where the extent and amount of the costs wasted is not entirely clear.

VIII.2 The Administrative Court

VIII.2.1 In the Administrative Court where the court is considering whether to make an order under s 51(6) of the Supreme Court Act 1981 (a wasted costs

order) it will do so in accordance with CPR 48.7 which contains similar provisions as to giving the legal representative a reasonable opportunity to attend a hearing to give reasons why the court should not make such an order. In addition to the power to make a wasted costs order, the Administrative Court has powers in relation to misconduct under CPR 44.14 which enable the court to make an order against a party or his legal representative where it appears to the court that the conduct of a party or his legal representative before or during the proceedings which gave rise to the summary or detailed assessment proceedings was unreasonable or improper.

PART IX: AWARDS OF COSTS AGAINST SOLICITORS UNDER THE COURTS
INHERENT JURISDICTION

IX.1.1 In addition to the power under reg 3 of the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335 to order that costs improperly incurred be paid by a party to the proceedings and the power to make wasted costs orders under s 19A of the POA 1985, the Supreme Court (which includes the Crown Court) may, in the exercise of its inherent jurisdiction over officers of the court, order a solicitor personally to pay costs thrown away by reason of a serious dereliction on the part of the solicitor of his duty to the court.

IX.1.2 No such order may be made unless reasonable notice has been given to the solicitor of the matter alleged against him and he is given a reasonable opportunity of being heard in reply.

IX.1.3 This power should be used only in exceptional circumstances not covered by the statutory powers.

PART X: CDS-FUNDED COSTS

X.1.1 Where it appears to any judge of the Crown Court or the Court of Appeal Criminal Division, sitting in proceedings for which CDS funding has been granted, that work may have been unreasonably done, eg, if the CDS-funded person's case may have been conducted unreasonably so as to incur unjustifiable expense, or costs may have been wasted by failure to conduct the proceedings with reasonable competence or expedition, the judge may make observations to that effect for the attention of the appropriate authority. The judge or the court as the case may be, should specify as precisely as possible the item, or items, which the determining officer should consider or investigate on the determination of the costs payable pursuant to the representation order. The precise terms of the observations must be entered in the court record.

X.1.2 This power co-exists with the power to disallow fees when making a wasted costs order. The Criminal Defence Service (Funding) Order 2001, SI 2001/855 allows the determining officer to disallow the amount of the order from the amount otherwise payable to solicitors and counsel and allows for deduction of a greater amount if appropriate (see para 16 of Sch 1 to the 2001 order).

X.1.3 In the Crown Court, in proceedings specified in para 1 of Pt II of Sch 2 to the 2001 order, where standard fees would otherwise be payable, where the trial judge is dissatisfied with the solicitors conduct of the case or he considers that for exceptional reasons, the fees should be determined by the appropriate authority, he may direct that such determination shall take place.

X.1.4 Where the judge or the court has in mind that observations under para X.1.1 or that a direction under para X.1.3 should be made, the solicitor or

- a counsel whose fees or expenses might be affected must be informed of the precise terms thereof and of his right to make representations to the appropriate authority and be given a reasonable opportunity to show cause why the observations or direction should not be made.

X.1.5 Where such observations or directions are made the appropriate authority must afford an opportunity to the solicitor or counsel whose fees might be affected to make representations in relation to them.

- b X.1.6 Whether or not observations under para X.1.1 have been made the appropriate authority may consult the judge or the court on any matter touching the allowance or disallowance of fees and expenses, but if the observations then made are to the effect mentioned in para X.1.1, the appropriate authority should afford an opportunity to the solicitor or counsel concerned to make representations in relation to them.

X.2 *Very high cost cases*

- d X.2.1 In proceedings which are classified as a very high cost case (vhcc) as defined by reg 2 of the Criminal Defence Service (General) (No 2) Regulations 2001, 2001/1437, the judge or court should, at the earliest opportunity, ask the representative of the LSC-funded person whether they have notified the LSC of the case in accordance with reg 23. If they have not they should be warned that they may not be able to recover their costs. Further, if the vhcc is one of fraud or serious financial impropriety, the judge or court should inform the representatives that the case can only be conducted by a firm who is a member of the specialist fraud panel and non-panel firms and advocates instructed by such firms may not be able to recover their costs.

PART XI: RECOVERY OF DEFENCE COSTS ORDERS

- f XI.1.1 Recovery of defence costs orders (RDCOs) are created and regulated by the Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001, 2001/856 (as amended) (the 2001/856 regulations) made under s 17 of the Access to Justice Act 1999.

- g XI.1.2 Where an individual receives representation in respect of criminal proceedings funded as part of the Criminal Defence Service, the court before which the proceedings are heard, other than a magistrates' court, must make an order requiring him to pay some or all of the costs of any representation, except for the following:

- an RDCO may not be made against a funded defendant who has appeared in the magistrates' court only;
- h • where a funded defendant is committed for sentence to the Crown Court;
- where a funded defendant is appealing against sentence to the Crown Court; or
- where a funded defendant has been acquitted, other than in exceptional circumstances. (See reg 4 of the 2001/856 regulations.)

- j XI.1.3 An RDCO may be made up to the maximum of the full costs of the representation in any court under the representation order and may provide for the payment to be made forthwith or in specified instalments (see reg 5 of the 2001/856 regulations). This includes the cost of representation in the magistrates' court.

XI.1.4 Subject to the exceptions set out above, the judge must make an RDCO (see reg 11 of the 2001/856 regulations).

XI.1.5 Where a funded defendant has been acquitted the judge must consider whether it is reasonable in all the circumstances to make such an order. a

XI.1.6 Where a person of modest means properly brings an appeal against conviction, it should be borne in mind that it will not usually be desirable or appropriate for the court to make an RDCO for a significant amount, if to do so would inhibit an appellant from bringing an appeal. (There is no power to make an RDCO in an appeal against sentence.) b

XI.1.7 The judge should consider the amount or value of every source of income and capital available to the defendant and the funded defendant's partner. Other than in exceptional circumstances, the judge shall not take into account:

- the first £3,000 of available capital, c
- the first £100,000 of equity in the principal residence, or
- his income where his gross annual income is less than £25,000 (see reg 9 of the 2001/856 regulations as amended by the Criminal Defence Service (Recovery of Defence Costs Order) (Amendment) Regulations 2003, SI 2003/643). d

These limits are prescribed and are subject to annual amendments by regulation change to the 2003 regulations.

XI.1.8 The judge may ask the defendant's solicitor to provide an estimate of the total costs which are likely to be incurred under the representation order. It should be borne in mind that whilst the solicitor may have little difficulty in producing an estimate of the costs incurred up until the point of request, this estimate may not be accurate. In a vhcc which has been managed under contract, the solicitor will be able to provide accurate figures of all costs incurred to date and to say what costs have been agreed as reasonable for the next stage of the case. Where an RDCO is made based on this estimate the defendant's solicitor must inform the Commission if it subsequently transpires that the costs incurred were lower than the amount ordered to be paid under an RDCO. In these circumstances, where the defendant has paid the amount ordered, the balance will be repaid to him (see reg 14 of the 2001/856 regulations). An RDCO for full costs may be made at the end of the proceedings. The appropriate authority will tax the costs incurred under the representation order. The defendant will be notified of the amount of the RDCO once this figure is known. e
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XI.1.9 Where a representation order has been made or is being considered, the appropriate officer or the court may refer the financial resources of the funded defendant to the Special Investigations Unit (SIU) at the Legal Services Commission for a report, where: h

- the defendant is being prosecuted by Customs and Excise, Serious Fraud Office, the Department of Trade and Industry or Inland Revenue;
- the information that the defendant supplies suggests that he has sufficient means to pay all of the costs incurred in his defence; or j
- there is some other information that suggests that the defendant has more resources than he has disclosed; for example the type of charge he faces or his reputation.

The SIU will produce a report for the judge to consider at the end of the case in the same way that the court will provide the judge with a summary of the

a defendant's means. This report is made to support the role of the court, and is not an application for costs.

b XI.1.10 During the proceedings, the judge may refer the matter to the Legal Services Commission/SIU for investigation where further information has come to light which had previously not been disclosed by the defendant to the court. The SIU may investigate the financial resources of the funded defendant and require him to provide further information or evidence as required.

c XI.1.11 At the end of the case where the judge is considering what order to make, he may make the order or, if further information is required, adjourn the making of the order and order that any further information which is required should be provided (see reg 12 of the 2001/856 regulations). This power may be used where further information has come to light during the case about the defendant's means. Where the defendant has failed to co-operate either with the court or the Special Investigations Unit, the judge may order that the further information should be provided.

d XI.1.12 The defendant is obliged to provide details of his means or evidence as is required by the court or the Legal Services Commission (see reg 6 of the 2001/856 regulations). Arrangements are in place to ensure that a summary of the means information is available for the judge at the first hearing, or details as to whether or not the defendant has provided any information. Where the funded defendant does not provide this information, the judge may order him to do so.

e XI.1.13 Where information required under the regulations is not provided the judge must make an RDCO for the full cost of the representation incurred under the representation order (see reg 13 of the 2001/856 regulations).

f XI.1.14 Where it appears to the judge that the funded defendant has:

- directly or indirectly transferred any resources to another person;
- another person is or has been maintaining him in any proceedings;
- or any of the resources of another person are or have been made available to him,

g the value of the resources of that other person may be assessed or estimated and may be treated as those of the funded defendant. In this context 'person' includes a company, partnership, body of trustees and any body of persons, whether corporate or not corporate (see reg 8 of the 2001/856 regulations).

h XI.1.15 The judge may make an order prohibiting any individual who is required to furnish information or evidence from dealing with property where:

- information has failed to be provided in accordance with the regulations;
- he considers that there is a real risk that relevant property will be disposed of; or
- at the conclusion of the case, the assessment of costs incurred under the representation order or of the financial resources of the defendant has not yet been completed (see reg 15 of the 2001/856 regulations).

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XII: ADVICE ON APPEAL TO THE COURT OF APPEAL CRIMINAL DIVISION

XII.1.1 In all cases the procedure set out in *A Guide to Proceedings in the Court of Appeal Criminal Division* published by the Criminal Appeal Office with the approval of the Lord Chief Justice in 1997 should be followed. The reference to 'Appendix 1' which follows is to the appendix to that guide.

XII.1.2 This procedure requires written advice to be delivered to the defendant within 21 days of conviction or sentence. In simple cases this will involve little or no expense. If the procedure is not followed and the work has not been done with due care, fees may be reduced accordingly. The advocate will have received instructions in the form of App 1 from the defendant solicitor which will specifically refer to the guide. The advocate is required to complete App 1 immediately following the conclusion of the case and the solicitor should give a copy to the defendant at that stage. Where the advocates' immediate and final view is that there are no reasonable grounds of appeal, no additional fee will normally be allowed. In any other circumstances the advocate must further advise in writing within 14 days and where it was reasonable for the advocate so to advise an allowance will be made for the advice.

XII.1.3 When both (a) the advocate or the solicitor has given positive advice to appeal; and (b) notice of application for leave to appeal or notice of appeal has been lodged with the Crown Court on the strength of that advice, the Registrar of Criminal Appeals is the appropriate authority to determine the fees in respect of the work in connection with the advice and notice of application, etc. The Crown Court should not determine those fees unless the solicitor confirms that the notice of application, etc, was not given on the solicitors' or the advocates' advice. Where no notice of application is given, either because of unfavourable advice or despite favourable advice, the appropriate authority is the appropriate officer for the Crown Court.

XII.1.4 If it appears that the defendant was never given advice, the Crown Court should direct the solicitors' attention to this fact and if there is no satisfactory explanation as to why no advice was sent, the determining officer should bear this in mind when determining the solicitor's costs and should draw the solicitor's attention to the above-mentioned guide of 1997.

PART XIII: APPEALS TO A COSTS JUDGE AND TO THE HIGH COURT PURSUANT TO THE COSTS IN CRIMINAL CASES (GENERAL) REGULATIONS 1986, THE LEGAL AID IN CRIMINAL AND CARE PROCEEDINGS (COSTS) REGULATIONS 1989, THE CROWN COURT RULES 1982 AND THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2001

XIII.1.1 Solicitors and counsel dissatisfied with the determination of costs under the above regulations may apply to the appropriate authority for a review of the determination. Appeal against a decision on such a review is made to a costs judge of the Supreme Court Costs Office. Written notice of appeal must be given to a costs judge within 21 days of receipt of the reasons given for the decision (14 days in the case of appeals under rr 16 and 17 of the 1982 rules) or within such longer time as the costs judge may direct.

XIII.1.2 The notice of appeal should be in Form A set out in Sch 3 (adapted where appropriate) setting out in separate numbered paragraphs each fee or item of costs or disbursement in respect of which the appeal is brought, showing the amount claimed for the item, the amount determined and the grounds of objection to the decision on the assessment or determination. Counsel and solicitors must provide detailed grounds of objection in respect of each item in accordance with reg 10(2) of the Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335, reg 15(5) of the Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, SI 1989/343, r 16(1) of the 1982 rules and para 21(5)(b) of Sch 1 to the Criminal Defence Service (Funding) Order 2001, SI 2001/855. Reference to accompanying correspondence or documents is insufficient and will result in the appeal being dismissed.

- a** XIII.1.3 The appeal must be accompanied by a cheque for the appropriate fee made payable to 'HM Paymaster General'. The notice must state whether the appellant wishes to appear or to be represented, or whether he will accept a decision given in his absence. The following documents should be forwarded with the notice of appeal: (a) a legible copy of the bill of costs (with any supporting submissions) showing the allowance made; (b) advocate's fee claimed, fee note, together with any note or memorandum by counsel submitted to the determining authority; (c) a copy of the original determination of costs and a copy of the redetermination; (d) a copy of the appellant's representations made to the determining authority on seeking redetermination; (e) the written reasons of the determining officer; (f) a copy of the representation order and any authorities given under reg 54 of the Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, SI 1989/344, or the representation order under s 26 of the Access to Justice Act 1999 and art 3(1) of the Criminal Defence Service (Funding) Order 2001.

XIII.2 Supporting papers

- d** XIII.2.1 Appellants who do not intend to appear at the hearing of their appeal should lodge all relevant supporting papers with the documents listed above. Appellants who do wish to attend the hearing of their appeal should not lodge their supporting papers until directed to do so by the Supreme Court Costs Office.

- e** XIII.2.2 Appellants are reminded that it is their responsibility to procure the lodgment of the relevant papers, even if they are in the possession of the Crown Court or other persons. Appeals may be listed for dismissal if the relevant papers are not lodged when required.

- f** XIII.2.3 Delays frequently arise in dealing with appeals by counsel because the relevant papers have been returned by the court to the solicitor whose file may not be readily available or who may have destroyed the papers. These problems would be avoided if counsel's clerk were, immediately on lodging with the court a request for redetermination, to ask instructing solicitors to retain safely the relevant papers.

- g** XIII.2.4 In complex or multi-handed appeals guidance should be sought from the clerk of appeals before lodging large volumes of papers to avoid duplication and unnecessary reading by the costs judge.

XIII.3 Time limits

- h** XIII.3.1 Appellants who are likely to be unable to lodge an appeal within the time limits should make an application prior to the expiry of the time limit seeking a reasonable extension with brief reasons for the request.

- j** XIII.3.2 Appellants who have not been able to lodge an appeal within the time limits, and who have failed to make application before those time limits have expired, should make application to the costs judge for leave to appeal out-of-time in writing setting out in full the circumstances relied upon. If the application is refused on the papers it can be renewed to a costs judge at an oral hearing. Such oral hearings should not be necessary if a full explanation is given in writing in the initial request for extension of time. Appeals should not be delayed because certain relevant documents are not available, an accompanying note setting out the missing documents and undertaking to lodge within a specified period, normally not exceeding 28 days, should be sent with the notice of appeal.

XIII.4 Appeals to the High Court

XIII.4.1 An appellant desiring to appeal to a judge from a decision of the costs judge should, within 21 days of the costs judge's decision, request him to certify that a point of principle of general importance (specifying the same) is involved. The appeal can proceed only if such a certificate is granted. Such an appeal is instituted by claim form under CPR Pt 8 in the Queen's Bench Division within 21 days of the receipt of the costs judge's certificate. The times may be extended by a costs judge or the High Court as the case may be.

XIII.4.2 The claim form by which an appeal is to be instituted must contain full particulars of the item or items, or the amount allowed in respect of which the appeal is brought. After issue of the claim form the appellant must forthwith lodge with the clerk of appeals at the Supreme Court Costs Office, all the documents used on the appeal to the costs judge.

XIII.4.3 The claim form is to be served in accordance with the provisions of CPR Pt 6 and the practice direction thereto. It is no longer necessary to endorse an estimate of the length of hearing on the claim form, the clerk to the senior costs judge will obtain from the judge a date for hearing and will notify the parties.

XIII.4.4 The appeal, which is final, will be heard by a judge of the Queen's Bench Division who will normally sit with two assessors, one of whom will be a costs judge and the other a practising solicitor or barrister.

XIII.4.5 After the appeal has been heard and determined the clerk will obtain the documents together with a sealed copy of any order of the judge which may have been drawn up and will notify the court concerned of the result of the appeal.

PART XIV: VAT

XIV.1.1 Every taxable person as defined by the Value Added Tax Act 1994 must be registered and in general terms (subject to the exceptions set out in the Act) whenever a taxable person supplies goods or services in the United Kingdom in the course of business a liability to Value Added Tax (VAT) arises.

XIV.1.2 Responsibility for making a charge to VAT in a proper case and for accounting to HM Customs & Excise for the proper amount of VAT is totally that of the registered person concerned or the person required to be registered.

XIV.1.3 The following directions will apply to all bills of costs lodged for determination or assessment after the date hereof.

XIV.2 VAT registration number

XIV.2.1 The number allocated by HM Customs and Excise to every person registered under the Act (except a government department) must appear in a prominent place at the head of every bill of costs, fee sheet, account or voucher on which VAT is being included as part of a claim for costs.

XIV.3 Action before taxation

XIV.3.1 VAT should not be included in a claim for costs in a between-the-parties bill of costs if the receiving party is able to recover the VAT as input tax. Where the receiving party is able to obtain credit from HM Customs and Excise for a proportion of the VAT as input tax only that proportion which is not eligible for credit should be claimed in the bill.

XIV.3.2 The responsibility for ensuring that VAT is claimed in a between-the-parties bill of costs only when the receiving party is unable to

a recover the VAT or a proportion thereof as input tax, is upon the receiving party. On an assessment of costs payable out of public funds the costs officer or determining officer as the case may be must continue to satisfy himself as to the tax position.

b XIV.3.3 Where there is a dispute as to whether VAT is properly claimed in a between-the-parties bill of costs the receiving party must provide a certificate signed by the solicitors or the auditors of the receiving party in the form in Sch 4. Where the receiving party is a litigant in person who is claiming VAT, reference should be made by him to HM Customs and Excise and whenever possible a statement to similar effect produced on assessment.

c XIV.3.4 Where there is a dispute as to whether any service in respect of which a charge is proposed to be made in the bill is zero rated or exempt, reference should be made to HM Customs and Excise and wherever possible the view of HM Customs and Excise obtained and made known on assessment. In the case of a between the parties bill such application should be made by the receiving party. In the case of a bill from a solicitor to his own client such application should be made by the client.

d XIV.4 *Form of bill of costs where VAT is included as part of the costs claimed*
Form of bill of costs where VAT rate changes

e XIV.4.1 Where there is a change in the rate of VAT, suppliers of goods and services are entitled by s 88(1) and (2) of the 1994 Act in most circumstances to elect whether the new or the old rate of VAT should apply to a supply where the basic and actual tax points span a period during which there has been a change in VAT rates.

f XIV.4.2 It will be assumed, unless a contrary indication is given in writing, that an election to take advantage of the provisions mentioned in para XIV.4.1, above, and to charge VAT at the lower rate has been made. In any case in which an election to charge at the lower rate is not made, such a decision must be justified in accordance with the principles of assessment which are applicable to the basis upon which the costs are ordered to be assessed.

XIV.5 *Apportionment*

g XIV.5.1 All bills of costs, fees and disbursements on which VAT is included must be divided into separate parts so as to show work done before, on and after the date or dates from which any change in the rate of VAT takes effect. Where a lump sum charge is made for work which spans a period during which there has been a change in VAT rates, and paras XIV.4.1 and XIV.4.2, above, do not apply, reference should be made to paras 30.9 and 30.10 of HM Customs and Excise
h Notice 700 (April 2002 edition) (or any revised edition of that notice), a copy of which is in the possession of every registered trader. If necessary, the lump sum should be apportioned.

XIV.6 *Disbursements*

j XIV.6.1 VAT attributable to any disbursement eg an expert's report, must (except in the case of a between-the-parties bill where VAT is not claimed) be shown as a separate item in the receipt or voucher.

XIV.6.2 (1) Petty (or general) disbursements such as postage, fares etc which are normally treated as part of a solicitor's overheads and included in his profit costs should be charged with VAT even though they bear no tax when the solicitor incurs them. The costs of travel by public transport on a specific journey

for a particular client where it forms part of the service rendered by a solicitor to his client eg charged in his bill of costs attract VAT. (2) With effect from 3 January 1978 VAT is added to sheriff's fees (see the Sheriffs' Fees (Amendment No 2) Order 1977, SI 1977/2111). a

XIV.6.3 Reference is made to the criteria set out in the VAT Guide (HM Customs and Excise Notice 700 (April 2002 edn) para 25.1, or any revised edition of that notice), as to expenses which are not subject to VAT. Charges for the cost of travel by public transport, postage, telephone calls and telegraphic transfers where these form part of the service rendered by the solicitor to his client are examples of charges which do not satisfy these criteria and are thus liable to VAT at the standard rate. b

XIV.7 CDS funding c

XIV.7.1 VAT will be payable in respect of every supply made pursuant to a criminal contract or otherwise with the benefit of CDS Funding where it is made by a taxable person and the assisted person belongs in the UK or other member state of the European Union and is a private individual or receives the supply for non-business purposes. The place where a person belongs is determined by s 9 of the 1994 Act. d

XIV.8 Tax invoice

XIV.8.1 Where costs are payable out of the LSC fund or central funds pursuant to any authority the tax invoice in the case of counsel will consist of his fee note and in the case of a solicitor his bill of costs as determined or assessed together with the payment advice supplied by the court as to the fees allowed on determination or assessment. e

XIV.9 Appeal

XIV.9.1 Where the fees or costs as determined or assessed are varied on appeal the VAT charged will be amended as appropriate by the costs officer or determining officer as the case may be. f

XIV.10 Vouchers

XIV.10.1 Where receipted accounts for disbursements made by the solicitor or his client are retained as tax invoices a photostat copy of any such receipted account may be produced and will be accepted as sufficient evidence of payment when disbursements are vouched. g

XIV.11 Solicitors and other litigants acting in person

XIV.11.1 Where a litigant acts in litigation on his own behalf he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable on that litigant's between-the-parties bill of costs unless VAT has been charged on disbursements when the normal rules will apply. h

XIV.11.2 Similarly, where a solicitor acts in litigation on his own behalf even on a matter arising out of his practice he is not treated for the purposes of VAT as having supplied services and therefore no VAT is chargeable on the bill of that solicitor. j

XIV.11.3 Consequently where such a bill as is described in the preceding two paragraphs is presented for agreement, determination or assessment VAT should not be claimed and will not be allowed on determination or assessment unless tax has been paid on disbursements.

XIV.12 Government departments

- a* XIV.12.1 On an assessment between the parties where costs are being paid to a government department in respect of services rendered by its legal staff, VAT should not be added since such services do not attract VAT.

PART XV: REVOCATIONS

- b* The following directions are hereby withdrawn:

- | | | |
|----------|------------------|--|
| <i>c</i> | 21 November 1968 | Lord Chief Justice: (Judges nominated to hear costs appeals) [1968] 3 All ER 869, [1969] 1 WLR 370 |
| <i>d</i> | 25 November 1982 | Lord Chief Justice: (magistrates discretion) [1982] 3 All ER 1152, [1982] 1 WLR 1447 |
| <i>e</i> | 15 May 1984 | Lord Chief Justice: (Procedure of Costs Appeals) [1984] 2 All ER 288, [1984] 1 WLR 856 |
| <i>f</i> | 3 May 1991 | Lord Chief Justice: (Costs in Criminal Proceedings) [1991] 2 All ER 924, [1991] 1 WLR 498 |
| | 8 February 1994 | Chief Taxing Master: (Crown Court: VAT) (No 2 of 1994) |
| <i>g</i> | 16 January 1995 | Lord Chief Justice: (Crown Court: Counsel) [1995] 1 WLR 261 |
| <i>h</i> | 10 July 2002 | Senior Costs Judge SCCO: Appeals as to Costs in Criminal Cases |

Melanie Martyn Barrister.

Schedule 1

- Crown Court Rules 1982, SI 1982/1109
- Costs in Criminal Cases (General) Regulations 1986, SI 1986/1335
- Crown Prosecution Service (Witnesses' etc Allowances) Regulations 1988, SI 1988/1862
- Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989, SI 1989/343
- Legal Aid in Criminal and Care Proceedings (General) Regulations 1989, SI 1989/344
- Criminal Defence Service (Funding) Order 2001, SI 2001/855
- Criminal Defence Service (Recovery of Defence Costs Orders) Regulations 2001, SI 2001/856
- Criminal Defence Service (Choice in Very High Cost Cases) Regulations 2001, SI 2001/1169
- Criminal Defence Service (General) (No 2) Regulations 2001, SI 2001/1437
- Crown Court (Confiscation, Restraint and Receivership) Rules 2003, SI 2003/421

Schedule 2

Costs from central funds and relevant statutory authorities

Proceedings	Court	Extent of availability	Authority
Information not proceeded with	Magistrates'	Defendant	s 16(1)(a) POA 1985
Decision not to commit for trial	Magistrates'	Defendant	s 16(1)(b) POA 1985
Dismissal for information	Magistrates'	Defendant	s 16(1)(c) POA 1985
Person indicted or committed for trial but not tried	Crown	Defendant	s 16(2)(a) POA 1985

<i>a</i>	Notice of transfer given but person not tried	Crown	Defendant	s 16(2)(aa) POA 1985
<i>b</i>	Acquittal on indictment	Crown	Defendant	s 16(2)(b) POA 1985
<i>c</i>	Successful appeal to the Crown Court against conviction or sentence	Crown	Appellant	s 16(3) POA 1985
<i>d</i>	Successful appeal to CACD against conviction or sentence or insanity/ disability finding	CACD	Appellant	s 16(4) POA 1985
<i>e</i>	Appeal against order or ruling at preparatory hearing	CACD	Appellant	s 16(4A) POA 1985
<i>f</i>	Application for leave to appeal to House of Lords	CACD	Appellant	s16(5)(c) POA 1985
<i>g</i>	Attorney-General reference to CACD on point of law following acquittal	CACD, House of Lords	Acquitted defendant	Criminal Justice Act 1972, s 36(5)
<i>h</i>	Attorney-General reference under s 36 CJA 1988 (lenient sentence appeals)	CACD	Convicted defendant	Criminal Justice Act 1988, Sch 3, para 11
<i>j</i>	Determination of proceedings in a criminal cause or matter in Divisional Court	Divisional Court	Defendant in criminal proceedings	s 16(5)(a) POA 1985

Determination of appeal or application for leave to appeal from CACD or DC	House of Lords	Defendant in criminal proceedings	s 16(5)(b) and (c) POA 1985	a
Proceedings in respect of an indictable offence	Magistrates' and Crown	Private prosecutor	s 17(1)(a) POA 1985	b
Proceedings before DC or House of Lords	Divisional Court and House of Lords	Private prosecutor	s 17(1)(b) POA 1985	c
Criminal cause or matter	All	Defence or private prosecution witness, interpreter and medical practitioner	s 19(3) POA 1985 –there are restrictions on what may be paid (see regs 18, 19, 20, 21, 24 and 25 of the 1986 regulations. For example, a witness cannot claim for any legal expenses incurred by them in attending court to give evidence or to set aside a witness summons.	d e f g
Murder case	Crown	Medical practitioner	Mental Health (Amendment) Act 1982, s 34(5)	h
Criminal Procedure (Insanity) Act 1964 proceedings	Crown	Person appointed to put case for the defence	s 19(3)(d) POA 1985	i
Cross examination of vulnerable witnesses	Magistrates' and Crown	Person appointed to cross-examine witness for the defence	s 19(3)(e) POA 1985	j

<i>a</i>	Compensation where a court refuses an application for a banning order	Magistrates' and Crown Court (on appeal where compensation refused by the magistrates' court).	Person against whom a banning notice has been given (limited to £5,000)	Football Spectators Act 1989 (as amended under Sch 1 to the Football (Disorder) Act 2000)
<i>b</i>	Licensing appeals	Crown	Licensing justices	Lotteries and Amusements Act 1976, Sch 3, para 11. Gaming Act 1968, Sch 9, para 14(2). Licensing Act 1964, s 25
<i>c</i>				

Schedule 3

a

FORM 'A'

Form of Notice of Appeal

b

Appeal Pursuant to the Costs in Criminal Cases (General) Regulations 1986/ The Legal Aid in Criminal and Care Proceedings (Costs) Regulations 1989/ The Crown Court Rules, 1982, the Criminal Defence Service (Funding) Order 2001

c

Crown Court/ Divisional Court/ Court of Appeal Criminal Division

d

Regina v
Appeal of

Case No

e

To: A Costs Judge, and to the appropriate authority of the
Crown Court/ Divisional Court/ Court of Appeal Criminal Division.

f

The Appellantappeals to a Costs Judge against the redetermination of the costs in the above matter.

The following are the items in respect of which the Applicant appeals:

g

Item	Description	Amount Claimed	Amount Allowed	Total Amount in Dispute After Rede-termination
1.				
2.				
3. etc				£

h

j

Grounds of Objection (To Be Set Out in Full)

We confirm that a copy of this notice has been served upon the appropriate authority.

a The Appellant should attach to this Notice of Appeal his/her Grounds of Objection and in so doing provide the Costs Judge with a detailed response to the written reasons provided by the Determining Officer.

Do you wish to attend the hearing of your Appeal: Yes/ No

b Dated the day of

(Signed)
.....

c

Appellant

Address
.....
.....

d

Tel No.
.....
.....

e

Ref:
.....
.....

f

Fax No.
.....
.....

g

DX No.
.....
.....

E-Mail
.....
.....

Schedule 4

FORM OF CERTIFICATE

To: The Chief Clerk
 Crown Court

Address:
Date:

Regina v A

With reference to the pending determination of the [prosecutor's] [defendant's] costs and disbursements herein which are payable by the [defendant] [the prosecutor] [public funds], we the undersigned (solicitors to) (the auditors of) the [prosecutor] [defendant] hereby certify that he on the basis of his last completed VAT return would (not be entitled to recover) (be entitled to recover only.....percent of the) Value Added Tax on such costs and disbursements, as input tax pursuant to Section 25 of the Value Added Tax Act 1994.

Signed
(Solicitors to) (Auditors of) (Defendant) (Prosecutor)
Registered number

End of Volume 2.